IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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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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Docket 78209 Document 2019-40183

EXHIBIT

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1 A. I mean, what I would say is, you know,
2 barring some information that says that his
3 condition has changed dramatically or, conversely,
4 that there is something about him that did not come
5 to light or was not revealed, then it's always
6 possible that my opinion would change.
7 Q. Okay. And --
8 A. But -- sorry. It's in a gray area.
9 Q. Certainly, no. What's the saying that --
10 well, "Inertia is the most powerful force in the
11 universe."
12 And so today he was competent on
13 September 10th, according to your evaluation, and
14 you think it's highly likely that he's still
15 competent today.
16 A. No, I'm not saying "highly likely." I'm
17 saying I don't have a reason to think otherwise
18 barring some new information --
19 Q. Okay.
20 A. -- or barring some information that,
21 perhaps, was missed.
22 Q. Okay. And you don't think that having
23 spoken with corrections officers who see him on a
24 daily basis for months at a time might have given

1 you additional data to strengthen your opinion?
2 A. Possible. I don't know.
3 Q. Okay. But in any event, you didn't feel
4 the need to gather that data.
5 A. No, I did not.
6 Q. Okay. You note on page two of your
7 evaluation that you -- under "Assessment procedures"
8 that you conducted a mental status exam.
9 A. Yes.
10 Q. What's that?
11 A. That's just how the person's doing right
12 now today. So we look at how oriented they are, do
13 they know where they are, when it is, who they are,
14 what's going on, the purpose of the evaluation. We
15 ask about their sleep and their mood, whether they
16 hear any voices.
17 Q. Okay. So that's separate from the forensic
18 interview.
19 A. That's separate because the mental status
20 exam is something that, really, any clinician should
21 do in any contact with whoever they're seeing.
22 Q. Okay. Now, I want to talk to you a little
23 bit more. Earlier you had said that some of Mr.
24 Vanisi's previous assessments, they either made an

1 unsupported, in your opinion, finding that he was
2 malingering or an unsupported finding that he was
3 affirmatively not malingering.
4 A. That's correct.
5 Q. What does "malingering" mean?
6 A. Well, malingering is the intentional
7 exaggeration or feigning of psychiatric symptoms or
8 cognitive symptoms or intellectual impairment for
9 some clear secondary gain.
10 Q. Okay.
11 A. So in the forensic context people might do
12 that to -- we're talking pre-adjudication now --
13 that they would do that to hopefully get some
14 mitigation or to delay prosecution or avoid it
15 altogether.
16 Q. Okay. That's probably the more common
17 presentation you see, someone who is mentally
18 healthy exaggerating mental symptoms in order to try
19 to convince someone they're ill?
20 A. I should just point out for the Court it's
21 not an either/or. It's possible for someone to have
22 a major mental illness and also to be malingering.
23 Q. That's where I was getting next.
24 But would it, nonetheless, be more common

1 for someone to malinger in favor of a finding of
2 mental illness to receive a perceived benefit?
3 A. I don't know and I don't really know how to
4 answer that question, because it sounds like you're
5 asking me to quantify how often that happens.
6 I would say it's more often the case that
7 somebody is feigning symptoms in order to either get
8 mitigation or delay or avoid adjudication. But we
9 do occasionally see people who are exaggerating who
10 are truly mentally ill.
11 Q. Okay.
12 A. It's -- it's just not either/or and that's
13 really -- it would be improper for an examiner to
14 assume that it's either/or.
15 Q. Certainly. Is it possible for someone who
16 is mentally ill to exaggerate, for lack of a better
17 word, their sanity?
18 A. Yes. So now we're talking about faking
19 good, right?
20 Q. You know, I've heard it described a lot of
21 ways. That's one of them.
22 A. Well, yes. So it's possible. And let me
23 just say this: I don't mean to trump your question
24 or go beyond it.

1 That was actually consideration. If you
2 notice in my report, I say he appeared to be
3 forthcoming, he appeared -- I -- and, again, had I
4 had those NDOC records before we went to the
5 interview, I would have challenged him more directly
6 on some of what he was saying.
7 Because if you look at the NDOC records,
8 it's clear that he thinks he shouldn't be on forced
9 medicine. He probably wouldn't take it if he
10 weren't being given forced medicine. Yet, when we
11 saw him, he said he believes he has a mental illness
12 and he's doing well because of the treatment and he
13 intends to keep taking it, so I didn't find that
14 piece to be entirely genuine.
15 Q. And that's really what I was getting after,
16 because on page three of your report you note "The
17 examiner noted Mr. Vanisi's purported perspective is
18 not necessarily congruent with the prison medical
19 record." Is that what you're getting at there?
20 A. That's correct, yes.
21 Q. And I believe in a separate part of your
22 evaluation you indicated that Mr. Vanisi very
23 likely, in your opinion, does not recognize the
24 severity of his underlying mental illness.

1 A. Where are you? I'm not disagreeing with
2 you. I just want to see it.
3 Q. Sure.
4 (Witness reviewing document.)
5 THE WITNESS: I see, "has limited insight
6 into the seriousness of his mental illness."
7 MR. PLATER: What page?
8 MR. WISNIEWSKI: I was about to ask him.
9 THE WITNESS: Oh, top of page three. It's
10 in the middle of the paragraph where "Vanisi" is on
11 the left side.
12 BY MR. WISNIEWSKI:
13 Q. Oh, okay. If you could continue with
14 sentence just for the record.
15 A. Oh, just -- well, I'll just repeat it.
16 "Mr. Vanisi has limited insight into the seriousness
17 of his mental illness and need for treatment as
18 evidenced by his stating in early August of 2018
19 that he would not concede to taking medication every
20 month, clearly referring to the long-acting
21 injectable form of antipsychotic."
22 Q. The Haldol?
23 A. Yes.
24 Q. So that's information, those NDOC records

1 that you received after you had come to your
2 conclusion that he was competent.
3 A. Yes. Just because he doesn't fully
4 appreciate the seriousness of his illness and need
5 for treatment doesn't -- that doesn't answer the
6 legal question.
7 Q. Sure. And I completely understand that as
8 we're here today your opinion is still that he's
9 competent.
10 But my question is, Do these issues, the
11 fact that his reported perspective is not
12 necessarily congruent with the prison medical record
13 and the fact he's downplaying the severity of his
14 mental illness, does that give you pause in
15 assessing just how competent he is?
16 A. Not necessarily. I can tell you exactly
17 what would give me pause, if that would be helpful.
18 Q. Please.
19 A. So, in doing this evaluation, Mr. Vanisi
20 has his own perspective about how he would like to
21 be able to proceed, which is at odds with what you
22 all think is in his best interest.
23 He declined to get into any kind of
24 discussion about that because he said counsel had

1 told him not to talk about it. If he harbored some
2 kinds of beliefs about that incident that were
3 clearly psychotic and that for which there was a
4 clear nexus to his legal decision-making, then I
5 would, perhaps, think twice. Although, I have to go
6 by what I'm given.
7 Q. Sure. Yes. Your opinion is only as good
8 as the data it relies upon.
9 A. That's truth, yes.
10 Q. Now, the one followup question I did have
11 is back a couple of questions ago you indicated that
12 if you'd had the NDOC records prior to interviewing
13 Mr. Vanisi, you would have asked some different
14 questions, you would have pushed him harder in
15 certain areas.
16 A. Well --
17 Q. Do you feel that you would need to do a
18 followup evaluation in light of receiving these
19 medical records?
20 A. I don't. What I would have done is been a
21 little more confrontive and say, Look, that's at
22 odds with what the records say.
23 Q. And what would you have hoped -- "hoped" is
24 probably not the best word -- but what may you have

1 uncovered if you were confrontational?
2 A. Well, sometimes when you're confrontational
3 with an examinee, you -- it depends, and it depends
4 on who is doing the confrontation and how they
5 deliver it.
6 But there are times when I believe an
7 examinee may become more forthcoming with
8 confrontation. Other examinees shut down. I can't
9 say for certain what he would have done. You sort
10 of start poking and then see how the person responds
11 and modify your questioning accordingly.
12 Q. In your experience do persons who are
13 suffering from schizo effective disorder or bipolar
14 disorder, does that sort of confrontational
15 questioning have the potential to uncover, for lack
16 of a better word, sort of an angry reaction?
17 A. It depends on the person. I don't know
18 that that's unique to any disorder.
19 Q. Oh, okay.
20 A. Some people get angry if they feel backed
21 into a corner.
22 Q. Do you think that someone who has a
23 mood-affecting disorder like schizo effective with
24 bipolar presentation or just bipolar disorder is

1 less able to control themselves when confronted
2 rather than someone like you or I who have that
3 capacity for self-regulation?
4 A. I think it depends on whether you're
5 talking about how adequately treated the person is.
6 If the person is receiving adequate treatment, I
7 wouldn't expect them to have difficulty dealing with
8 that. That's an individual variable.
9 If the person were acutely symptomatic,
10 then, yeah, I don't know that one should confront
11 the person.
12 Q. Probably good words of wisdom.
13 Now, correct me if I'm wrong, though.
14 Isn't this type of testing designed, in part, to
15 determine if someone is adequately medicated? For
16 example, you may think that just because someone is
17 on a certain medication regimen they are
18 asymptomatic, but you when you pressure them, it is
19 obvious they're unable to control their emotions
20 and, therefore, you may say, Oh, it looks like they
21 may not be on an adequate medication regimen. We
22 need to up their medication?
23 A. Well, I don't make any -- I don't have any
24 thoughts about that or what they should be getting

1 because I'm not a psychiatrist.
2 But, you know, I don't really test whether
3 -- I go by what I see in front of me, and on the day
4 that we saw Mr. Vanisi he was pleasant, he was
5 reasonably cheerful. I mean, he was not
6 disorganized.
7 Now, I do know from reading the record he
8 can get disorganized when he's not -- so those are
9 the kinds of things I'd look at. I'm looking at
10 what they say they're seeing, clearly, when he's not
11 treated.
12 Q. Got you. Now, in the course of your
13 questioning, was there ever anything that you
14 challenged Mr. Vanisi on yourself?
15 A. Yes. So, when he made a comment -- and I'm
16 not reading from my report because I forget where I
17 put these.
18 Q. Which page?
19 A. I don't know. This is all recall.
20 Q. Oh, okay.
21 A. So at one point during the evaluation he
22 said, you know, I just wish that my attorneys would
23 talk to me the way you and Dr. Zuchowski are talking
24 to me. And I said, Well, look, I think -- I don't

1 know exactly the words that I used, but -- I don't
2 know if I said, You're being a little unfair. Our
3 role in this process is different than the role of
4 your counsel. We're here simply to do an evaluation
5 and provide information for the court so the court
6 can make a determination about this issue. They are
7 trying to keep you from being executed. So these
8 are competing roles, clearly.
9 Q. And how did he respond to that explanation
10 from you?
11 A. He -- well, he understood what I was
12 getting at. I mean, he didn't -- he didn't balk at
13 that or argue about it. He accepted it, I would
14 say.
15 Q. Okay. And, you know, I know I'm getting
16 into very specific stuff here, what made you come to
17 the -- because that's your opinion, that he accepted
18 it. What made you come to that opinion? You said
19 that he didn't argue with it.
20 Was there anything that he did to assent to
21 that opinion?
22 A. I don't remember. I mean, I think -- I
23 can't remember if he kinda shrugged his shoulders
24 and said, Okay. You know, I don't recall. But in

1 my opinion yes, I don't think that he was resisting.
2 Q. Okay.
3 A. That's a clinical judgment, clearly, right?
4 I mean, that's ...
5 Q. On page five you mention -- let me find the
6 exact area for you.
7 A. Okay.
8 Q. The third sentence of the second topic,
9 whether petitioner has a mental disorder --
10 A. Okay.
11 Q. -- you write, "Because he is not displaying
12 acute psychiatric symptoms," you know, and then you
13 go on from there.
14 What did you mean by "acute psychiatric
15 symptoms"?
16 A. Well, not obviously psychotic, not in any
17 gross distress, not delusional, as far as we can
18 tell, right? And not -- pardon me -- not acutely
19 unstable with regard to his mood.
20 Q. Okay. Is an inflated sense of optimism
21 potentially a symptom?
22 A. I don't think so.
23 Q. Okay.
24 A. I mean --

1 Q. Why not?
2 A. Well, because -- was there something else
3 you wanted to ask?
4 Q. Well, you're familiar with the concept of
5 grandiosity?
6 A. Yes.
7 Q. Okay. How is an inflated sense of optimism
8 different than a grandiose idea?
9 A. Well, grandiosity, I would say, has no
10 basis in reality. A person thinks that they're a
11 movie star or something, a person is in love with
12 them.
13 You know, we see this all the time in these
14 evaluations, where a defendant -- again, I'm
15 speaking for pre-adjudication. I realize that it's
16 different from this case. But a defendant will say,
17 No, I want to take my case to trial. I really think
18 I can beat it. And the public defender is, like,
19 Look, the evidence is really strong, I got you this
20 good deal.
21 They're hopeful that they might avoid
22 prison. And, again, there's always that chance if
23 they go to trial, but I would say that's an inflated
24 sense of optimism. I don't think that that makes

1 them crazy.
2 Q. So your definition, then, is that
3 grandiosity is something which is absolutely not
4 physically true, whereas as an inflated sense of
5 optimism is something that is just a miscalculation
6 of odds?
7 A. I would say grandiosity is -- yeah. Well,
8 it's more than just that there's no basis in
9 reality. You can say that about any psychotic
10 symptom but -- not that grandiosity is a psychotic
11 symptom -- but I would say it's inherently
12 pathological. It's not something that is going to
13 be shared by outside observers. I mean, when we say
14 somebody is grandiose, they're saying things that no
15 one else would agree with, right? I mean --
16 Q. How so?
17 A. Well, that if it's truly grandiose, then
18 it's out of proportion to reality. Somebody may --
19 look, you know, occasionally people who are acutely
20 ill will come into the hospital and they'll say, I
21 have three degrees and I'm a nuclear physicist, and
22 there's no way that that is true, without even going
23 and investigating that, if I may be so bold as to
24 say, I mean.

1 Q. Sure. Could the belief that, if you just
2 tell your side of the story to a jury and they would
3 automatically acquit you in spite of overwhelming
4 physical evidence of guilt? Is that something that
5 could be a grandiose idea?
6 A. It could be. I'd have to know more.
7 Q. But it is potentially the case.
8 A. It would need to be more than just that.
9 Q. Okay.
10 A. It would need to be -- there would need to
11 be something else about that that's driving that,
12 that it's clearly pathological -- from my
13 perspective as an examiner it has to be clearly
14 pathological in order to establish that nexus.
15 Q. Okay. And, now, I'm merely speaking of
16 grandiosity as a symptom, not as sufficient in and
17 of itself to establish a diagnosis.
18 And we're on the same page?
19 A. Say that again.
20 Q. So, I just want to make sure. You're
21 saying that there has to be an underlying pathology
22 involved for that grandiose overestimation of chance
23 of victory to establish -- and I'm not sure what
24 we're establishing. Is it establishing a mental

1 illness or merely establishing the threshold matter
2 of whether that is or is not a grandiose idea?
3 A. As an examiner I would say it's merely
4 establishing the presentation of that. I mean,
5 there has to be a mental illness but that alone
6 isn't enough. There has to be something about that
7 that leads to the impairment.
8 I think this gets really tricky because
9 hope springs eternal. People want to believe that
10 things are going to go their way and they don't
11 always. I don't know that you can pathologize
12 someone for that -- or I don't feel I can
13 pathologize someone for that. I've spent too many
14 years talking to inmates and listening to how they
15 think.
16 Q. What you're saying, then, is that Mr.
17 Vanisi's optimism is something that may or may not
18 be a result of his lengthy incarceration more than
19 any logical appraisal of victory chances.
20 A. I don't know how to really explain this. I
21 think it's very easy for -- I don't want to speak
22 for anyone else in this room -- but it's very easy
23 for us to look at Mr. Vanisi from the outside, from
24 a distance and say he's making this completely

1 irrational choice because he's not going along with
2 the evidentiary hearing in the hope that something
3 could be done about his sentencing.
4 Listening to him and hearing his
5 perspective, which is, look, he's already done all
6 this time, it's not something that he wants. And
7 that may be irrational from our way of thinking at
8 it, but from his way of thinking at it, it doesn't
9 sound like that's what he values.
10 Q. You're talking, basically, about cultural
11 competence.
12 A. Well, I don't know if it's cultural. I
13 don't know what you mean by that.
14 Q. Well, that's what I'm wondering. Now, for
15 example, you're well aware that one of the issues
16 examined here was Mr. Vanisi's belief in life after
17 death.
18 A. Yes.
19 Q. And that was held not to be illogical or
20 anything based on unprovable evidence because it's a
21 cultural belief to which he subscribes. That can't
22 be used as any kind of indication that his thought
23 processes are impaired.
24 A. That's correct.

1 Q. Okay. And what I'm asking, then, is your
2 statement about those of us who are looking at this
3 from the outside may see what he's doing as
4 illogical because it's not supported by evidence.
5 But for someone who has spent twenty years on death
6 row, this could be an inherently logical decision.
7 A. I didn't say that it's illogical based on
8 evidence. I said that it's our value system as
9 people living free in the community would be, of
10 course, we want to try to avoid execution at all
11 costs.
12 What I'm saying is he's already done a lot
13 of time and from his perspective perhaps getting his
14 death sentence changed to a life sentence or life
15 without any possibility of parole is not what he
16 wants. I mean, he's already done twenty years,
17 so -- go ahead. I'm sorry.
18 Q. No. You're the one answering the
19 questions.
20 A. Well, I think there's something very
21 parental about the imposition of the will of those
22 of us outside on somebody. I mean, again, barring
23 some condition that clearly indicates he can't make
24 this decision for himself, my value system as an

1 examiner says he should be allowed to do this.
2 I will allow for this. There are probably
3 examiners out there who are terribly parental and
4 would say, Oh, he can't possibly be competent
5 because of the decision. From my perspective as an
6 examiner, the accent's on the wrong syllable there.
7 First you start with the condition and then
8 see if that's impacting the decision, not looking at
9 the decision and saying this is the problem.
10 Q. Okay. And so, really, I mean, you know, I
11 understand that's sort of a world view and approach
12 to psychology.
13 What I'm just sort of trying to understand
14 is when you're examining Mr. Vanisi's state of
15 desires and his state of beliefs, it sounds to me
16 like you're examining them with a recognition that
17 his beliefs are, in part, caused by his over twenty
18 years of incarceration. Is that fair or am I wrong?
19 A. I don't know that they're caused by. I
20 just think that, look, I don't care whether you're
21 housed in the joint or whether you work in the
22 joint. That changes who you are. That shapes the
23 way that you see things. I mean, people who work
24 there for years, those of us who -- and we're

1 different than other people. We just are.
2 Q. All right.
3 A. And I don't know that I can quantify that
4 exactly for you, but I think if you talk to people
5 who have either done time in prison or spent time
6 working in prison, they have a different view of the
7 world.
8 Q. Now, one other thing that I wanted to ask
9 you about, you again -- and I know we've talked
10 about this before -- but you have that one sentence
11 where you note that Mr. Vanisi has limited insight
12 into his mental illness.
13 A. Yes.
14 Q. Is that opinion based entirely on review of
15 the NDOC records or was there something in the
16 forensic interview that made you come to that
17 conclusion?
18 A. No. It's both. He's telling us when we
19 meet with him that he believes that he has a serious
20 mental illness and he needs treatment and he feels
21 he's doing well presently because he's getting that
22 treatment. And then when we read the records,
23 there's a different picture and it suggests that
24 that's not entirely accurate.

1 Q. Okay. So what you just said, when you met
2 with him he stated that he believes he has a serious
3 mental illness and the treatment is making him
4 better, but you don't think he was being truthful in
5 that statement to you?
6 A. Not entirely so. I would say this again.
7 I would say -- I don't know if we really delved into
8 this, maybe as we were trying to earlier, but in
9 this context I certainly allow for the possibility
10 that he was trying to portray himself in a better
11 light --
12 Q. So to some extent he --
13 A. -- because he wants this.
14 Q. Right. So to some extent he was faking
15 good, to use your --
16 A. Well, I can't say that without objective
17 testing. I would say that's a consideration. And
18 just like faking bad should be a consideration in
19 all those other evaluations. I'm a very suspicious
20 person as an examiner.
21 Q. Okay. So, you know -- and I don't know if
22 this was really answered. Was there anything other
23 than that statement's discrepancy with the record
24 that lead you to make the statement that Mr. Vanisi

1 has limited insight into his mental illness? Any
2 other factors you relied upon?
3 A. Well, the fact that he's on forced
4 medication. Presumably, if he understood his need
5 for treatment, there wouldn't be a need for that
6 forced medication panel.
7 Q. Okay. And I don't mean to piecemeal this.
8 Anything else?
9 A. I don't recall.
10 Q. Okay. All right. Can a psychologist
11 determine when an opinion is formed?
12 A. I don't know what you mean by that.
13 Q. Let's say that I -- you know, right now I'm
14 telling you that I believe the sky is blue.
15 Do you know when I first formed that
16 opinion?
17 A. I don't know that it's an opinion. I would
18 say that's a fact, because we all agree --
19 Q. It's --
20 A. I don't mean to be argumentative. I'm just
21 -- I mean, I get what you're saying, so -- and the
22 answer is nobody can tell that unless they do what I
23 would call a retrospective evaluation.
24 Q. Okay. Was there anything -- and, now, you

1 know, it's pretty clear from your report that Mr.
2 Vanisi is adamant that he wants to move on to
3 guilt-phase relief and ignore his penalty-phase
4 relief, according to the statements in here.
5 Do you have any way of knowing from the
6 testing you conducted when he came to that opinion?
7 A. No.
8 Q. Okay. Could someone form an opinion in a
9 psychotic state which they then carry over into a
10 nonpsychotic state?
11 A. I don't know. I mean, I would allow it's
12 possible, if that's helpful. I don't -- I don't
13 really know how to answer that.
14 Q. Okay. Why not? Is there any way --
15 A. Well, because -- I don't know. I mean,
16 again, this is based on clinical experience.
17 Usually people clear up when they're not psychotic.
18 They may say things that don't make any sense or
19 make decisions and then they take medication and
20 they're like, oh, wow, that wasn't such a good idea.
21 Q. Okay. Sort of like, let's say, an
22 outlandish example like, The mafia is out to kill
23 me.
24 A. Right.

1 Q. If that's formed in a psychotic state, is
2 it possible for someone to maintain that belief
3 after they've been adequately medicated and are in a
4 non-actively psychotic state?
5 A. It's possible. I wouldn't say it's
6 probable.
7 Q. Okay. Why not?
8 A. Because it's clearly tied to the illness,
9 and when the illness is treated, that kind of
10 thinking tends to improve, becomes more
11 reality-based.
12 Q. Okay.
13 A. If they continued with that, I would say
14 they're still psychotic, right? Unless you've got
15 objective evidence that the mafia is after them.
16 Q. All right.
17 MR. WISNIEWSKI: Can I have a moment, your
18 Honor?
19 THE COURT: Yes.
20 MR. WISNIEWSKI: Pass the witness. Thank
21 you, your Honor.
22 CROSS-EXAMINATION
23 BY MS. NOBLE:
24 Q. Good afternoon, Dr. Moulton.

1 A. Hello.
2 Q. I want to talk a little bit more about your
3 background as a clinician, as a forensic
4 psychologist.
5 A. Okay.
6 Q. So where did you do your -- where did you
7 get your degree in psychology?
8 A. I graduated with my Ph.D from Saint John's
9 University in Jamaica, New York, in January of 2000.
10 Q. In 2000?
11 A. Yes.
12 Q. Okay. And after that did you have any
13 additional training in either clinical psychology or
14 forensic psychology?
15 A. Well, prior -- while I was still a student,
16 I did some rotations in forensic settings in New
17 York. I worked at Kirby Forensic Psychiatric Center
18 for a while as part of my training.
19 And then since then, as I said earlier,
20 every two years I go attend a full series of
21 workshops put on by the American Academy of Forensic
22 Psychology.
23 Q. Now, you indicated that you've done a
24 number of competency evaluations. I think you said

300.

A. 350.

Q. Okay. I'm interested -- have you testified in court before about the issue of competency or issues surrounding competency?

A. Yes.

Q. Where have you testified in court?

A. Oh, dear. Well, down in Fallon, the Tenth Judicial District Court. Clark County, but we do that through video. And then I've testified in Elko. Most of it's been here in Washoe County.

Q. And have you ever been called to testify as an expert in a case?

A. Yes.

Q. Okay. And are those the times that you're referencing?

A. Yes.

Q. Okay. And have you ever testified here in Washoe County?

A. Yes.

Q. And you've testified in an expert capacity as a psychologist --

A. Yes.

Q. -- regarding the issue of competency?

1 A. Yes.
2 Q. Now, some questions were asked about the
3 fact that you and Dr. Zuchowski interviewed Mr.
4 Vanisi in tandem, or at the same time.
5 Is that approach consistent with
6 professional standards?
7 A. I would say it is.
8 Q. Now, what are the advantages to that type
9 of approach?
10 A. Well, it's nearly always for the
11 convenience of the defendant. When two people are
12 doing an evaluation together, one examiner may
13 pursue a line of questioning that hadn't occurred to
14 the other examiner.
15 I think in some ways you can make the case
16 that it's a more thorough and informative
17 evaluation. We don't do it for that reason. It's
18 too hard to coordinate people's schedules so, again,
19 we do it when it's convenient for the examinee or
20 there's something about the examinee, they're very
21 negative or oppositional, they're only going to do
22 it one time. We may have as many as three people,
23 three examiners in a panel.
24 The criticisms of that approach have been

1 that, while you're just all getting together and
2 deciding together and you're influencing each other,
3 that's actually not true. I can tell you there have
4 been panels where's Dr. Zuchowski and I sat in with
5 a third examiner and, again, looking at the same
6 information, Dr. Zuchowski said that person was
7 competent and I and the other examiner said no, this
8 person is not competent.
9 So, again, people are weighing the
10 information somewhat differently. I think most of
11 the time examiners are going to agree but there are
12 occasions where they do disagree. We disagree even
13 though we sit in the same panel.
14 Q. Now, you indicated in your testimony that
15 Dr. Zuchowski asked about three-quarters of the
16 questions.
17 A. I think so. I -- I'm not entire -- I don't
18 know but --
19 Q. More than --
20 A. Oh, well over half. I mean, he really took
21 the lead on this.
22 Q. So fair to say more questions than you
23 asked.
24 A. Oh, clearly.

1 Q. Did Dr. Zuchowski's participation in the
2 interview prevent you from asking a question that
3 you thought was important to the analysis or the
4 evaluation?
5 A. No. And, in fact, there was a moment where
6 I said -- I'm doing this all from recall. I think I
7 mentioned to Mr. Vanisi, Look, Dr. Zuchowski has --
8 I don't want to speak for him, but he has a concern,
9 and I brought that out. So no. I mean, I don't
10 have any problems speaking up in these panels.
11 Q. Okay. Thank you. And there was also --
12 I'm sorry. Are you finished answering my question?
13 A. Yes.
14 Q. Oh, okay. So, there was also some
15 discussion about prison staff that were in the room,
16 correct?
17 A. Correct.
18 Q. And that someone might have asked a
19 question at some point.
20 A. Yes.
21 Q. Do you recall during one point in your
22 interview a discussion about the advantages of being
23 in general population versus death row?
24 A. Yes, I do recall that now and -- go ahead.

1 Sorry.
2 Q. And do you recall during that time one of
3 the prison staff piped in, for lack of a better
4 term, about what some of the programs or advantages
5 might be?
6 A. Yes, I do recall that.
7 Q. Okay. Well, I want to go back to the
8 purpose of his interview, which is different than a
9 lot of your competency interviews, correct?
10 A. Oh, it's completely different, in my
11 opinion.
12 Q. Okay. Would you say it's more or less
13 nuanced?
14 A. I don't know how to answer that, actually.
15 I don't know if it's a question of more or less.
16 It's different.
17 Q. Okay. So what questions did you set out to
18 answer in evaluating Mr. Vanisi?
19 A. Well, the questions spelled out in the
20 court order. This is a very narrow, limited
21 evaluation, so a lot of the things that we would get
22 into for a pre-adjudicative evaluation wouldn't make
23 any sense to get into for this evaluation.
24 So whether he has the capacity to

1 appreciate his position, I would define that as does
2 he know he's on death row, does he know where he is
3 in the legal process, does he know what he was
4 accused of, why he is where he is, and he could
5 answer all of that, as an example.
6 Q. Okay. And did it also include whether or
7 not his mental illnesses or diagnoses were affecting
8 his decision-making so as to substantially impair
9 it?
10 A. Yes. So if you look at the court order
11 there were, actually, two, what I would call,
12 prongs. I break the first one up into two. I think
13 that makes more sense from my perspective as an
14 examiner, because they're two separate issues.
15 If we say make a rational choice, we mean
16 an examinee being not impaired by the threshold
17 condition, but then this also says "substantially
18 affected." I don't know. It's a little, I guess,
19 odd, if you will. I know that's the standard but...
20 Q. It's probably because lawyers wrote it.
21 A. Right.
22 Q. But I want to follow up that question
23 with--
24 A. Yes. Go ahead.

1 Q. I want to ask you, You had indicated you
2 were not entirely sure as to the accuracy of the
3 diagnosis schizo effective disorder bipolar type or,
4 perhaps, bipolar, correct?
5 A. Correct.
6 Q. So those are both personality disorders,
7 are they not?
8 A. No, they are not. They're both very
9 serious mental illnesses. A personality disorder is
10 a separate condition.
11 Q. Oh, okay. Thank you for educating me on
12 that.
13 A. Yeah. And people -- I don't know if you
14 care about this, but people who are only personality
15 disordered are nearly always seen as fit, even
16 though they have that.
17 Q. Okay. So in any event, as to which
18 diagnosis is it material as to the determination of
19 whether or not Mr. Vanisi is able to function in the
20 way that the court posed the question?
21 A. Not necessarily. That -- so it's really
22 interesting. If you look at different evaluation
23 reports, you'll often see that psychiatrists will
24 give a diagnosis because they're often -- at least

1 in the hospital -- and this is pre-adjudication --
2 they're treating the person and so they're
3 diagnosing.
4 From the perspective of the psychologist
5 who's doing these evaluations, we don't get into
6 those nuances because what we care about is what's
7 the functional impairment. It doesn't really matter
8 -- I won't say it doesn't matter.
9 For the purpose of the opinion, what's
10 causing that impairment is less important to us than
11 the fact that there is the impairment, so that's why
12 I don't tend to get into splitting hairs over this
13 because it's a lot of -- I don't know. It's taking
14 the evaluation, I think, in a direction that it
15 doesn't necessarily need to go and the specific
16 diagnosis, again, can't answer the question, so
17 that's why I say it's relatively less important.
18 Q. Now, prior to forming your opinion, did you
19 review counsel's suggestion of incompetency, Mr.
20 Vanisi's counsel and their concerns?
21 A. Yeah. Are you talking about the
22 declaration?
23 Q. Yes.
24 A. Yes.

1 Q. Thank you, Doctor.
2 And do you recall being on a conference
3 call with counsel for Mr. Vanisi and myself?
4 A. I do.
5 Q. And do you remember counsel characterizing
6 what gave rise to their concerns during that call?
7 A. Yes. I don't want to misquote, though.
8 Q. No. That's fine. But do you recall issues
9 of high energy versus low energy?
10 A. I do.
11 Q. And, perhaps, pressured speech?
12 A. Yes.
13 Q. Okay. So did you take that into account in
14 forming your opinion?
15 A. Well, I didn't see it when I met with him
16 so I -- I have no reason to not believe that that's
17 what was observed but I didn't see it when I met
18 with Mr. Vanisi.
19 Q. And you were looking for it, right?
20 A. I was looking for it. I don't mean to
21 sound, like, prejudicial or anything, but I went to
22 NNCC fully expecting to see someone who is in a much
23 worse condition based on the information that I had
24 ahead of time.

1 Q. Now, did you look at the letters that Mr.
2 Vanisi had written to the court and to counsel?
3 A. I did.
4 Q. And could those -- would it be fair to say
5 that those are fairly short letters?
6 A. They were.
7 Q. So they weren't rambling.
8 A. No. They were very much to the point.
9 Q. Now, you were also asked some questions, I
10 think -- or, perhaps, it was Dr. Zuchowski -- but
11 Mr. Vanisi was restrained -- had restraints on
12 during your interview.
13 A. Yes.
14 MR. WISNIEWSKI: Objection, beyond the
15 scope.
16 THE WITNESS: I'm sorry.
17 THE COURT: I don't remember. You didn't
18 ask him how he was restrained in the room?
19 MR. WISNIEWSKI: I didn't ask anything
20 about restraints. That was all Dr. Zuchowski.
21 THE COURT: Okay. So if you want to open
22 -- re-call him as a witness, you can do so to go
23 into that area.
24 MS. NOBLE: Okay. Your Honor, it was my

1 understanding that would apply on redirect, but I'll
2 be happy to proceed as the Court wishes. I'm
3 mindful of the doctor's time.
4 THE COURT: I know. I'll let you do it as
5 though you were reopening and then cross.
6 MR. WISNIEWSKI: And we have no objection,
7 just that it be non-leading questions.
8 THE COURT: Okay.
9 BY MS. NOBLE:
10 Q. What if any restraints was Mr. Vanisi
11 wearing at the time? Do you recall?
12 A. I believe similar -- sorry. I believe
13 similar to what he's wearing today.
14 Q. Okay. And during the course of your
15 interview did those restraints appear to affect his
16 ability to answer your questions?
17 A. No.
18 Q. Is it the first time you've interviewed a
19 restrained person?
20 A. No.
21 Q. Now, did you see any indication in your
22 interview -- during your interview of auditory or
23 visual hallucinations?
24 A. No.

1 Q. Now, for lack of a better -- I'm going to
2 try to summarize. You and Dr. Zuchowski asked Mr.
3 Vanisi why he would want to waive this hearing.
4 Is that right?
5 A. Right.
6 Q. And what did he tell you?
7 A. Well, he basically said he's not satisfied
8 pursuing this penalty-phase relief. He wants
9 guilt-phase relief.
10 And he was dancing around this and I said,
11 Look, I don't want to put words in your mouth --
12 again, I'm paraphrasing because I don't have a
13 written transcript of the interview -- but I said,
14 It sounds like you're saying you're hoping to get
15 your conviction completely overturned and have a new
16 trial and he said, Yeah, that's what I'm hoping for.
17 Q. So, would it be fair to say that his goal
18 is a new trial?
19 A. I think so.
20 Q. And would it be fair to say that he
21 perceives his counsel's goal as a new penalty phase?
22 A. That's correct. And he talked about how he
23 defined success in this process differently than his
24 counsel defines it.

1 Q. So what is success to Mr. Vanisi?
2 A. Well, success is getting the chance to go
3 back and argue his guilt.
4 Q. And did --
5 A. Oh, sorry.
6 Q. I apologize. Go ahead.
7 A. No. And he's very clear he can't get that
8 with pursuing this in state court. This is very
9 limited.
10 Q. And so Mr. Vanisi is prioritizing that
11 objective over penalty-phase relief?
12 A. Right.
13 Q. Does that prioritization, in your opinion,
14 flow from a delusion?
15 A. No. But I -- again, he would not talk
16 about the circumstances so, you know, I allow for
17 the possibility. Again, I don't -- sorry.
18 Q. Go ahead. Sorry.
19 A. No. Just I didn't see any evidence of that
20 but, again, he's not talking about those details.
21 Q. Now, if I were to tell you that Mr.
22 Vanisi's attorneys have filed -- have pursued
23 post-conviction relief regarding the trial phase and
24 written arguments about why there were various

1 errors at trial, et cetera, would that make Mr.
2 Vanisi's wish to pursue those claims more
3 understandable?
4 A. Possibly, but I don't know. I mean, I
5 would really want to know more about his thinking,
6 about why he thinks that's likely to be successful.
7 I will say this, though. This is why --
8 and I don't mean to be so wishy-washy. You know, he
9 acknowledges that there's no guarantee. He would
10 still like this. This gets back to what I was
11 saying earlier about the length of time that he's
12 been incarcerated.
13 He understands that it's a slim chance,
14 right? But yet as somebody who has been confined
15 for this long, he's like, Yeah, I'm going to take
16 that chance. I want to take that chance. That's my
17 right. I get to decide how this goes.
18 Q. And would you characterize that as rational
19 thinking?
20 A. I think it depends on which lens you're
21 looking at it, through, right? I mean, if we're
22 looking at it from the perspective of somebody who
23 has been confined as long as he has, I can't say
24 that's irrational unless I have some other

1 information that says this is driven by a major
2 mental illness.
3 Again, as I said earlier, people looking at
4 it from the outside say, Well, that's ridiculous,
5 why would you not want to pursue this, they worked
6 so hard to get you this relief. And we asked him
7 that too. We said, Look, why not let this proceed
8 in state court and then you can go argue this other
9 stuff.
10 And he's concerned about the delay and how
11 long it would take. And I don't know how long it
12 would take and I don't know that anybody can answer
13 that, but that is his concern. That's not what I'd
14 call a psychotic concern.
15 Q. I want to get into the issue of grandiosity
16 versus, perhaps, being overly optimistic and,
17 perhaps, differentiating the two.
18 You were asked some questions, and I
19 believe you answered it's possible that this
20 approach could -- or Mr. Vanisi's preference could
21 be the result of some sort of grandiosity.
22 Is that right?
23 A. It's possible.
24 Q. Now, if you were to assume for me that Mr.

1 Vanisi has heard his attorneys in both this
2 proceeding and prior proceedings argue that there
3 were many errors during the trial, would that make
4 it more or less likely to be the result of grandiose
5 ideation? In other words, he's heard attorneys make
6 those arguments.
7 A. Well, no. Then I would say it's probably
8 less likely. I mean, he had a number of complaints.
9 I don't know that I should go into all those today,
10 but what was not done at his trial, he had a lot of
11 issues --
12 Q. Okay.
13 A. -- things that he was unhappy with.
14 Q. Was his thought process fairly easy to
15 follow?
16 A. I thought so.
17 Q. And he appreciated that he's in a
18 life-or-death situation potentially?
19 A. Yes. Although, I have to tell you --
20 again, I'm speaking completely from memory -- but,
21 you know, when we talked about the whole possibility
22 of execution, he said, Look, you know, the state
23 can't even execute people that want to be executed.
24 So he appreciates that this is a risk, but

1 it also sounds like he's able to recognize that the
2 odds are not necessarily in favor of that happening.
3 In other words, it's not imminent and there's some
4 question whether that will happen.
5 Q. But he understood that he could lose in
6 federal court.
7 A. Absolutely. He said there's no guarantees.
8 Q. So he was flexible in terms of being able
9 to entertain that.
10 A. Right.
11 Q. So to put it simply, it's a chance he's
12 willing to take.
13 A. Yes. That was my impression.
14 Q. Did he appear to understand the concept of
15 death?
16 A. Yes.
17 Q. Did Mr. Vanisi appear to understand based
18 on your conversation with him that his attorneys
19 advise against waiving the upcoming evidentiary
20 hearing?
21 A. Oh, absolutely. And that clearly is the
22 source of heartburn or conflict. At the same time I
23 would just point out that he also said he's wants to
24 work with his attorneys.

1 Q. Dr. Moulton, what is your ultimate opinion
2 about whether or not Mr. Vanisi has the capacity as
3 described in the Court's order?
4 A. I think that he has the capacity to waive
5 the hearing and I -- again, as I said earlier, I
6 can't say that, based on what he said during the
7 interview, that his thinking is inherently
8 irrational. And I acknowledge that he has a major
9 mental illness. I don't see evidence that that
10 mental illness is active to the degree that it would
11 impair his ability to make this decision.
12 MS. NOBLE: I have no further questions at
13 this time, Doctor. Thank you.
14 THE COURT: Counsel?
15 MR. WISNIEWSKI: Thank you, your Honor.
16 REDIRECT EXAMINATION
17 BY MR. WISNIEWSKI:
18 Q. Just a couple of areas to go back over,
19 Doctor.
20 A. Sure.
21 Q. You indicated that Mr. Vanisi -- I tried to
22 scribble down as verbatim as I could.
23 He understands that it's a slim chance that
24 he will receive relief in federal court.

1 A. I think those are my words but --
2 Q. Sure.
3 A. -- yes, he -- we -- sorry. I should let
4 you finish your question.
5 Q. Well, you seemed all ready to go so I was
6 going to let you.
7 But he understands it's a slim chance to
8 obtain victory in federal court.
9 What actual observations and statements do
10 you rely upon to come to the conclusion that he
11 understands that?
12 A. Well, Dr. Zuchowski pointedly asked him,
13 Look, why do you think you're going to get anywhere
14 with that when you didn't get anywhere with it in
15 state court, right?
16 And he, nonetheless, wishes to argue it and
17 he acknowledges that there's not a guarantee that
18 he's going to prevail with it. There's an element,
19 I would say, of impatience with Mr. Vanisi. He
20 wants -- he doesn't like what's happening so far in
21 state court. He wants to move it along.
22 You know, but I don't know that his -- I
23 can't say that his impatience is psychotically
24 driven, for lack of a better word.

1 Q. You said Dr. Zuchowski stated something to
2 this effect and then Mr. Vanisi assented to it.
3 Was it another situation where he just
4 didn't argue the point or did he affirmatively
5 expand on the slimness of this chance?
6 A. I can't remember.
7 Q. Okay. You'll agree with me that there is a
8 difference between someone passively accepting the
9 statement of another and affirmatively making that
10 statement themselves?
11 A. I will agree with that. I wouldn't
12 characterize Mr. Vanisi as passive.
13 Q. Okay. Moving on, you said in response to
14 Ms. Noble's questioning that he had a lot of issues
15 with prior trial counsel and then said you don't
16 know if you should go into them. I'd like you to go
17 into them.
18 A. Okay. Well --
19 MS. NOBLE: Objection, relevance.
20 THE COURT: What is the relevance?
21 MR. WISNIEWSKI: Judge, we're trying to
22 find out -- we're really trying to get to the bottom
23 of why Mr. Vanisi wants to waive this evidentiary
24 hearing and why he thinks he has a higher likelihood

1 of success at the federal level.
2 Really what I'm looking to explore is what
3 his reasons are for some of his claims that he finds
4 so persuasive and how they impacted Dr. Moulton's
5 conclusion.
6 THE COURT: Counsel?
7 MS. NOBLE: My response would be that we're
8 not here today to determine whether or not Mr.
9 Vanisi has the correct opinion. It's whether or not
10 he has the right to have one and to have some agency
11 in how this case proceeds.
12 THE COURT: Okay. The question was that he
13 was unhappy with some of the things his prior
14 counsel had done?
15 THE WITNESS: Yes.
16 THE COURT: And when?
17 THE WITNESS: In the actual defense, prior
18 to his being found guilty.
19 THE COURT: Okay. So what those people did
20 or didn't do is completely briefed, I think, in the
21 habeas that we have and the Supreme Court of Nevada
22 has ruled on it.
23 So that's the law of the case in Nevada. I
24 think what's, perhaps, relevant is why he thinks

1 it's different in federal court. That might be
2 relevant. But what he complained about, that's
3 clearly part of the record.
4 MR. WISNIEWSKI: Absolutely. Thank you,
5 your Honor. And, yeah, I'm trying to establish as a
6 foundational matter what the issues are and then
7 follow up with why he thinks federal would be
8 better.
9 THE COURT: There are 23 issues that went
10 to the supreme court. I don't think we want to
11 spend all that time.
12 MR. WISNIEWSKI: Not 23 of them, Judge,
13 just the ones that he spoke to Dr. Moulton about.
14 THE COURT: Well, I don't know. No. I
15 don't think it's relevant.
16 So you can ask Dr. Moulton why Mr. Vanisi
17 said he felt it would be different in federal court
18 over state court. That's legitimate.
19 MR. WISNIEWSKI: Oh, okay.
20 THE COURT: So did anybody ask you that?
21 Did he tell you that?
22 THE WITNESS: I don't recall that.
23 MR. WISNIEWSKI: Okay.
24 THE COURT: Okay.

1 MR. WISNIEWSKI: But we can't ask him what
2 those issues he complained about were?
3 THE COURT: No. We've already got those
4 issues in the record. We know what he's complained
5 about.
6 MR. WISNIEWSKI: Okay. All right.
7 And in that case, no further questions.
8 THE COURT: Anything further, counsel?
9 MS. NOBLE: No, your Honor. Thank you.
10 THE COURT: Thank you, sir. You may step
11 down.
12 THE WITNESS: Thank you.
13 THE COURT: You are excused. Thank you for
14 being so patient all day.
15 THE WITNESS: That's okay.
16 THE COURT: We're going to take a recess
17 now and then we'll be back on the record for
18 argument. Court's in recess.
19 (Recess taken.)
20 THE COURT: Thank you. Please be seated.
21 Okay. I think so we should try to bring
22 this back to what we were doing here today. Today I
23 was reviewing the doctors' recommendations for
24 whether or not Mr. Vanisi is competent to make a

1 decision. We think we know what that decision is
2 but I don't even know today what his decision is
3 going to be. That we'll have to deal with after we
4 make a determination of competency. So there's a
5 lot -- I don't need the arguments with regards to
6 what his decision is, necessarily. We really need
7 to talk about whether or not I should accept the
8 doctors' evaluations that he's competent to make his
9 own decision.
10 And then in part of that argument is
11 probably what has been noted by the court, the
12 supreme court, as to what the standard should be and
13 that's how we got the order in the first place
14 asking the doctors for their evaluation.
15 So your arguments should be surrounding the
16 standard, whether it's been met by the
17 recommendations of the doctors and/or whether I
18 should accept those recommendations.
19 So, counsel, you may argue.
20 MR. FIEDLER: Thank you, your Honor.
21 So I'd like to start by just reviewing the
22 standard. The standard, per the Court's order and
23 per the U.S. Supreme Court and Nevada Supreme Court,
24 is whether Mr. Vanisi has the capacity to appreciate

1 his position and make a rational choice with respect
2 to continuing or abandoning further litigation, or,
3 on the other hand, whether he is suffering from a
4 mental disease, disorder, or defect which may
5 substantially affect his capacity.
6 And I'm going to focus on the second part,
7 because I view the standards as being in the
8 alternative. And if it's one, then he's competent;
9 if it's the other, he's incompetent.
10 And both Dr. Zuchowski and Dr. Moulton
11 agreed that Mr. Vanisi is suffering from a mental
12 disease, disorder, or defect and Dr. Zuchowski
13 diagnosed schizo effective disorder bipolar type and
14 Dr. Moulton didn't specify which, but he agreed it
15 was something very serious.
16 So then the question becomes whether that
17 disease, disorder, or defect is substantially
18 affecting Mr. Vanisi's capacity. And the answer has
19 to be that it is substantially affecting his
20 capacity and we see that with the indications of
21 grandiosity which are related to what appears to be
22 a manic phase Mr. Vanisi's going through. And the
23 grandiosity relates to Mr. Vanisi's overstating his
24 chances of success on appeal, which the doctors

1 accepted at face value because they did not test --
2 do any testing or do anything to examine Mr.
3 Vanisi's reasoning ability as to gauging his chances
4 of success on appeal.
5 And they did nothing to test or evaluate
6 whether his schizo effective disorder or severe
7 mental illness was something that was substantially
8 affecting specifically that part of what Mr. Vanisi
9 believed about his case.
10 And I think this Court should further
11 question and regard with some degree of skepticism
12 the evaluations of Dr. Zuchowski and Dr. Moulton on
13 the basis that there are some questions about the
14 efficacy of the evaluations. There were guards
15 present. Apparently, they were participating either
16 by interjecting or by asking questions.
17 And we also heard Dr. Moulton testify about
18 how it's important for a psychologist to refer to
19 multiple data points. But Dr. Moulton only relied
20 upon the clinical interview and his review of the
21 prior evaluations. What he did not do is
22 standardized testing, which is normally how a
23 psychologist goes about evaluating and relying on
24 enough sources of data.

1 And so in determining whether the doctors
2 have provided enough information to this Court for
3 this Court to find that Mr. Vanisi is competent, we
4 ask that the Court focus on the fact that the
5 evaluators failed to really pick apart and look at
6 Mr. Vanisi's reasoning with regard to his chances of
7 success on appeal. And the fact that they didn't
8 meant they failed to see that that over-judgment of
9 his chances of success on appeal are related to
10 grandiose beliefs. Thank you.
11 THE COURT: Okay. Thank you.
12 MS. NOBLE: So, confining my argument to
13 just the question of whether or not this Court
14 should accept the conclusions of the evaluators,
15 both Dr. Moulton and Dr. Zuchowski testified to
16 their experience and expertise in this general area
17 of competency.
18 Both understood and respected the standard
19 that sets forth in the Calambra case and the Rees
20 case, which asks the question of whether or not Mr.
21 Vanisi's got the capacity to appreciate his position
22 and make a rational choice. Or if, instead, whether
23 or not his choice is the result of his mental
24 disease, disorder or defect.

1 Both doctors testified unequivocally that
2 that is not the case. Dr. Moulton characterized Mr.
3 Vanisi as remarkably competent, and the only person
4 who has diagnosed Mr. Vanisi with mania or
5 grandiosity is the federal public defender. There
6 was no indication on this examination of grandiosity
7 or of manic phasing.
8 Now, they're asking this Court to conclude
9 that, despite these experts' testimony, simply
10 disagreeing with the approach that the federal
11 public defender has chosen to take is tantamount to
12 incompetence. And I would submit that that's simply
13 not supported by the case law and it's not supported
14 by the testimony.
15 The doctors had the interview and then they
16 also reviewed the records, they reviewed his
17 medications, they talked about what they would be
18 looking for if he was, indeed, in a state where he
19 could not appreciate the decision that he was
20 making. And they distinguished between being overly
21 optimistic and making a choice that was the result
22 of grandiose ideation. I, perhaps not very well,
23 tried to draw out this point: How is it grandiose
24 ideation of Mr. Vanisi if he thinks he wants to

1 argue about purported errors in the trial phase when
2 his own attorneys have argued in front of this court
3 and the Nevada Supreme Court that there were,
4 indeed, many errors during the trial phase? Of
5 course, we don't concede that and Mr. Vanisi admits
6 during his interview an understanding that the
7 Nevada Supreme Court has rejected those claims.
8 So I'd submit to the Court that that's not
9 evidence of grandiosity, it's not evidence of manic
10 phasing. We have two experienced professionals who
11 evaluated this person pursuant to the standard
12 described by the United States Supreme Court and the
13 Nevada Supreme Court and they concluded that this
14 person is capable of making this decision, whatever
15 that decision is.
16 THE COURT: Counsel?
17 MR. FIEDLER: Just one point, your Honor.
18 This is not about a client disagreeing with his
19 attorney. This is about someone who suffers from
20 schizo effective disorder bipolar type, which
21 recognizes that there are or could be manic
22 episodes, disagreeing with his attorney and whether
23 that is based on a mental disease, disorder or
24 defect. And because it is, this Court should find

1 Mr. Vanisi is incompetent as to this waiver.
2 THE COURT: But there's no evidence that it
3 is.
4 MR. FIEDLER: Well, the evidence that --
5 the evidence is that he's overstating his chances of
6 success on appeal and --
7 THE COURT: Where's the evidence of that?
8 MR. FIEDLER: Well, the evidence I would
9 suggest is his degree of certainty reflected in the
10 experts' evaluations about his chances on appeal.
11 And I understand he acknowledged the possibility
12 that his appeals in federal court could get denied,
13 but he still, even based on what he conveyed to the
14 evaluators, is overstating the chances of success on
15 appeal in federal court.
16 THE COURT: I'm sorry, but there really
17 isn't any evidence of that. We don't know that yet,
18 do we?
19 MR. FIEDLER: We don't know sort of in an
20 absolute sense, but we know how often federal habeas
21 petitioners lose in federal court. There are a lot
22 of procedural considerations that go into whether a
23 claim will even be heard on the merits and even if a
24 claim is heard on the merits, it's subject to

1 deference to state court adjudications. As we all
2 know here, those state court adjudications as to Mr.
3 Vanisi's guilt-phase claims so far have been met
4 without success.
5 THE COURT: But the evidence before me
6 today is that Mr. Vanisi had a rational conversation
7 with the doctors indicating that he had a strong
8 preference for going forward with the federal
9 appeals rather than lingering in prison and that he
10 did not have a desire to have the death penalty
11 overturned just to spend the rest of his life in
12 prison.
13 Is there some reason that isn't -- that on
14 its face we have to say that that's a grandiose
15 idea?
16 MR. FIEDLER: No, your Honor. But I think
17 the difficulty is with how Dr. Zuchowski and Dr.
18 Moulton approached that part of their analysis.
19 They did not do anything to really evaluate Mr.
20 Vanisi's thinking on this point. They just accepted
21 it on face value and that's -- that shouldn't be
22 good enough for this Court in determining Mr.
23 Vanisi's competence.
24 THE COURT: Okay. Based on my questions,

1 did you have anything else you wanted to say?
2 MS. NOBLE: I would just say there was some
3 evaluation of that thinking in that they asked some
4 followup questions about why he might want to do
5 this. And Mr. Vanisi indicated, in part, he knows
6 that appeals related to this state post-conviction
7 hearing are going to take time and they'll tie him
8 up further in state court before he can get to
9 federal court.
10 And so I would submit that that is some
11 evaluation of part of the reasoning behind Mr.
12 Vanisi's rational apparent choice and I know we
13 still have to establish that to waive the
14 evidentiary hearing that's coming up.
15 THE COURT: The evaluations that were
16 conducted were conducted, actually, at the request
17 of the public defender's office. Federal public
18 defenders specifically requested that I not find Mr.
19 Vanisi competent to waive his right to have a
20 hearing and on that basis asked that I have
21 evaluation -- psychological evaluations conducted.
22 That request was granted and we are now
23 here for the hearing. The traversing of the doctors
24 did not raise any issues about the doctors'

1 competency to prepare reports in this case. We had
2 no indication that either doctor had ever had any
3 issues with regard to their recommendations to
4 courts. Their testimony -- well, one testimony went
5 on very long this morning, but even this afternoon
6 we were about an hour and a half, an hour and
7 forty-five minutes with the second doctor, so we've
8 spent a great deal of time looking at what they had
9 to say and what they thought.
10 Neither doctor had any doubt in their mind
11 about whether or not Mr. Vanisi was capable of
12 making this decision, whatever that decision may be,
13 based upon his competency. Their reports are
14 unequivocal and are both to the same conclusion that
15 Mr. Vanisi does understand -- I want to get the
16 wording right -- understands and has the capacity to
17 appreciate his position and make a rational choice
18 with respect to waiving a scheduled hearing and they
19 both found that he did, in fact, have that capacity
20 and was competent to make that determination.
21 Then the second question about whether or
22 not he has a mental disease, disorder, or defect
23 that has affected or substantially affects his
24 capacity to make a decision to waive the evidentiary

1 hearing was that no, it was not substantially
2 affecting his capacity to just make a decision to
3 waive and evidentiary hearing.
4 Dr. Zuchowski found those determinations to
5 a reasonable degree of medical certainty that Mr.
6 Vanisi had the capacity to appreciate the position
7 and make a rational choice with respect to waiving
8 the scheduled evidentiary hearing.
9 He had a further opinion with regard to --
10 to a degree of reasonable medical certainty that his
11 disease was under control, in remission, and that
12 there was no thought process or perception that
13 substantially affected his capacity to make this
14 decision.
15 The Court has, based on the written reports
16 and the examinations today, both direct and cross, I
17 do find that Mr. Vanisi is competent to make this
18 decision.
19 So we need to make a decision -- I have to
20 make a decision about what the decision is that he's
21 making and I have to assure myself that he
22 understands the ramifications of that. So I think
23 he's competent. The doctors give me that. But I
24 don't think I can give the doctors the decision

1 about whether or not Mr. Vanisi is making a rational
2 choice. I think I need to explore completely with
3 Mr. Vanisi what I believe the consequences are of
4 this decision if he goes forward with that and make
5 sure that I assure myself that he understands and
6 appreciates that.
7 Just being competent doesn't necessarily
8 mean that he understands and appreciates what he's
9 giving up, as with any decision that anyone makes,
10 any defendant makes in a case.
11 So, that's the next prong, I believe, in
12 our inquiry today, and I'm not sure what Mr. Vanisi
13 wants to do. I know he's written some letters, he's
14 changed -- you've changed your mind a little bit,
15 Mr. Vanisi, here and there. I want to remind you
16 that I'm going to be asking you some questions.
17 You're still represented by counsel and so if you
18 want to talk to counsel now and if they want to make
19 some sort of a discussion with me before I start
20 inquiring of you, we'll do that.
21 So I want to give you a few minutes to talk
22 to counsel just so that we know that counsel can
23 make a record if you have any problem with the
24 inquiry that I intend to make.

(Sotto voce discussion between counsel and defendant.)

MR. FIEDLER: I think we're ready to move forward with the Court's canvass, your Honor.

THE COURT: Okay. I think, Mr. Vanisi, can you stand where you are? Is that okay?

THE DEFENDANT: Yeah.

THE COURT: All right. And I kind of want to start, Mr. Vanisi, by inquiring of -- I know your attorneys have told you this but I haven't told you this. I want to tell you I don't think you should waive the hearing. That's my thought process. I think that you have a hearing coming up, one's scheduled, witnesses are subpoenaed, your lawyers are ready to go. You should go forward with that. That's what I think you should do.

But, as you have told us, you think it's your choice to make and the United States Supreme Court has told me it's your choice to make. So you're the one who has to make this decision. Originally you just didn't want to be here for the hearings. We can still do that and the hearings can go forward. Do you understand that?

THE DEFENDANT: Yeah.

1 THE COURT: And if you want to go back to
2 that position, that's fine. No one will be --
3 nobody will care. Nobody will be upset with you.
4 It won't bother me at all. So if after hearing
5 everything you've heard today and you thought about
6 all of this -- it's been a month almost since we've
7 started down this road of whether or not you'd be
8 able to waive the hearing completely, if you want to
9 just waive your appearance at the hearing, we can do
10 that and we'll go forward and we'll have the
11 hearing. It'll start in a week or so.
12 Do you understand?
13 THE DEFENDANT: Yeah.
14 THE COURT: Okay. What is it that you'd
15 like to do today?
16 THE DEFENDANT: I'd like to appear.
17 THE COURT: You'd like to be here?
18 THE DEFENDANT: Yeah.
19 THE COURT: And you want to be here for the
20 hearing?
21 THE DEFENDANT: Yes.
22 THE COURT: So you do want a hearing? You
23 want to go forward with the hearing?
24 THE DEFENDANT: I like to -- if you --

1 well, I like to appear if you decide on it. If you
2 decide on a hearing, I would like to appear, if you
3 decide on a hearing.
4 THE COURT: All right. Well, is there some
5 reason we wouldn't do a hearing? Do you not -- are
6 you still saying you do not want a hearing?
7 MR. LEE: Yeah, I do not -- I want to waive
8 my hearing.
9 THE COURT: Okay. Why do you want to do
10 that?
11 THE DEFENDANT: For the reasons I stated
12 before on December 5th, why I wanted for those
13 reasons. I feel if I lose my appeal, I should be
14 able to decide what I want to do. It's my appeal
15 and it's my case. I should be able to decide on
16 what I want to do on my appeal.
17 THE COURT: Did your lawyers tell you that,
18 if you do not want to have the hearing, you would be
19 in effect, doing -- do you need some water?
20 What you'd be, in effect, doing is you'd
21 have to withdraw that claim in your habeas writ.
22 Because you had those claims that you had in your
23 writ and I heard them and you appealed. I know it's
24 your lawyers, but you appealed to the supreme court

1 and the supreme court said, Judge Steinheimer, you
2 were right on these number of issues but, Judge
3 Steinheimer, you should have given him a hearing on
4 the issue of how much mitigation could have been put
5 on.
6 And that hearing, they sent it back to me
7 and said, Judge, you should do that hearing. Mr.
8 Vanisi is entitled to that hearing. So that's
9 what's set. If you say you don't want to hearing,
10 you have to give up that issue.
11 THE DEFENDANT: Yeah, that's what I'm
12 saying.
13 THE COURT: But do you understand giving
14 up what giving up that issue means?
15 THE DEFENDANT: Yeah.
16 THE COURT: And I'm going to tell you, if
17 you give up that issue, there's nothing to appeal
18 anymore in state court.
19 THE DEFENDANT: Yeah. I'm fine.
20 THE COURT: The next step that I would have
21 to make is I would have to set a death warrant for
22 you. We would set a date for your execution, a week
23 for your execution. That's what we would have to do
24 if you do that.

1 If all of your appeals are exhausted and a
2 remittitur issues from the supreme court sending
3 your case back to me, that's what I have to do.
4 THE DEFENDANT: I understand.
5 THE COURT: Well, wouldn't it be better to
6 have a hearing, just get through all those witnesses
7 and see if it makes a difference? I mean, even it
8 doesn't make a difference to me and I make a ruling
9 that it didn't, you don't have to appeal it. You
10 could always tell the supreme court I don't want to
11 appeal it. I'm going to waive my appeal of that, if
12 you think you can procedurally go to federal court.
13 I don't know all the rules about federal
14 court. Your federal defense attorneys know. But
15 you could still have a hearing. We've got it all
16 set and you could change your mind after the
17 hearing. That would give you a little bit of time.
18 THE BAILIFF: Your Honor, he gets weak. I
19 just want to make sure he's not going to fall.
20 Are you good standing up?
21 THE DEFENDANT: I'm good.
22 THE COURT: If you need to sit down, just
23 sit down. You understand?
24 THE DEFENDANT: Yeah.

THE COURT: So wouldn't it be better just to have the hearing and then you could decide whether you want to appeal it or not?

THE DEFENDANT: No. I made up my mind to waive my hearing.

THE COURT: I know you made up your mind but now I'm trying to convince you that maybe it wasn't the right choice.

Can you consider what I'm thinking?

THE DEFENDANT: Yeah, I can consider it.

THE COURT: Have you thought about maybe it would be okay to have the hearing? It's going to be for a month or so and then I'll rule and then if -- I might rule in your favor.

But if I don't and you expect me not to -- and I understand that -- but if I don't, you could then say I don't want to appeal to the Nevada Supreme Court, but you'd have a chance to hear those witnesses. Doesn't that make sense to you?

THE DEFENDANT: Yeah, that makes sense, but I want -- I still want to waive my appearance. I still want to waive my evidentiary hearing.

THE COURT: Why? If what I said makes sense to you, what's a month? What's one more month

1 in how long you've been in custody and one more
2 month for the rest of your life? What's one more
3 month?
4 THE DEFENDANT: I don't have an answer to
5 that.
6 THE COURT: I want you to think about it a
7 little bit, okay? So you can talk to your lawyers a
8 little bit. I believe that the next step would be
9 that you have to withdraw your habeas issue, this
10 claim. You'd have to withdraw that claim, because
11 if you don't withdraw that claim, I have direction
12 from the supreme court about what I have to do with
13 that claim.
14 So you would have to withdraw that claim
15 and your attorneys would have to do that on your
16 behalf or we would have to have you represent
17 yourself, which is a whole other discussion and I
18 don't think you want to do that. They're your best
19 shot in federal court. You want to keep them
20 representing you.
21 So we can take a short recess and you can
22 visit with your lawyers a little bit.
23 Does that make sense?
24 MR. FIEDLER: Yes, your Honor. Thank you.

1 THE COURT: Okay. So, counsel -- and I'd
2 ask the state maybe to step out and the audience to
3 step outside so Mr. Vanisi can visit with his
4 lawyers here in the courtroom. Court's in recess.
5 (Recess taken.)
6 THE COURT: Thank you. Please be seated.
7 Go ahead and sit down, Mr. Vanisi. I'll
8 ask your attorney. Did you get a chance to visit
9 with Mr. Vanisi?
10 MR. FIEDLER: Yes, your Honor.
11 THE COURT: And has he changed his mind
12 about what he wants to do?
13 MR. FIEDLER: I don't believe he's changed
14 his mind, your Honor.
15 THE COURT: Okay. So, counsel, I know when
16 I said that Mr. Vanisi would have to withdraw his
17 claim, I wasn't sure what your faces looked like, so
18 I certainly would like to hear from you if you think
19 I'm advising him inaccurately.
20 My problem is the case came back on one
21 issue. If there is no hearing, there is no ruling
22 on that issue because the supreme court sent it back
23 for that purpose. So I either have to have a
24 hearing and reach a ruling or the issue can't be

1 before me. At least that's the way I see it.
2 Does the State have a position?
3 MS. NOBLE: Your Honor, yes. The State
4 agrees with the Court that, because this was sent
5 back for an evidentiary hearing, the Court can just
6 rule on the pleadings because the Court's already
7 done that, essentially. And so to honor Mr.
8 Vanisi's decision to waive the issue, then the
9 correct thing would be for the claim to be
10 withdrawn.
11 THE COURT: Counsel?
12 MR. FIEDLER: And, your Honor, I think it's
13 possible that I've been confused about this, but I
14 assumed that the waiver was as to the hearing and
15 that the Court would still adjudicate the claim on
16 its merits but without, obviously, the benefit of
17 the evidence that would have been presented at the
18 hearing.
19 THE COURT: I've already adjudicated it and
20 the supreme court came back and said I needed a
21 hearing.
22 MR. FIEDLER: But my understanding of the
23 supreme court's ruling in that regard is Mr. Vanisi
24 had made a sufficient showing to be entitled to an

1 evidentiary hearing and so that your prior ruling
2 was not the same as the ruling on the merits of the
3 claim.
4 THE COURT: But I wouldn't have any
5 evidence to rule on the merits.
6 MR. FIEDLER: Yes, you would not have any
7 evidence. And so certainly it would not help the
8 merits of the claim if there was no evidence in
9 support of it, but that is what I assumed we were
10 doing.
11 THE COURT: I'm having a very difficult
12 time. It's almost like you're arguing -- and maybe
13 you're right -- that you can't waive the hearing,
14 and I think that's true. You either have to
15 withdraw that claim or have a hearing. You can't
16 not have the hearing and still proceed on that
17 claim.
18 Otherwise -- or I can't let you do that
19 because I'm going to be in a position where the
20 supreme court will say that I violated what they
21 sent the case back to me for.
22 MR. FIEDLER: Well, I think, I guess, I'm
23 still -- I guess what I was envisioning was that it
24 would still be a ruling on the merits of the claim

1 but, essentially, the ruling might be something
2 along the lines of, well, there was no evidence
3 presented in support of this claim and so I rule the
4 claim lacks merits, or something along those lines.
5 And so, I guess, I had assumed there would
6 still be a merits ruling on the claim. It would
7 just be a ruling on the claim without the
8 presentation of evidence.
9 THE COURT: Okay. So where we're at here
10 -- let's start thinking about this a little bit more
11 -- is this hearing is to establish good cause to
12 have a subsequent habeas. Because he has previously
13 been here so we're not on the first habeas, right?
14 MR. PLATER: Right.
15 MS. NOBLE: I might be --
16 THE COURT: It says, "Mr. Vanisi argues
17 that the district court erred in concluding his
18 claims of ineffective assistance of post-conviction
19 counsel lacked merit and thus failed to provide good
20 cause to overcome the procedural bars."
21 So the purpose of the hearing is to help
22 you overcome your procedural bars to even have the
23 issue before me, right?
24 MR. FIEDLER: Yes, your Honor, but -- and I

1 couldn't find the exact language but I think a
2 subtle -- and I'm sorry for being an annoying
3 distinction --
4 THE COURT: No, you're not.
5 MR. FIEDLER: -- is that I believe the
6 Nevada Supreme Court found good cause in they found
7 post-conviction first -- sorry -- first state
8 post-conviction counsel's performance was deficient.
9 And the hearing that we were to have in this court
10 was to establish prejudice arising from
11 post-conviction counsel's deficiency and the
12 prejudice was specifically as to whether the
13 penalty-phase ineffective assistance of counsel
14 claim was meritorious. So specifically did their
15 deficient performance in failing to investigate and
16 present that claim prejudice Mr. Vanisi, which is a
17 long way of saying it's my understanding that the
18 hearing --
19 THE COURT: Well, I don't think they made
20 that finding yet because, otherwise, they wouldn't
21 be asking me to discover whether trial counsel could
22 have discovered. The hearing should address whether
23 trial counsel could have discovered and presented
24 the evidence, and that's number one.

1 And then as well as whether or not there
2 was a reasonable probability of a different outcome
3 at the penalty hearing had the additional mitigation
4 evidence been presented. So the first prong is to
5 figure out if they could have discovered all of
6 this.
7 MR. FIEDLER: Yes. I'm sorry if I
8 misspoke. I was not trying to refer to trial
9 counsel's deficient performance. I was trying to
10 refer to post-conviction's counsel deficient
11 performance.
12 THE COURT: Oh, okay.
13 MS. NOBLE: If I may, your Honor, I agree
14 with most of what Mr. Fiedler says. The question of
15 prejudice with respect to first post-conviction
16 counsel can only be established if we examine
17 whether or not there was actual ineffective
18 assistance of counsel during the trial phase with
19 respect to mitigation, and so to determine that,
20 we've got to examine the performance of the trial
21 counsel during that aspect of the trial.
22 THE COURT: Correct.
23 MS. NOBLE: Okay. I just want to make sure
24 I understand what the Court is saying.

1 THE COURT: Well, I think you agreed with
2 most of what he said except for the fact that we
3 aren't -- the supreme court hasn't reached a
4 determination yet.
5 MS. NOBLE: Your Honor, it's my
6 understanding based on the order that the supreme
7 court determined that it was deficient but that
8 deficiency prong of Strickland deficient
9 representation, but in terms of the actual prejudice
10 to Mr. Vanisi, that couldn't be determined unless we
11 can -- unless there was an evidentiary hearing where
12 this Court decided whether or not such a claim would
13 have actually had merit and would have afforded Mr.
14 Vanisi some relief.
15 THE COURT: Okay.
16 MS. NOBLE: So the prejudice prong of
17 Strickland for first post-conviction counsel really
18 can't be answered until we have an evidentiary
19 hearing.
20 THE COURT: To determine if trial counsel
21 could have found mitigating evidence --
22 MS. NOBLE: Precisely.
23 THE COURT: -- and, secondly, whether or
24 not it could have made a difference.

1 MS. NOBLE: Yes, your Honor.
2 MR. FIEDLER: And I was going to agree.
3 THE COURT: So that gets us back to the
4 issue here about whether or not the hearing is
5 waived whether or not that in and of itself has to
6 withdraw that claim.
7 MR. FIEDLER: And I don't think that
8 waiving the hearing necessarily means that the claim
9 has to be withdrawn, but I understand that and some
10 in ways it's an academic distinction. But, I guess,
11 the distinction, really, is whether the claim gets
12 ruled on the merits versus not.
13 THE COURT: Well, I know that that's the
14 goal of the federal public defender so that's a
15 necessary component to proceeding in front of a
16 court. It has to be adjudicated on the merits here,
17 right?
18 MR. FIEDLER: The short answer is yes, your
19 Honor. It's a little bit complicated but yes, the
20 short answer is we are here to exhaust these claims.
21 But in terms of what the Nevada Supreme
22 Court ordered, I think it's -- I guess I would
23 analogize the situation to, if we showed up for the
24 evidentiary hearing and announced we had no

1 witnesses to present and then the Court ruled on the
2 merits of the claim at that point.
3 THE COURT: But if you showed up and said,
4 I have no witnesses, then that would prove that
5 trial counsel couldn't find witness because you
6 couldn't find witnesses. I mean, that would be
7 strong evidence that trial counsel wouldn't have
8 done more than they did.
9 The problem is you've told me that you have
10 witnesses. I don't know the circumstances of what
11 they've got to say. I don't know all the details.
12 But we're not there. We're at a situation where --
13 unless maybe you all think you can brief it somehow.
14 MR. FIEDLER: And, I guess, yes, we could
15 do that and that is sort of what I envisioned.
16 Further, I guess, to me the ruling on the
17 merits, assuming this Court allows Mr. Vanisi to
18 waive the evidentiary hearing, would be a ruling
19 that might focus on whether we've met our burden of
20 proof, sort of take into the account the fact that
21 we didn't present any evidence at a hearing.
22 MS. NOBLE: Your Honor, I'm not sure as to
23 the wisdom of briefing the entire issue over again.
24 That was done in the last proceeding. If this Court

1 wants to issue an order taking notice of the waiver
2 of the hearing and with the understanding that Mr.
3 Vanisi has presented no further evidence, the Court
4 readopts its original findings that you issued, I
5 think in 2014, 2011 -- I'm sorry. I don't know what
6 year.
7 But, I mean, we could do it that way if
8 that's the only way they're comfortable with, but it
9 makes no sense to re-brief all these issues.
10 They've already been done. Exhibits were attached
11 with affidavits -- or declarations from various
12 people and arguments were made. I think it would
13 just be a complete waste of judicial resources and
14 would delay things further, which is, clearly, what
15 Mr. Vanisi doesn't want to do.
16 So it's like he's conceding the claim. I
17 would say that that's what it is. By not putting
18 any evidence on, they've conceded the claim.
19 THE COURT: Counsel?
20 MR. FIEDLER: Without using those exact
21 words of Ms. Noble, we would be comfortable with
22 that resolution, your Honor.
23 THE COURT: Okay. So, Mr. Vanisi, you've
24 heard what everybody's had to say. I'm not sure I

1 agree with everything that the lawyers are saying,
2 but I do agree that, if you don't have the hearing
3 that we've got scheduled, I won't have any evidence
4 to rule in your favor. You understand that?
5 THE DEFENDANT: Yes.
6 THE COURT: And so whether that -- how that
7 ends your appeals, I don't know. There's also the
8 potential that by waiving your hearing, that that
9 extends your appeal issue because the supreme court
10 may ultimately say, No, Judge, you were wrong. You
11 shouldn't let him waive his appeal, his hearing.
12 You couldn't let him waive his hearing, and then
13 we'd be back here again and you'd still be in state
14 court.
15 So you understand there's that possibility
16 too?
17 THE DEFENDANT: Yeah.
18 THE COURT: Are you comfortable with your
19 lawyers except for this disagreement about having a
20 hearing or not?
21 THE DEFENDANT: Yeah.
22 THE COURT: You told the psychiatrist that
23 you thought you were. Are you still?
24 THE DEFENDANT: Yes.

1 THE COURT: Okay. These guys have been
2 listening to what you have to say today when we took
3 breaks and when you talked to them?
4 THE DEFENDANT: Yes.
5 THE COURT: So do you still want them to
6 represent you?
7 THE DEFENDANT: I'd like to fire them.
8 THE COURT: Why do you want to fire them?
9 THE DEFENDANT: Because they're not doing
10 what I want to do on my appeal. They've indicated
11 to me that they're going to do something else on my
12 appeal that I don't want them to do --
13 THE COURT: Okay. Well --
14 THE DEFENDANT: -- but that's for another
15 time, though.
16 THE COURT: Okay.
17 THE DEFENDANT: But this time I understand
18 if we make a decision whether or not to waive my
19 appearance -- whether or not to waive my evidentiary
20 hearing.
21 THE COURT: Right. That's what I have to
22 decide now.
23 So, counsel, the decision about whether or
24 not you continue to represent him after the habeas

1 will be left to you and Mr. Vanisi. That will be
2 something that would be discussed later. It's not
3 something that we would decide today.
4 Is that what you agree with, Mr. Vanisi?
5 THE DEFENDANT: Yes.
6 THE COURT: We keep the federal public
7 defenders still representing you here today --
8 THE DEFENDANT: Yes.
9 THE COURT: -- and in this court and if
10 there's any appeals from what happens with the
11 waiver of the evidentiary hearing.
12 THE DEFENDANT: Yes.
13 THE COURT: Now, we've talked a lot.
14 You've heard a lot about what the doctors had to say
15 about you waiving the evidentiary hearing. You sat
16 through that today, right?
17 THE DEFENDANT: Correct.
18 THE COURT: Have you changed your mind at
19 all?
20 THE DEFENDANT: No.
21 THE COURT: And can you tell me why you
22 feel so strongly you want to waive this evidentiary
23 hearing?
24 MR. FIEDLER: Court's indulgence.

THE COURT: Yes.

THE DEFENDANT: Trying to -- it's been a long day.

THE COURT: It has been. Would you like to sleep on it and come back tomorrow? It's already 4:20 in the afternoon.

THE DEFENDANT: Yes. I've only had two pieces of cheese to eat.

THE COURT: You didn't get much to eat?

THE DEFENDANT: Yeah.

THE COURT: Okay. Let's sleep on it and come back tomorrow.

The clerk tells me we can start tomorrow morning about 10:30 with you. So we'll have you come back in the court at 10:30 and then you can tell me what -- you've slept on it, you can decide what you will do, okay?

THE DEFENDANT: Yeah.

THE COURT: All right. We'll be in recess with this matter until 10:30 tomorrow morning. Court's in recess.

(End of proceedings at 4:20 p.m.)

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STATE OF NEVADA)
) SS.
COUNTY OF WASHOE)

I, CHRISTINA MARIE AMUNDSON, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter, I was present in Department No. 4 of the above court on Monday, September 24, 2018, at the hour of 9:00 a.m. of said day, and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein in the case of State of Nevada, Plaintiff, v. SIAOSI VANISI, Defendant, Case No. CR98-0516.

That the foregoing transcript is a true and correct transcript of my said stenotype notes so taken as aforesaid, and is a true and correct statement of the proceedings had and testimony given in the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 6th day of September 2018.

/S/ Christina Marie Amundson, CCR #641

Christina Marie Amundson, CCR #641

4185

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

STATE OF NEVADA,

Dept. No. 4

Plaintiff,

Case CR98-0516

v.

SIAOSI VANISI,

Defendant.
_____/

Pages 1 to 47, inclusive.

TRANSCRIPT OF PROCEEDINGS

REPORT PSYCHIATRIC EVALUATION
Tuesday, September 25, 2018

A P P E A R A N C E S:

FOR THE PLAINTIFF: JENNIFER P. NOBLE, DDA
JOSEPH R. PLATER, III, DDA
1 So. Sierra St., So. Tower
Reno, NV 89502

FOR THE DEFENDANT: SCOTT WISNIEWSKI, FPD
RANDOLPH FIEDLER, FPD
411 E. Bonneville Ave
Las Vegas, NV 89101

REPORTED BY: Christina Amundson,CCR #641
Litigation Services, 323.3411

RENO, NEVADA -- TUESDAY 9/25/18 -- 10:30 A.M.

-o0o-

THE COURT: Thank you. Please be seated.

Good morning. Let's go ahead and make our appearances for the record. Counsel?

MS. NOBLE: Good morning, your Honor. Jennifer Noble and Joseph Plater on behalf of the State.

MR. FIEDLER: Randy Fiedler and Scott Wisniewski with the Federal Public Defender's Office on behalf of Mr. Vanisi, who is present.

THE COURT: So we were starting to discuss Mr. Vanisi's decision to waive the hearing last night. And it was late and I didn't realize, Mr. Vanisi, that you hadn't gotten very much to eat yesterday. So we'll go ahead and do some more discussion today, if that's all right with you.

THE DEFENDANT: Yeah, that's fine.

THE COURT: Okay. And I think what we need to do is -- before we go any further is we do need to swear you in so what you tell me is under oath about your decision. Okay?

THE DEFENDANT: Okay.

THE COURT: All right. The clerk will

swear you.

(Defendant sworn.)

THE COURT: Okay. So, Mr. Vanisi, you wanted to think about your decision and sleep on it overnight.

Have you talked to your attorneys some more?

THE DEFENDANT: Yes.

THE COURT: Okay. So what are you thinking today? What do you want to do?

THE DEFENDANT: Judge, I still want to move on -- move ahead with waiving my evidentiary hearing.

THE COURT: Okay. And I need you to tell me why.

THE DEFENDANT: It's just for tactic reasons, Judge.

THE COURT: Can you give me more information on that?

THE DEFENDANT: Yeah. I'm just trying to maneuver myself to a better -- to a better advantage position. I think in federal courts is where I should be looking to. Besides, I don't want any penalty-phase relief, your Honor.

1 THE COURT: You don't want any?
2 THE DEFENDANT: Yeah, I don't want any
3 penalty-phase relief.
4 THE COURT: So when you told the doctors
5 that you would prefer to stay on death row if that
6 was all you could get, is that what you're saying?
7 THE DEFENDANT: Yeah. Yes.
8 THE COURT: Well, Mr. Vanisi, you
9 understand -- do you understand, I guess is my
10 question, that you could end up losing all of your
11 federal appeals?
12 THE DEFENDANT: Yes, I understand that,
13 Judge.
14 THE COURT: And what do you see the end
15 result being if you lose those appeals?
16 THE DEFENDANT: I would be executed.
17 THE COURT: And do you understand that, if
18 you give up this option to have this hearing and
19 move forward with this, this issue, you're getting
20 that much closer to execution?
21 THE DEFENDANT: Yes, I realize that, your
22 Honor.
23 THE COURT: When you talk to your lawyers,
24 as I understand it, they're basically telling you

1 that they disagree that you should do this.
2 Is that correct?
3 THE DEFENDANT: Yes, your Honor.
4 THE COURT: And they disagree because they
5 don't think you necessarily are going to win in
6 federal court.
7 THE DEFENDANT: That might happen. That's
8 the chance, it might happen.
9 THE COURT: And so that chance is something
10 you want to take, that risk?
11 THE DEFENDANT: Yeah, your Honor, I want to
12 take that risk.
13 THE COURT: Can you explain to me why you
14 don't want any death-penalty relief with regard to
15 the penalty?
16 THE DEFENDANT: You know, in the end what
17 am I really getting? What am I really getting? I'm
18 not getting that much in return.
19 Do you see what I'm saying, Judge?
20 THE COURT: Well, I want to understand what
21 you're saying. Can you explain it a little bit more
22 to me?
23 THE DEFENDANT: If I get penalty-phase
24 relief, I could get the death penalty back. They

1 could give me the death penalty back or I could get
2 life without possibility of parole, correct?
3 THE COURT: Yes.
4 THE DEFENDANT: And so that's really not
5 that interesting to me.
6 THE COURT: Okay. In that you don't want
7 to spend the rest of your life in prison.
8 Is that what you're telling me?
9 THE DEFENDANT: Yes, your Honor.
10 THE COURT: Do you not see that there could
11 be some value in living, even if you are in prison?
12 THE DEFENDANT: Yes, I see that also and --
13 but I choose the other way also.
14 THE COURT: The "other way" being?
15 THE DEFENDANT: Executed if my appeal -- if
16 I were to lose all of my appeal.
17 THE COURT: One of the concerns that I've
18 heard from your attorneys is that you aren't being
19 very realistic about the chances of your appeal in
20 federal court. They think that you are -- you
21 believe you might win in federal court, and I'm
22 getting the sense from them that they don't
23 necessarily think you're going to win in federal
24 court.

1 Have you gotten that impression from them
2 also?
3 THE DEFENDANT: Yes, your Honor. So my
4 position is let's go for it. Let's go and see what
5 the federal courts has to say, you know. Let's see
6 what kind of ruling they'll give me, you know.
7 I already know what I'm getting at the
8 state level. I'm not getting nothing on the state
9 level. I want to pursue the federal court to see if
10 they'll give me a fair shake.
11 THE COURT: Now, when you say you're not
12 getting anything at the state level, do you
13 understand that you still have an opportunity at the
14 state level with regard to your penalty?
15 THE DEFENDANT: Yeah. But, then again, I
16 don't want penalty-phase relief.
17 THE COURT: Okay.
18 THE DEFENDANT: Because the outcome of that
19 is not so much better than what I've got now.
20 THE COURT: So, Mr. Vanisi, how old are
21 you?
22 THE DEFENDANT: Forty-eight.
23 THE COURT: So how long have you been
24 appealing this since you were first convicted?

THE DEFENDANT: I've been appealing since 2000.

THE COURT: Okay. So, basically, 18 years.

THE DEFENDANT: Yeah.

THE COURT: If you keep going with your appeal and finish out your state court appeal and then go to the federal court, do you understand that you might -- it might be another period of time in the federal court that would prolong the death sentence, even if you lose?

THE DEFENDANT: Yes, I understand my prolonged -- but my life clock is ticking, your Honor. I want to be able to go into federal court to see what they will give me. I'm willing to take my chances in federal courts.

THE COURT: And federal court, what if federal court says, No, we're not going to grant any relief to you?

THE DEFENDANT: That's fine, your Honor. I'm going to accept that.

THE COURT: I don't know all the ins and outs of your case. I don't deal with your appeal directly. You understand?

THE DEFENDANT: Correct.

THE COURT: But I do know that you have a very long order from the supreme court where they entered a decision in your case.

Have you read that order?

THE DEFENDANT: Yeah. But I don't remember -- I don't remember what you're pointing out in the appeal.

THE COURT: Okay. The reason I'm asking you this is I want you to -- we're going to take a little recess and I want you with your lawyers to go over this order again, because those issues that you think you might win at federal court are discussed in the order by the Supreme Court of Nevada. And I want to make sure that you look at that and realize what at least the Nevada Supreme Court has said about your possibilities of winning a guilt-phase appeal at the habeas level.

Do you understand what I'm saying?

THE DEFENDANT: Yeah, I understand what you're saying.

THE COURT: I know it's a big, long order. I know it'll take you a little while to read it, but if you give up your hearing, it's done. You've given it up, so I think it makes sense to take the

1 time now to make sure you are really understanding
2 what you're giving up, okay?
3 THE DEFENDANT: Yes.
4 THE COURT: Now, the other thing I wanted
5 to ask you about is what I started to talk to you
6 about that yesterday. Remember what I said about
7 you could have the hearing and it's going to start
8 in a week? It'll be over in -- I mean, completely
9 over in my court easily within six weeks from now.
10 That's not a very long delay. And then you
11 could decide to not appeal to the supreme court, if
12 you don't like my decision, but you will have known
13 what my decision was and you would have heard the
14 evidence.
15 Did you think about what I said about
16 that--
17 THE DEFENDANT: Yeah.
18 THE COURT: -- last night?
19 THE DEFENDANT: Yes, I did.
20 THE COURT: So what's six more weeks, you
21 know, to your situation? I mean, that wouldn't
22 delay it very long.
23 THE DEFENDANT: You're right on the time
24 frame. You're right on the time frame. It's not

1 that long. But I want to waive my evidentiary
2 hearing, your Honor, you know. Despite what you
3 said about the time frame, I want to go ahead and
4 waive my evidentiary hearing anyway.
5 THE COURT: All right. Well, I'd like you
6 to take a minute to look. Mr. Fiedler, you've got
7 that order.
8 MR. FIEDLER: Yes, your Honor.
9 THE COURT: I'd like you to just -- so that
10 Mr. Vanisi clearly can tell me that he remembers
11 what those errors that were provided to the Supreme
12 Court of Nevada that Nevada did not accept, which
13 would be the same errors that you'd go to federal
14 court, correct?
15 MR. FIEDLER: That's correct, your Honor.
16 THE COURT: So just make sure he
17 understands what that was.
18 Yes?
19 MR. PLATER: Good morning, Judge.
20 THE COURT: Good morning.
21 MR. PLATER: One small thing. I heard Mr.
22 Vanisi say even if he got state court relief, he
23 doesn't want to spend the rest of his life in
24 prison.

1 I also want to make sure he understands if
2 he were successful in his evidentiary hearing and he
3 got a sentence less than death, he has two options.
4 He could get life with parole --
5 THE COURT: Yes.
6 MR. PLATER: -- or life without. So it's
7 not a guarantee that he would spend the rest of his
8 life in prison.
9 THE COURT: Right.
10 MR. PLATER: That is the possibility.
11 THE COURT: I understand that.
12 Did you see what Mr. Plater was saying?
13 THE DEFENDANT: He presented that life with
14 parole or life without parole or the death sentence.
15 THE COURT: Correct.
16 THE DEFENDANT: Yeah.
17 THE COURT: Because when you were talking
18 to me a few minutes ago, you said it's possible you
19 would get the death sentence again or life without
20 parole.
21 THE DEFENDANT: Right.
22 THE COURT: But you didn't tell me that you
23 understood that you could get life with parole, that
24 could be the result if you got a new penalty

hearing.

THE DEFENDANT: Yeah. But I don't think chances of getting life with parole is available as -- as easily available to me.

THE COURT: Well, it is available to you. But are you saying you don't think a jury would give you that penalty?

THE DEFENDANT: Right.

THE COURT: But you understand that that's a potential?

THE DEFENDANT: It is a potential.

THE COURT: So when you're --

THE DEFENDANT: Just like the potential of federal courts giving me a fair chance, a fair shake and giving me relief on my appeal, just so there's a chance there also, just as there's a chance of getting life with parole.

THE COURT: You're right, Mr. Vanisi. You frequently get there and you always are thinking about your process and you are absolutely right. Those are both chances and it is, in my opinion, your choice to make, but I want to make sure you're making an informed decision.

That's why we'll take one more recess and

1 let you look at this order?
2 THE DEFENDANT: Okay, your Honor.
3 THE COURT: All right. So we'll be in
4 recess for a little while. Court's in recess.
5 (Recess taken.)
6 THE COURT: Thank you. Please be seated.
7 So, Mr. Vanisi, have you had a chance to go
8 -- to remind yourself about what that order
9 affirming in part and reversing in part and the
10 remand was about from the Nevada Supreme Court?
11 THE DEFENDANT: Yes.
12 THE COURT: Okay. Do you have any
13 questions about what they did.
14 THE DEFENDANT: No.
15 THE COURT: And now looking at that, does
16 it change your opinion about how successful you
17 might be in federal court?
18 THE DEFENDANT: Does it change how
19 successful I will be at federal court?
20 THE COURT: Of what you think of that.
21 THE DEFENDANT: Yeah. I think with these
22 claims I'll be successful in federal court, but if
23 they're not successful, then I'm okay with that.
24 THE COURT: Okay. So it didn't really

1 change your opinion about your desire to go straight
2 to the federal court on these claims.
3 THE DEFENDANT: No.
4 THE COURT: Okay. Counsel, do you have
5 anything to add?
6 MR. FIEDLER: No, your Honor.
7 THE COURT: Mr. Plater, do you have any
8 suggested inquiry that I should be making of the
9 petitioner?
10 MR. PLATER: I know our supreme court likes
11 during a canvass to show that he understands that,
12 if he waives his hearing and you therefore dismiss
13 or deny the petition, that he can no longer raise
14 these claims in state court and he won't be able to
15 resurrect them again and he won't be able to argue
16 the substantive value on direct appeal, if he
17 appeals this decision.
18 We should probably give him a full
19 understanding of what the possible penalties are for
20 first-degree murder, which would be life without the
21 possibility of parole, life with the possibility of
22 parole after a minimum of 20 years has been served
23 or a definite term of 50 years in prison with
24 eligibility of parole starting after 20 years.

THE COURT: In this case I think he was originally charged with murder with the use of a deadly weapon.

MR. PLATER: Okay. And the deadly weapon enhancements.

THE COURT: Which would add 1 to 20 years on --

MR. PLATER: Yes. It would be consecutive and equal to the primary offense, because that's how the law read at the time he committed the crime.

THE COURT: The old law.

MR. PLATER: Right.

THE COURT: Okay. Anything else?

MR. PLATER: I think that's all.

THE COURT: Okay. So, Mr. Vanisi, what Mr. Plater was recommending is that I have to ask you a couple more questions to make sure that it's clear what's happening here.

And one is that, Do you understand this is a permanent decision? You can't later change your mind and say, Oh, I want that evidentiary hearing after all?

THE DEFENDANT: Correct.

THE COURT: So you understand if you waive

1 it, you can't, what Mr. Plater said "resurrect," but
2 what it means is you can't have that option again.
3 THE DEFENDANT: Right.
4 THE COURT: You understand that?
5 THE DEFENDANT: Right.
6 THE COURT: Do you understand what he said
7 when he said you wouldn't be able to appeal on a --
8 substantively appeal this issue?
9 In other words, there's no hearing to
10 appeal on so there's -- I have no evidence to rule
11 differently than I did. And when you try to go to
12 the Nevada Supreme Court, there won't be anything
13 for them to say I did right or wrong.
14 THE DEFENDANT: Correct.
15 THE COURT: And so you understand that's an
16 appeal right that you're giving up.
17 THE DEFENDANT: Right.
18 THE COURT: Even with those things in mind,
19 do you still want to give these rights up?
20 THE DEFENDANT: Yes, your Honor.
21 THE COURT: Can you tell me all the
22 possible penalties for the offense that you were
23 charged with, in case you got a new penalty hearing
24 what all those possible outcomes could be? Mr.

1 Plater named them, but I'd like to hear them in your
2 words.
3 THE DEFENDANT: Well, death penalty.
4 THE COURT: Okay.
5 THE DEFENDANT: Life without possibility of
6 parole.
7 THE COURT: After you've -- yes, without.
8 Okay.
9 THE DEFENDANT: Life with parole.
10 THE COURT: And what does "with parole"
11 mean?
12 THE DEFENDANT: After 20 years. You serve
13 20 years, then you get parole.
14 THE COURT: But do you remember that you
15 were charged with murder with the use of a deadly
16 weapon?
17 THE DEFENDANT: Yeah.
18 THE COURT: And so the requirement is that
19 the use of a deadly weapon requires a like penalty
20 that's consecutive to the first.
21 So if you got life with the possibility of
22 parole, your sentence would be life with the
23 possibility of parole after 20 years plus then, when
24 you're done with that, you'd have to start another

1 life with the possibility of parole after 20 years.
2 THE DEFENDANT: Right.
3 THE COURT: So those add up to 40 years
4 minimum. Do you understand that?
5 THE DEFENDANT: Right.
6 THE COURT: And then what else is the
7 possible penalty?
8 THE DEFENDANT: Manslaughter.
9 THE COURT: Okay. So if you had a whole
10 guilt phase, you'd have other possibilities.
11 THE DEFENDANT: Right.
12 THE COURT: But if you just have a penalty
13 hearing, you'd only be sentenced on what you were
14 convicted of.
15 THE DEFENDANT: Correct.
16 THE COURT: Now, do you understand that
17 there is a possibility of a penalty for first-degree
18 murder of up to 50 years, a definite term of 50
19 years in prison --
20 THE DEFENDANT: Yeah.
21 THE COURT: -- with parole after a minimum
22 of --
23 MR. PLATER: 20 years.
24 THE COURT: So do you understand that?

THE DEFENDANT: Right.

THE COURT: And then if you got with the use of a deadly weapon enhancement, it would be again --

THE DEFENDANT: Another 20 years.

THE COURT: Another 20 years and 100 years on the top. So those are the possible penalties that would be available to you if you were to get a new penalty hearing. Do you understand that?

THE DEFENDANT: Right.

THE COURT: So there's things other than the death penalty.

THE DEFENDANT: Right. I've considered those and I'm not -- I've considered those other possibilities but I still want to waive my evidentiary hearing.

THE COURT: So, knowing that you can't get it back, that if you waive it you won't get another chance to have this evidentiary hearing --

THE DEFENDANT: Right.

THE COURT: -- and knowing that there wouldn't be much to appeal if you don't have the evidentiary hearing, right?

THE DEFENDANT: Right.

1 THE COURT: And knowing that, if you win
2 the evidentiary hearing, you have a chance to get
3 life with the possibility of parole on these
4 charges--
5 THE DEFENDANT: Right.
6 THE COURT: -- or a definite term of 50
7 years enhanced with a deadly weapon, even knowing
8 that, you still do not want to have your evidentiary
9 hearing?
10 THE DEFENDANT: Yes, your Honor.
11 THE COURT: "Yes" what?
12 THE DEFENDANT: Yes, I want to waive my
13 evidentiary hearing.
14 THE COURT: Okay. All right.
15 Mr. Vanisi, I've tried everything I could
16 to try to convince you to have the evidentiary
17 hearing. I do believe, as I said yesterday, that
18 you are competent to make this decision, that you
19 understand the decision that you are making.
20 Has anyone forced you to make this decision
21 in any way?
22 THE DEFENDANT: No.
23 THE COURT: Has anyone told you you would
24 be guaranteed anything if you made this decision?

THE DEFENDANT: No.

THE COURT: Has anyone said anything to you to get you to enter this decision that you haven't told me about?

THE DEFENDANT: No.

THE COURT: Do you feel like you're making this on your own and not because someone's making you make this decision?

THE DEFENDANT: Yes.

THE COURT: Okay. Any further inquiry, counsel?

MS. NOBLE: Court's indulgence.

(Sotto voce discussion between counsel.)

MS. NOBLE: Your Honor, the State believes that covers it.

THE COURT: Mr. Fiedler, any other questions that you think I should ask your client?

MR. FIEDLER: No, your Honor.

THE COURT: Any other questions I could ask him to change his mind that you can suggest to me?

MR. FIEDLER: Not that I can think of, your Honor.

THE COURT: Mr. Vanisi, the reason I'm asking that question of your attorney is I think

1 this is the wrong decision for you to make and I
2 don't want you to make this decision.
3 But I do believe you have a right to make
4 the decision. You are competent, you understand the
5 ramifications of the decision, and you understand
6 what the consequences are if you waive your right to
7 have this hearing.
8 So, because I do believe that you have
9 those rights and you are competent to make that
10 decision, I am going to find that you're freely and
11 voluntarily waiving your hearing and I'll accept
12 that waiver.
13 THE DEFENDANT: Thank you, your Honor.
14 THE COURT: So, that being said, we still
15 -- I would like to have some oral arguments on the
16 habeas -- you all discussed that yesterday -- that
17 you think there would be some decision -- you can be
18 seated, Mr. Vanisi -- some decision the Court would
19 have to make, so I would like to set an oral
20 argument on that.
21 MR. FIEDLER: Your Honor, if I may, we did
22 want to offer one argument that notwithstanding Mr.
23 Vanisi's waiver that we move forward with the
24 evidentiary hearing.

1 THE COURT: Okay.
2 MR. FIEDLER: So could we do that before we
3 set an oral argument?
4 THE COURT: Yes. But how long do you want
5 to argue on that today?
6 MR. FIEDLER: I don't expect it to take
7 very long, your Honor.
8 THE COURT: Okay.
9 MR. FIEDLER: So under the Nevada Rules of
10 Professional Conduct, Rule 1.2-A, it specifies what
11 the scope, like whose role in an attorney-client
12 relationship it is to make certain decisions.
13 Waiving an evidentiary hearing is not one of the
14 decisions that a client is allocated under 1.2-A and
15 so, first, we'd suggest that under 1.2-A this is not
16 Mr. Vanisi's decision.
17 And, second, we'd also refer to Rule 1.14
18 the diminished capacity Rule. And I'm providing to
19 opposing counsel an ethics opinion from a professor
20 David Siegel -- may I approach, your Honor?
21 THE COURT: Yes.
22 MR. FIEDLER: And we'd like to file this in
23 open court.
24 THE COURT: Okay. Give it to the clerk.

1 THE CLERK: Document to be filed in after
2 court.
3 MR. FIEDLER: And what Professor Siegel
4 indicates is that, if a client is suffering from
5 diminished capacity, then -- and the attorney
6 reasonably believes that that client is suffering
7 from diminished capacity, a decision like waiving
8 the evidentiary hearing should be the attorney's.
9 So based on what I've already indicated to
10 the Court to support --
11 THE COURT: Just a minute.
12 Go ahead.
13 MR. FIEDLER: And based on what I've
14 already indicated to the Court that suggested to me
15 that a competency evaluation was required, I believe
16 that Mr. Vanisi is suffering from diminished
17 capacity.
18 And so I further believe that it is our
19 decision whether to move forward with the
20 evidentiary hearing and we would like to move
21 forward with the evidentiary hearing.
22 THE COURT: Thank you.
23 MS. NOBLE: Your Honor, we disagree that
24 the question is one of strategy. It is a question,

1 rather, of the goal of the representation. And
2 under Nevada Rules of Professional Conduct 1.2-A,
3 the same rule that Mr. Fiedler initially cited, the
4 client can decide the objective of the
5 representation.
6 This is an instance in which Mr. Vanisi and
7 his counsel have different goals. Mr. Vanisi does
8 not value a new penalty phase. That is not his goal
9 and that is not an objective that he wishes to
10 pursue.
11 Under the Calambra and Rees cases, he can
12 decide what the objective of the representation is.
13 This is not a strategy decision. This is a
14 goal-oriented decision. This is the goal of the
15 representation. And that could be distinguished
16 from the additional Rule of Professional Conduct
17 cited by counsel.
18 And I understand their take on it, but that
19 is about strategy. This is not necessarily a pure
20 strategic decision. It is one of objective of the
21 representation. They have diverging goals. And
22 when that happens, Mr. Vanisi, if he is competent to
23 make the decision, has the right to decide the goal
24 and the representation.

1 THE COURT: Okay.
2 MR. FIEDLER: I would just make two points.
3 One is that Mr. Vanisi has been clear throughout all
4 this when he was speaking with the evaluators that
5 he has no wish to die, and I would suggest that that
6 guides what the goal of this representation is and
7 should be.
8 And, secondly, all of this is in the
9 context of a client who I believe to be suffering
10 from diminished capacity. And so, although I
11 understand the Court found him competent and the
12 evaluators also indicated competency, at the end of
13 the day it's a different standard and --
14 THE COURT: Well, diminished capacity, are
15 you saying that he's retarded? He has less than
16 mental faculties? What is the basis for a
17 diminished capacity claim that you're making?
18 MR. FIEDLER: The basis, your Honor, is --
19 and here I'm citing Professor Siegel's opinion
20 offers a block quote on page two, going into page
21 three. And the block quote is from the Model Rules
22 of Professional Conduct. They're commentary to the
23 Model Rules 1.14. And Nevada has the same
24 diminished capacity rules so, although it's the

1 Model Rules comment, it's as to the same role.
2 And they offer that the client suffers from
3 -- well, an attorney in considering whether a client
4 suffers from diminished capacity needs to consider
5 the client's ability to articulate his reasoning
6 leading to a decision.
7 THE COURT: There's no problem here on
8 that. He can clearly articulate it.
9 MR. FIEDLER: Yes, the variability of his
10 state of mind and ability to appreciate the
11 consequences of a decision.
12 THE COURT: Where is there any indication
13 that he doesn't understand the consequences of his
14 decision?
15 MR. FIEDLER: Well, for me, your Honor,
16 it's related to the variability of state of mind,
17 and we saw that in the NDOC records and we saw what
18 the evaluators had to say.
19 THE COURT: What? We saw nothing in the
20 NDOC records that shows he's changed his mind about
21 this decision. The fact that he may occasionally
22 show manic or frustrated behavior, we've seen -- I
23 have no evidence. If you've got some evidence to
24 give me, give it to me, but I've seen nothing that

1 he's changed his mind since the first time he sent a
2 letter to the court in late June.
3 MR. FIEDLER: For me the variability comes
4 from the indications of paranoia, the difficulties
5 in redirecting him, and the difficulty with his
6 words that were indicated in the NDOC records.
7 THE COURT: Where in the NDOC records? I'm
8 sorry. I'm going to make you make this record,
9 because I don't see it. If you've got something
10 there, you have to show me what it is.
11 Do we have the NDOC records?
12 MR. FIEDLER: Would the Court be satisfied
13 with Dr. Zuchowski's summary of the NDOC records?
14 Because I did not bring the NDOC records with me.
15 THE COURT: Okay.
16 MR. FIEDLER: So I'm looking at Dr.
17 Zuchowski's evaluation on the bottom of page four,
18 going into page five. And I'm quoting, "The main
19 event of potential relevance to this evaluation was
20 a documented change in Mr. Vanisi's mental status
21 and level of cooperation in late July 2018."
22 He was described as "paranoid, difficulty
23 with" -- bracketed -- "word" -- unbracketed --
24 "processing and more difficult to redirect. He

1 expressed a desire to stop his Haldol injection."
2 And then the last factor from the comment
3 to the Model Rules is the consistency of a decision
4 with the known long-term commitments and values of
5 the client.
6 THE COURT: I'm sorry. I don't understand
7 why that somehow makes him -- shows a variability of
8 his thought process.
9 MR. FIEDLER: I think it shows a
10 variability in his state of mind in that he is sort
11 of --
12 THE COURT: But are you saying state of
13 mind -- is it your opinion that anyone who has been
14 diagnosed with schizophrenia, bipolar affect as Mr.
15 Vanisi could never make a decision and stick with
16 it?
17 I mean, doesn't the rule mean he keeps
18 changing his mind about how he wants to do things,
19 what he wants to have the outcome to be? If he one
20 day said, Oh, I definitely want a new penalty
21 hearing and the next day, No, I don't want a new
22 penalty hearing, isn't that what we're referring to?
23 MR. FIEDLER: My understanding is referring
24 to -- that it's referring to sort of his mental

1 status. And I understand that the record indicates
2 Mr. Vanisi's been consistent about this decision,
3 but I think that the reference in Dr. Zuchowski's
4 report shows that Mr. Vanisi's mental status has not
5 been consistent at least in recent history.
6 THE COURT: But Dr. Zuchowski discounted
7 that. He said he didn't think it had any impact or
8 bearing on the decision that he rendered to a
9 reasonable degree of medical certainty that Mr.
10 Vanisi did -- was capable of making that decision,
11 that nothing in the prison records affected his
12 decision of his recommendation to this court.
13 And you cross-examined him for a long time
14 but he never adopted any opinion that that somehow
15 showed variable mental status.
16 MR. FIEDLER: Understood. However, I would
17 respectfully suggest that I read the NDOC records
18 and Dr. Zuchowski's records to indicate variability.
19 Additionally, the last factor that the
20 comments of the Model Rule refer to is the
21 consistency of a decision with known long-term
22 commitments and values of the client.
23 And Mr. Vanisi's consistent indication that
24 he does not have a desire to die, I think, indicates

1 that the long-term goal here is to avoid the death
2 penalty.
3 THE COURT: But Mr. Vanisi's stated goal is
4 not to spend the rest of his life in prison. Why do
5 we take one goal -- why do we say that those are
6 mutually exclusive?
7 In other words, if he doesn't want to spend
8 the rest of his life in prison but he doesn't want
9 to commit suicide, therefore, he must be not
10 understanding that the possibility of death penalty
11 is real.
12 MR. FIEDLER: I think it's the
13 inconsistency that suggests diminished capacity.
14 THE COURT: So your position is that
15 anybody who is facing the death penalty who says, I
16 don't want to spend the rest of my life in prison
17 and I don't really want to die, but if that's what
18 happens, that's what happens, that shows that they
19 have diminished capacity?
20 MR. FIEDLER: If they additionally have
21 been diagnosed with schizo effective disorder and
22 there have been indications recently that there are
23 -- there is something going on with their mental
24 status.

1 THE COURT: Okay. Thank you.
2 Counsel, are you red ready to argue this?
3 I know this is all new.
4 MS. NOBLE: Thank you, your Honor. Yes,
5 I'm ready to argue it.
6 I think we need to get back to what the
7 test is. The test is not whether or not Mr. Vanisi
8 suffers from any mental disorders or defect. The
9 test is what's laid out in the case -- in the two
10 cases, whether he's got the capacity to appreciate
11 his position. That's been established. Whether or
12 not he's making a rational choice. That's been
13 established.
14 Mr. Vanisi has clearly indicated to this
15 Court that he understands that if he waives this
16 evidentiary hearing, it's possible it may hasten the
17 date at which he is executed. The execution will be
18 set and that the State appeals will be done.
19 He's indicated that but he also has
20 indicated that he's willing to risk that because he
21 wants to move on to federal court and see what they
22 want to do with his trial-phase claims.
23 Mr. Fiedler and the Federal Public
24 Defender's Office may not agree with that decision

1 but that doesn't make Mr. Vanisi suicidal. It
2 doesn't make him incompetent. It means that he
3 disagrees with the goal of the representation, and
4 he has the right to do that.
5 And I would just note for this Court that
6 this approach, where a client wishes to move on and
7 even if they want to be executed, like Scott Dozier.
8 The supreme court recently in oral arguments -- and
9 I noted that in one of our pleadings -- was talking
10 to the Federal Public Defender's Office -- not these
11 attorneys -- about clients having the right to make
12 these types of decision.
13 This is the product of rational thought.
14 Mr. Vanisi used the term "reductive reasoning." He
15 wants to get to federal court and he wants to get
16 there faster. He's willing to roll the dice. We
17 should respect that decision and allow him to make
18 it. There's no reason to believe that he's not
19 competent to make it.
20 MR. FIEDLER: We would submit it, your
21 Honor.
22 THE COURT: Okay. I understand your
23 arguments and, of course, I appreciate the colloquy,
24 the discussion we had about them. Appreciate

1 hearing your thoughts on this process, Mr. Fiedler.
2 But I agree with what the State has said
3 and I think that Mr. Vanisi has freely and
4 voluntarily waived his right to have a hearing, and
5 I do not think that there's any basis for me to deny
6 that request.
7 Although, Mr. Vanisi used the words that it
8 was a strategic decision, in fact, it wasn't
9 traditional legal strategy that he's talking about.
10 It is talking about the goal or objective of his
11 appeals.
12 And he has made it very clear to me that he
13 does not wish to have another penalty hearing if
14 that's the only relief he gets. He would prefer to
15 go forward with the federal appeals to see if he can
16 receive guilt-phase remedies. If he can't, he's
17 accepted the reality that he would prefer to have an
18 execution than spend the rest of his life in prison
19 or even any of these other alternatives that we've
20 discussed. That is his choice.
21 So, for all the reasons that we've talked
22 about today and the arguments presented by the
23 State, I am going to deny your request to decline to
24 allow Mr. Vanisi to waive his hearing.

1 Now, that gets us to the next stage. We
2 need to set a hearing date -- an argument date.
3 When do you all want to do that? Do you
4 want to use the date we have? October 4th? It's
5 a week from Thursday.
6 MR. FIEDLER: Yes. I'm suddenly free on
7 October 4th, your Honor.
8 THE COURT: Okay. And, Mr. Vanisi, do you
9 want to be present when they make their arguments on
10 October 4th?
11 THE DEFENDANT: Yes.
12 THE COURT: Okay. So we'll bring you here
13 for that argument, and so the continuing order to
14 produce for October 4th at ...
15 THE CLERK: That's what I was going to ask
16 you about. Counsel, how long do you think the
17 arguments will take?
18 MS. NOBLE: Your Honor, I don't believe
19 very long. And, in fact, prior to this hearing I
20 was able to talk to the federal public defenders
21 about what would be the content and the legal effect
22 of what the order will be. I think we're fairly on
23 the same page on it, but I understand the Court is
24 under a limited period of time right now so ...

1 THE COURT: I'm sorry. In terms of?
2 MS. NOBLE: Well, it's my understanding --
3 and I know you'll correct me if I'm wrong -- that
4 the next hearing that we're setting is to talk about
5 the effect of this, whether a claim should be
6 withdrawn or denied --
7 THE COURT: Right.
8 MS. NOBLE: -- or how we do it. I think we
9 are on the same page about that.
10 THE COURT: So are you thinking you could
11 do it later this afternoon without having to come
12 back?
13 MS. NOBLE: I certainly could do it right
14 now.
15 THE COURT: Well, it's a quarter to twelve
16 and yesterday Mr. Vanisi got nothing to eat, so I
17 don't want that to be the result again. He's got to
18 have time to be given a meal and so I don't want to
19 go into the lunch hour again.
20 MS. NOBLE: I understand, your Honor.
21 THE COURT: But we could do it later this
22 afternoon.
23 MS. NOBLE: That's fine with the State. I
24 don't know what counsel -- if they changed --

MR. FIEDLER: That's fine with counsel for Mr. Vanisi.

THE COURT: Okay. And, gentlemen, can you get lunch for Mr. Vanisi?

THE BAILIFF: Your Honor, whatever you want to do, we will make sure he gets fed.

THE COURT: I'll make sure he gets something to eat. I don't want him here like yesterday. That was a long day.

THE BAILIFF: I have no idea what happened yesterday. I was told they brought up a lunch by the Washoe County deputies and that was offered to him for lunch.

THE COURT: Okay. Somehow I think what happened is it got here too late and we had planned to go back on the record, so I didn't know about it.

THE BAILIFF: I'll make sure he gets fed today.

THE COURT: Okay. So how long do you need me to recess so we can make sure that happens?

Would 1:30 work out?

THE BAILIFF: Oh, that's plenty of time. We'd only need a half hour or 45 minutes to get something delivered.

1 THE COURT: Okay. So 1:30 we'll be back on
2 the record. Is that all right with you, Mr. Vanisi?
3 THE DEFENDANT: Yes.
4 THE COURT: Okay. So I'll see you all back
5 at 1:30. Thank you. Court's in recess.
6 (Lunch recess taken at 11:49 a.m.)
7 -o0o-
8 THE COURT: Thank you. Please be seated.
9 Counsel, you were going to present your
10 arguments.
11 MR. FIEDLER: And so I believe the State
12 and we are on the same page about this, but we
13 believe that, in light of Mr. Vanisi's waiver, the
14 next step would be for this Court to adjudicate Mr.
15 Vanisi's claim on the merits, but sort of take into
16 account the evidence that has been presented to the
17 Court and, obviously, without a hearing, no evidence
18 will have been presented.
19 THE COURT: Okay.
20 MS. NOBLE: That's correct, your Honor. So
21 this is the approach the State would suggest:
22 Of course, the purpose of the upcoming
23 evidentiary hearing was to determine whether Mr.
24 Vanisi was prejudiced by first post-conviction

1 counsel's failure to investigate and present claims
2 regarding mitigation, ineffective assistance of
3 counsel. This Court ordered a hearing, and pursuant
4 to Means v. State, Mr. Vanisi bore the burden -- or
5 bears the burden to demonstrate that prejudice.
6 That is, but for counsel's errors, there's a
7 reasonable possibility that the result would have
8 been different.
9 Now, because Mr. Vanisi has declined to
10 present evidence in support of that remaining claim
11 concerning mitigation, the Court should find that he
12 has not met that burden and that the claim is
13 therefore denied. That would be our suggested
14 approach, your Honor.
15 THE COURT: Is that what you were saying
16 also, counsel?
17 MR. FIEDLER: Yes, your Honor.
18 THE COURT: Okay. And then you would have
19 30 days within which to appeal that decision.
20 Is that correct?
21 MR. FIEDLER: Yes, your Honor.
22 THE COURT: It is 30 days?
23 MR. PLATER: It is after -- you have to do
24 a Notice of Entry of Order, mail it to both counsel

1 and the petitioner and give 33 days after that.
2 THE COURT: Okay. So, Mr. Vanisi, we're
3 back together, and did you get your lunch?
4 THE DEFENDANT: Yes. Thank you, Judge.
5 THE COURT: So you still want to do this?
6 You still want to waive your hearing?
7 THE DEFENDANT: Yes, Judge.
8 THE COURT: No changing your mind.
9 THE DEFENDANT: No changing my mind.
10 THE COURT: Okay. Then the ruling that I
11 made before lunch will stand. Based upon your
12 arguments today, there is no basis for me to find
13 that the claim that was pending has any merit, as
14 discussed by the State's argument.
15 So what the Court is going to do at this
16 time is I'm going to deny Mr. Vanisi's writ on --
17 I'm adopting the arguments that the State presented.
18 So the next step for me is that I'm going
19 to order the State to prepare a decision with regard
20 to Mr. Vanisi's competency, Mr. Vanisi's valid
21 waiver, and the decision on the writ, as I've
22 articulated earlier today and this afternoon.
23 Once those proposed decisions are prepared,
24 please share them with counsel for Mr. Vanisi.

1 Then, counsel, you can let me know if you have any
2 issues with the form of the proposed orders and then
3 I will review them and enter my order.
4 Once my orders are entered, they will be
5 served on counsel. And, Mr. Vanisi, you're going to
6 get one through the mail also, at which point, then
7 there will be a Notice of Entry of Order and you
8 only have 30 days to appeal that.
9 Do you understand?
10 THE DEFENDANT: (Defendant nods.)
11 THE COURT: You're nodding your head "yes."
12 THE DEFENDANT: Yes.
13 THE COURT: Okay. And that's up to you and
14 your attorneys, whether or not you appeal it.
15 And then the next step after that, if you
16 do not appeal it, will be either you will file
17 something in federal court that will somehow stay
18 the proceedings or you will be back here and we'll
19 set it for an execution date.
20 And you may at that point, if you haven't
21 already, you will file things in federal court as
22 you've indicated to me, which would operate.
23 So you understand how this is going to go?
24 THE DEFENDANT: Yes, your Honor.

1 THE COURT: Okay. So is there anything
2 further for today?
3 MS. NOBLE: Your Honor, I just want to make
4 sure I prepare these orders in the way the Court is
5 contemplating.
6 So I'm thinking two orders, one on the
7 competency issue and the waiver and then the second
8 order regarding the merits of the petition.
9 THE COURT: Right. One would be on the
10 writ and the other would be on the other.
11 MS. NOBLE: Yes, your Honor.
12 THE COURT: Mr. Fiedler?
13 MR. FIEDLER: Just two quick things. One,
14 I would just note for the record that Mr. Vanisi has
15 a federal habeas petition currently filed in federal
16 court.
17 THE COURT: Oh, okay.
18 MR. FIEDLER: It's stayed, just for future
19 reference.
20 THE COURT: All right. Thank you.
21 MR. FIEDLER: And then I apologize for my
22 ignorance of local practice, but the evaluations of
23 Dr. Moulton and Dr. Zuchowski were filed under seal
24 and so I was not sure if we're allowed to provide a

1 copy to Mr. Vanisi.
2 THE COURT: Yes. There are actually -- I
3 believe they were set at what we call "confidential
4 level," which means that a party may see it without
5 a court order. No one else can. And you can't give
6 it to anyone else but Mr. Vanisi is entitled to it.
7 And that is their level.
8 So, now, the last thing I think I would
9 like to do is all these people that you've
10 subpoenaed and noticed for the hearing, obviously
11 you're going to have to notice them that they are
12 not needed.
13 But I would like to order that you notice
14 them that they need to stay in touch with you and
15 notify you of any change of address in the next
16 year. I just want to make sure that we can find
17 them again if the supreme court or the federal court
18 in the foreseeable future determines that my
19 findings are not going to be sustained.
20 So I don't want -- I want you to notify
21 them that they do have to remain in contact with you
22 by order of the court for the next year. Keep it at
23 a year.
24 MR. FIEDLER: And then can I ask, you're

1 just indicating you want us to communicate with
2 them.
3 THE COURT: Yes.
4 MR. FIEDLER: Okay, thank you.
5 THE COURT: That'll be fine. You can do
6 that by communication.
7 Okay. Anything further?
8 MS. NOBLE: No. So the State assumes,
9 then, that the hearing dates are vacated and we can
10 call off all our witnesses.
11 THE COURT: Yes. With the same notice to
12 them.
13 MS. NOBLE: Yes, your Honor.
14 THE COURT: And so all the hearings are
15 vacated, Mr. Vanisi. If we set another hearing,
16 we'll notify you and your attorneys and they'll be
17 part of setting that hearing, okay?
18 THE DEFENDANT: Okay. Thank you.
19 THE COURT: Otherwise right now no more
20 hearings.
21 THE DEFENDANT: Thank you.
22 THE COURT: Okay. Then, that concludes the
23 matters for today. Thank you very much.
24 Court's in recess.

(End of proceedings at 1:41 p.m.)

-o0o-

STATE OF NEVADA)
) SS.
COUNTY OF WASHOE)

I, CHRISTINA MARIE AMUNDSON, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter, I was present in Department No. 4 of the above court on Tuesday, September 25, 2018, at the hour of 10:30 a.m. of said day, and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein in the case of State of Nevada, Plaintiff, v. SIAOSI VANISI, Defendant, Case No. CR98-0516.

That the foregoing transcript is a true and correct transcript of my said stenotype notes so taken as aforesaid, and is a true and correct statement of the proceedings had and testimony given in the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 25th day of September 2018.

/S/ Christina Marie Amundson, CCR #641

Christina Marie Amundson, CCR #641

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2018-09-28 03:02:37 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6903702

CASE NO. CR98-0516 (POST-CONVICTION)

TITLE: THE STATE OF NEVADA VS. SIAOSI VANISI

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
9/25/18 HONORABLE CONNIE STEINHEIMER DEPT. NO.4 M. Stone (Clerk) C. Amundson (Reporter)	**STATUS HEARING – PETITIONER'S WAIVER OF EVIDENTIARY HEARING** Petitioner, Siaosi Vanisi, present with counsel, Assistant Federal Public Defender Randolph Fiedler and Assistant Federal Public Defender Scott Wisniewski. Chief Deputy District Attorney Jennifer Noble and Deputy District Attorney Joseph Plater represented the State of Nevada. 10:35 a.m. Court convened. Appearances set forth for the record. Mr. Vanisi sworn and canvassed as to his waiver of the evidentiary hearing. Counsel Platter requested that the Court canvass Mr. Vanisi as to the possible penalties for First Degree Murder should his current sentence be overturned through post-conviction proceedings in State Court. 10:48 a.m. Court recessed in order for Counsel Fiedler and Wisniewski to review with the Petitioner the Supreme Court of Nevada's Decision directing the Court to have the scheduled evidentiary hearing. 11:21 a.m. Court reconvened with respective counsel and Petitioner present. Mr. Vanisi notified the Court that he had sufficient time to review the Supreme Court Decision with counsel and after that review, it does not change his mind as to his waiver of the scheduled evidentiary hearing. Court further canvassed Mr. Vanisi, who remained under oath, as to the effects of waiving the scheduled evidentiary hearing and as to the possible penalties for First Degree Murder should his current sentence be overturned through post-conviction proceedings in State Court. Mr. Vanisi advised the Court that he still wishes to waive the scheduled evidentiary. Neither counsel for Mr. Vanisi had any additional question for the Court to ask Mr. Vanisi. Although, the Court does not believe it is the right decision to make, the Court does believe it is Mr. Vanisi's right to make the decision and that he understands the consequences of waiving his right to have the scheduled evidentiary hearing. The Court found that Mr. Vanisi is freely and voluntarily waiving the scheduled evidentiary hearing and accepted such waiver. Counsel Fiedler motioned the Court to proceed with the scheduled evidentiary hearing despite the waiver by Mr. Vanisi. Counsel Noble presented objection to such. Court found that Mr. Vanisi freely and voluntarily waived the evidentiary hearing and has a right to make such decision. Therefore, **COURT ENTERED ORDER** denying request.	

9/25/18
C. Amundson
(Reporter)

STATUS HEARING – PETITIONER'S WAIVER OF EVIDENTIARY HEARING

Discussion ensued regarding setting the oral arguments on the Petition. Mr. Vanisi advised the Court that he wishes to be present at such hearing. Respective counsel indicated that the arguments on the mitigation claim in the Petition for Writ of Habeas Corpus (Post-Conviction) would not take long and could be completed during this hearing.

11:45 a.m. Court recessed until 1:30 p.m.

1:34 p.m. Court reconvened with respective counsel and Petitioner present.

Counsel Fiedler and Noble advised the Court that the Court should rule on the merits of the claim of ineffective assistance of counsel for first post-conviction counsel's failure to investigate and present claims regarding mitigation. Based on Mr. Vanisi's failure, by waiver of the evidentiary hearing, to present evidence in support of that remaining claim, he has not met the burden and the claim should be denied.

Mr. Vanisi advised the Court that he still wants to waive the evidentiary hearing and have the Court deny the claim so that he could proceed in Federal Court.

Based on Mr. Vanisi's waiver of the evidentiary hearing and arguments presented at this hearing, there is no basis for this Court to find that the claim regarding mitigating evidence has merit. Therefore, **COURT ENTERED ORDER** denied the Petition for Writ of Habeas Corpus on the claim that first post-conviction counsel failed to investigate and present evidence regarding mitigation.

Court directed the State to prepare an Order regarding Mr. Vanisi's competency and waiver of the evidentiary hearing, as well as an Order denying the remaining claim in the Petition.

Court advised Mr. Vanisi and his counsel that once the Notice of Entry of Order has been entered, they have 33 days to file an appeal to the Supreme Court of Nevada.

Counsel Fiedler advised the Court that there is currently a Federal habeas petition pending and it is stayed pending the outcome of the State petition.

COURT ENTERED ORDER that all witness for the evidentiary hearing in this matter shall be called off. All witnesses shall be directed to maintain contact with either the Federal Public Defender's Office and/or the Washoe County District Attorney's Office for a period of 1 year.

Court adjourned. Petitioner remanded to the custody of the Warden.

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Jacqueline Bryant
Clerk of the Court
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

SIAOSI VANISI, Petitioner, v. WILLIAM GITTERE, Acting Warden, et. al., Respondents.	Case No. CR98-0516 Dept. No. IV **MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS** (Death Penalty Habeas Corpus Case)

POINTS AND AUTHORITIES

Siaosi Vanisi, through counsel, requests leave to supplement his petition to add Claim Twenty-Five, which argues that Mr. Vanisi's death sentence is invalid under state, federal, and international law because he suffers from severe mental illness.[1]

I. PROCEDURAL HISTORY

On May 4, 2011, Siaosi Vanisi filed his Petition for a Writ of Habeas Corpus (Post-Conviction). This petition included twenty-four claims, including a claim that his trial counsel were ineffective for failing to investigate, develop, and present mitigating evidence during the penalty phase.[2] After this Court denied Mr. Vanisi's petition, the Nevada Supreme Court reversed, ordering this Court to conduct an evidentiary hearing "concerning whether Vanisi was prejudiced by postconviction counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce additional mitigation evidence."[3] The Court further instructed that "[t]he hearing should address whether trial counsel could have discovered and presented the evidence as well as whether there was a reasonable probability of a different outcome at the penalty hearing had this additional mitigation evidence been presented."[4]

[1] This claim is attached as Ex. 1 to this motion.

[2] *See* Pet. for Writ of Habeas Corpus (Post-Conviction) [hereinafter Pet.], 20-89 (May 4, 2011) (Claim One).

[3] *Vanisi v. Baker*, No. 65774, Order, at 7, (Nev. Sept. 28, 2017).

[4] *Id.*

Proceedings began again before this Court in anticipation of this hearing. On July 24, 2018, Mr. Vanisi sent a letter to this Court: "I am writing you to see if I can waive my evidentiary Hearing [sic]."[5] Litigation over this request and Mr. Vanisi's competency followed, including an evidentiary hearing where Dr. Zuchowski and Dr. Moulton testified.[6] This Court ultimately found Mr. Vanisi competent and accepted his waiver of the evidentiary hearing.[7]

In light of the history of this case and the testimony of Drs. Zuchowski and Moulton, Mr. Vanisi requests that this Court grant leave to file a supplement to his petition.

II. ARGUMENT

Under *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006) and NRS 34.750(5), this Court has discretion to allow the filing of a Supplement, subject only to one condition, which is allowing the State an opportunity to respond. *Barnhart*, 122 Nev. at 303-04, 130 P.3d at 651-52.

[5] Request from Defendant (July 24, 2018).

[6] *See, e.g.*, Mot. to Set Hr'g Regarding Vanisi's Req. to Waive Evidentiary Hr'g (July 25, 2018); Suggestion of Incompetency & Mot. for Evaluation (July 25, 2018); State's Resp. to Vanisi's "Suggestion of Incompetency & Mot. for Evaluation" (July 30, 2018); R. to State's Resp. to Pet'r's Suggestion of Incompetency & Mot. for Evaluation (Aug. 6, 2018); Mot. for Order to Conduc Disc. (Aug. 13, 2018); Order for Expedited Psychiatric Evaluations (Sept. 6, 2018); Mot. for Further Disc. (Sept. 12, 2018); Opp. to Mot. for Further Disc. (Sept. 17, 2018); R. to Opp. to Mot. for Further Disc. (Sept. 18, 2018); Order (Sept. 18, 2018); Court Ordered Evaluation (Sept. 19, 2018); Hr'g (Sept. 24-25, 2018).

[7] Hr'g Tr. 86 (Sept. 24, 2018, 1:48 p.m.).

Here, this Court should allow the filing of the Supplement because it is based, in part, on information that was provided and entered into evidence when Dr. Zuchowski and Dr. Moulton testified. Specifically, Dr. Zuchowski testified that Mr. Vanisi suffers from schizoaffective disorder, bipolar type.[8] Dr. Moulton testified that, Mr. Vanisi suffers from a severe mental illness.[9] This testimony is part of a history of Mr. Vanisi's mental health problems, and the interaction between those problems and Mr. Vanisi's ability to litigate his case.[10] And, this Court's recent need to conduct a competency hearing is itself part of a history of Mr. Vanisi's attorneys becoming concerned about his mental health and requesting evaluations. This history, and specifically this most recent competency litigation, evidences that Mr. Vanisi suffers from a severe mental illness that prevents a reliable adjudication of the appropriate penalty in his case. Because reliability in death penalty cases is mandated by the Eighth Amendment, Mr. Vanisi is ineligible for the death penalty. Thus, this Court should grant leave for Mr. Vanisi to supplement his petition.

Nor would this claim be barred by procedural default. *See* NRS 34.726, 34.800, 34.810. The Nevada Supreme Court has established that procedural default will be excused if failing to review a claim will result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). The fundamental miscarriage of justice standard "can be met where the petitioner

[8] Hr'g Tr. 21 (Sept. 24, 2018, 10:00 a.m.)

[9] Hr'g Tr. 10 (Sept. 24, 2018, 1:48 p.m.)

[10] *See* Pet. Ex. 190; Pet. Ex. 25; Pet. Ex. 59; Pet. Ex. 49; Pet. Ex. 50; Pet. Ex. 163; Pet. Ex. 164.

makes a colorable showing he is actually innocent of the crime *or is ineligible for the death penalty.*" *Id.* (emphasis added). Here, Mr. Vanisi makes a colorable showing that he is ineligible for the death penalty, *see* Ex. 1, and thus procedural default would not bar this Court from considering his claim.

Accordingly, this Court should grant leave to file the Supplement to Mr. Vanisi's Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 28th day of September, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

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

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

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
Assistant Federal Public Defender

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

The undersigned does hereby affirm that the preceding MOTION FOR LEAVE TO FILE SUPPLEMENT PETITION FOR WRIT OF HABEAS CORPUS filed in the District Court Case No. CR98-0516 does not contain the social security number of any person.

DATED this 28th day of September, 2018.

/s/ Randolph M. Fiedler

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

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 28th day of September, 2018, a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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

Index of Exhibits

1. Supplement to Petition for Writ of Habeas Corpus (Post Conviction)

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Clerk of the Court
Transaction # 6903790 : pmsewell

EXHIBIT 1

EXHIBIT 1

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

SIAOSI VANISI, Petitioner, v. WILLIAM GITTERE, Acting Warden, et. al. Respondents.	Case No. CR98-0516 Dept. No. IV **SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)** (Death Penalty Habeas Corpus Case)

CLAIM TWENTY-FIVE

Mr. Vanisi's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, effective assistance of counsel, a reliable sentence, fair trial, freedom from self-incrimination, equal protection, freedom from cruel and unusual punishment, meaningful appellate review, and compliance with international law. U.S. Const. art. VI, amends. V, VI, VIII, XIV; Nev. Const. art. 1, §§ 1, 3, 6, 8; International Covenant on Civil and Political Rights, art. 6, 7, 14.

SUPPORTING FACTS

A. Mr. Vanisi suffers from severe mental illness and that severe mental illness has interfered with the presentation of mitigating evidence in his case.

1. Mr. Vanisi suffers from severe mental illness. *See* Ex. 164 at 5 (Dr. Foliaki: "Mr. Vanisi suffers from a chronic and disabling mental disorder known as Schizoaffective Disorder that greatly impairs his cognitive, emotional and behavioural control and the evidence for this is unequivocal . . . ."); Ex. 163 at 69 (Dr. Mack: "Mr. Vanisi's Psychotic Disorder appeared to begin in his early twenties, which is consistent with the typical course of schizophrenic illness. To reiterate, Mr. Vanisi's presentation of extreme mental illness is not something, in my opinion, that can be consistently malingered for a decade and a half. Mr. Vanisi continues to persistently [be] hypomanic and to display some schizophrenic symptoms despite copious psychotropic medication including IM Haldol, Seroquel, Vistaril and Lithium."); Hr'g Tr. 17-21, Sept. 24, 2018, 10:00 a.m., (testimony of Dr. Zuchowski describing schizoaffective disorder and noting his diagnosis of Mr. Vanisi as

suffering from schizoaffective disorder); Hr'g Tr. 10, Sept. 24, 2018, 1:48 p.m., (Dr. Moulton: "I don't question that Mr. Vanisi has a serious mental illness.").

2. Mr. Vanisi's severe mental illness has caused a plethora of problems for his case, his counsel, and this Court. His mental illness has presented the problem of his competence, of pursuing a litigation strategy against the advice of counsel, and, most importantly, of the failure to present compelling mitigation evidence, during his trial, his post-conviction, and, most recently, after the Nevada Supreme Court remanded for an evidentiary hearing on this very mitigation evidence.

B. Mr. Vanisi's severe mental illness renders him ineligible for the death penalty.

3. "[D]eath is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). In light of this, the Supreme Court's Eighth Amendment jurisprudence recognizes that "an individualized decision is essential in capital cases." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart, Powell, Stevens, JJ.). To ensure an individualized decision, the Supreme Court has repeatedly emphasized that the factfinder must be able to consider all mitigation evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("By holding that the sentence in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."); *see also Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) ("the

sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'").

4. This precedent "makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

5. Severe mental illness, by its nature, interferes with a defendant's ability to navigate his way through the criminal justice system. This interference prevents a fair proceeding. Because of this, this Court should recognize that someone who suffers from severe mental illness is exempt from capital punishment. Five theories, separately and cumulatively, support this exemption for Mr. Vanisi: (1) because Mr. Vanisi's severe mental illness prevents a reliable adjudication of a death sentence, Mr. Vanisi is ineligible for the death penalty; (2) because there is a national consensus that executing individuals with severe mental illness is improper, Mr. Vanisi is ineligible for the death penalty; (3) because no penological purpose is served by executing someone with severe mental illness, Mr. Vanisi is ineligible for the death penalty; (4) because international law prohibits the execution of someone with severe mental illness, Mr. Vanisi is ineligible for the death penalty; and (5) because the Nevada Constitution prohibits the execution of someone who suffers from severe mental illness, Mr. Vanisi is ineligible for the death penalty.

6. Because Mr. Vanisi's severe mental illness renders him ineligible for the death penalty, this Court must grant his petition for writ of habeas corpus.

1. Because Mr. Vanisi's severe mental illness prevents a reliable adjudication of a death sentence, Mr. Vanisi is ineligible for the death penalty.

7. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court recognized that individuals with intellectual disability create an impermissible risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320 (quoting *Lockett*, 438 U.S. at 605). The Court noted that this was because of the unique problems faced by intellectually disabled defendants, such as: (1) the enhanced risk of false confessions; (2) the reduced ability of intellectually disabled individuals to make a persuasive showing of mitigation; (3) the lesser ability that intellectually disabled individuals have to give meaningful assistance to their attorney; (4) the fact that they are poor witnesses; (5) the fact that their demeanor may make them appear to lack remorse; and (6) the fact that intellectual disability as a mitigating circumstance is a double-edged sword. *Id.* at 320-21. The Court concluded, "Mentally retarded defendants in the aggregate face a special risk of wrongful execution." *Id.* at 321.

8. The factors laid out by the Supreme Court in *Atkins* provide a framework for when the Eighth Amendment prohibits imposition of the death penalty because of unreliability. The Supreme Court applied this framework again in finding that juveniles should be categorically exempt from the death penalty, looking to differences between juveniles and adults and concluding that juveniles "cannot with reliability be classified among the worst offenders." *Roper v. Simmons*,

543 U.S. 551, 569 (2005). The Court emphasized that their youth results in "impetuous and ill-considered actions and decisions," that juveniles are "more vulnerable or susceptible to negative influences and outside pressures," and that their personality traits are more transient. *Id.*

9. Based on these two decisions, the Eighth Amendment prohibits imposition of the death penalty where unique difficulties prevent a reliable sentence. Six factors from *Atkins* and *Roper* show that Mr. Vanisi's severe mental illness undermines the reliability of his death sentence: (a) Mr. Vanisi's severe mental illness impairs his ability to cooperate with his attorney and his attorney's ability to prepare a defense; (b) Mr. Vanisi's severe mental illness renders him a poor witness; (c) Mr. Vanisi's severe mental illness causes distortions in his thinking process that are likely to produce bad decisions; (d) Mr. Vanisi's severe mental illness has a double-edged nature that poses the risk that it will be improperly turned into aggravation; (e) the complexity and conflicting views of experts in the area is likely to generate confusion and misunderstanding among jurors; and (f) the sheer brutality of the crime could preclude jurors from properly considering Mr. Vanisi's severe mental illness.[1]

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[1] These factors are adapted from a law review article. *See* Scott E. Sundby, *The True Legacy of* Atkins *and* Roper: *The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 510-11 (Dec. 2014).

a. Mr. Vanisi's severe mental illness impairs his ability to cooperate with his attorneys and his attorneys' ability to prepare a defense.

10. As evidenced by the procedural history of this case, Mr. Vanisi's severe mental illness has interfered with his relationship with counsel and has interfered with his attorneys' ability to prepare a defense.

11. Before Mr. Vanisi's first trial, his trial counsel informed this Court that Mr. Vanisi was "talking gibberish," "washing himself in his own urine," and "dancing naked."[2] This Court ordered a competency evaluation.[3] This Court found Mr. Vanisi competent.[4] Before Mr. Vanisi's second trial, again, counsel expressed concern about Mr. Vanisi's bizarre behavior, complaining that counsel was unable to have substantive conversations with Mr. Vanisi, and requesting that the Court order Mr. Vanisi transferred to Lake's Crossing to have his medication altered.[5] This Court ordered a competency evaluation.[6] This Court found Mr. Vanisi competent.[7] During the initial post-conviction proceedings, both post-conviction counsel indicated that Mr. Vanisi had partially undressed during an interview with them, that he broke out into song, that he indicated he had not slept in eight days, that he was an independent sovereign, and that he, while naked, made snow angels

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[2] Hr'g Tr. 19, Aug. 4, 1998.

[3] Hr'g Tr. 1, Sept. 28, 1998.

[4] Hr'g Tr. 1, Nov. 6, 1998.

[5] Hr'g Tr. 1-2, June 1, 1999.

[6] Order (June 3, 1999).

[7] Hr'g Tr. 2, June 23, 1999.

in the yard.[8] This Court ordered a competency evaluation.[9] This Court found Mr. Vanisi competent.[10]

12. On remand, after the Nevada Supreme Court ordered this Court to conduct an evidentiary hearing, "concerning whether Vanisi was prejudiced by postconviction counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce additional mitigation evidence," counsel, again, requested that this Court order a competency evaluation.[11] This Court ordered a competency evaluation; this Court found Mr. Vanisi competent.[12]

13. The effect of Mr. Vanisi's severe mental illness was not just that his attorneys have been worried about his competency. During Mr. Vanisi's first trial, counsel had great difficulty working with Mr. Vanisi, which affected their ability to present a defense. For example, Mr. Vanisi insisted, despite the advice of counsel, to pursue a defense that an alternate suspect committed the offense.[13] The trial that followed, where trial counsel pursued the alternate suspect defense, ended in a

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[8] Edwards Aff. (Nov. 8, 2004); Qualls Aff. (Nov. 8, 2004); *see* Mot. for Stay of Post-Conviction Habeas Corpus Proceedings and for Transfer of Pet'r to Lake's Crossing for Psychological Evaluation and Treatment (Hr'g Requested) (Nov. 9, 2004).

[9] Hr'g Tr. 25-26, Nov. 22, 2004; *see also* Ex. 48.

[10] Ex. 56.

[11] *See* Suggestion of Incompetency & Mot. for Evaluation (July 25, 2018); *see also* R. to State's Resp. to Pet'r's Suggestion of Incompetency & Mot. for Evaluation (Aug. 6, 2018).

[12] *See* Order for Expedited Psychiatric Evaluations (Sept. 6, 2018); Hr'g Tr. 86, Sept. 24, 2018, 1:48 p.m.

[13] *See* Ex. 33 (Rule 250 Memorandum) at 1437.

mistrial.[14] During the second trial, Mr. Vanisi moved to represent himself.[15] This Court denied that request, noting that Mr. Vanisi "exhibited difficulty processing information," "took an extremely lengthy period of time to respond to many of the Court's questions," "spoke out loud to himself in such a manner that it was at times difficult to determine if he was speaking for his own benefit or to the courtroom audience or the Court," had been "standing up and engaging in unsettling rocking motions," was "repeating himself over and over again," and "has a history of aggressive and disruptive behavior while at the Nevada State Prison."[16]

14. Then, Mr. Vanisi insisted on pursuing a defense that trial counsel felt they could not ethically present.[17] Counsel moved to withdraw.[18] During the hearing on this motion, counsel represented that for the prior six months, Mr. Vanisi had refused to communicate about a possible defense.[19] Counsel indicated their belief that they could no longer ethically represent Mr. Vanisi because they could not present a defense—because they could not ethically contradict Mr. Vanisi's preferred defense—but they also could not present Mr. Vanisi's preferred

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[14] Ex. 90.

[15] *See* Exs. 16, 17.

[16] Ex. 19 at 4-5.

[17] *See* Ex. 35 ("That counsel has been advised by counsel for the State Bar that the presentation of the Defendant's defense will result in a violation of Supreme Court Rule 166.").

[18] *Id.*

[19] *See* Ex. 23 at 2.

defense because it was factually unsupported.[20] This Court noted, "The issue for the Court at this stage in the proceedings is I have a defendant who is malingering and a defendant who does not want to go to trial. I have a defendant who can not [sic] represent himself . . . . I have a defendant who will continue to manipulate counsel."[21] The Court added:

> And if I rule at this stage in the proceedings that your representations are in fact correct, that you cannot represent Mr. Vanisi, and that you cannot fashion any defense in this case that is ethical, then I have set up to never have this case go to trial; and you may not believe that, but I know that to be the case.[22]

This Court denied counsel's motion to withdraw.[23]

15. During the initial post-conviction proceedings, Mr. Vanisi's competence distracted counsel from adequately developing Mr. Vanisi's claims. Counsel's sole focus on Mr. Vanisi's competence caused them to fail to investigate, develop, and present the claim of ineffective assistance of trial counsel that the Nevada Supreme Court remanded back to this Court.[24]

16. Finally, during the instant proceedings, Mr. Vanisi waived his evidentiary hearing, all but ensuring the denial of his claim that penalty-phase counsel were ineffective. This was against the advice of counsel. And, because it

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[20] *Id.* at 7.

[21] *Id.* at 15-16.

[22] *Id.* at 16.

[23] Ex. 72 at 1.

[24] *See Vanisi v. Baker*, No. 65774, Order, at 3-6 (Sept. 28, 2017).

prevented the presentation of his mitigation evidence, it greatly interfered with his attorneys' ability to prepare and present a defense.

17. Mr. Vanisi's behavior—motivated, at least in part, by his severe mental illness—has greatly impaired Mr. Vanisi's cooperation with his counsel, and had the effect that no factfinder has heard the extensive and compelling mitigation evidence showing his severe mental illness.

b. Mr. Vanisi's severe mental illness renders him a poor witness.

18. Dr. Mack opined that "An in-depth review of the history of Siaosi Vanisi reveals an individual who was in a state of chronic mental illness at the time of the homicide of Sergeant George Sullivan . . . ."[25] Dr. Mack went on to note:

> At the time of the homicide Mr. Vanisi had delusional and perseverative thinking about the need to kill a police officer; he had been talking about an imaginary friend Lester; he had a preoccupation with religious ideas/religiosity, flight of ideas, and emotional lability. He appeared to essentially enter into a state of schizophrenia and persistent hypomania/mania in his early twenties. Mr. Vanisi remained in a psychotic and decompensated state throughout his imprisonment, with partial improvement on high doses of anti-psychotic, tranquilizing and mood stabilizing medication. He has smeared feces on the walls and his body. He at times sings, crows, openly masturbates, talks to himself, bangs his head against the walls. He becomes mute. He has periodic alexithymia which is a marked flattening of emotions and affects, and is a negative symptom of schizophrenia.[26]

Dr. Mack categorized Mr. Vanisi's problems as "extreme mental illness" and noted the "intensity and severity of his psychotic state at the time of the homicide."[27]

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[25] Ex. 163 at 66.

[26] *Id.* at 67.

[27] *Id.* at 69-70.

19. Dr. Foliaki explained that "The four weeks leading up to the instant offense, Mr. Vanisi descends into a florid psychosis and the psychotically driven notion to kill a policeman is released as his labile mood state increases his impulsivity, and propensity towards violence."[28] Dr. Foliaki also noted that "Mr. Vanisi's mental status since being in custody has been very disturbed."[29]

20. Because of Mr. Vanisi's delusional state during the time of the offense, he is an unreliable witness with regard to what happened. This presents a difficulty in the ability of Mr. Vanisi to cooperate with counsel and in counsel's fashioning of a defense. This difficulty was on display when trial counsel moved to withdraw, based on the possibility that they would present a defense inconsistent with what Mr. Vanisi wanted.[30] Further, defense counsel believed they could not cross-examine witnesses, or present argument, because of the possibility that Mr. Vanisi would testify.[31]

21. Thus, the concerns expressed by the *Atkins* Court apply here: because of Mr. Vanisi's mental illness, there was an enhanced risk that he would present as a poor witness.[32] Either Mr. Vanisi's mental illness would cause him to be

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[28] Ex. 164 at 24.

[29] *Id.* at 22.

[30] Ex. 180 at 2; Ex. 181 at 2.

[31] *Id.*

[32] Sundby, 23 Wm. & Mary Bill Rts. J. at 515

disruptive,[33] or Mr. Vanisi's medicated state might cause him to appear remorseless.[34] Under either scenario, Mr. Vanisi would not be a good witness.

c. Mr. Vanisi's severe mental illness causes distortions in his thinking process that are likely to produce bad decisions.

22. Mr. Vanisi's mental illness distorts his thinking process and has resulted in bad decisions. Trial counsel noted Mr. Vanisi's insistence on pursuing a defense against counsel's advice.[35] And to reiterate, when trial counsel moved to withdraw, they did so on the basis that Mr. Vanisi was ignoring their advice to pursue what counsel considered an impossible defense.[36]

23. Finally, Mr. Vanisi waived the evidentiary hearing ordered by the Nevada Supreme Court in its Sept. 28, 2017 Order. This was a bad decision, as acknowledged by this Court: "I want to tell you I don't think you should waive the hearing. That's my thought process. I think that you have a hearing coming up, one's scheduled, witnesses are subpoenaed, your lawyers are ready to go. You should go forward with that. That's what I think you should do." Nonetheless, Mr. Vanisi chose to waive the hearing.

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[33] *See* Ex. 19 at 4 ("At previous hearings, Mr. Vanisi has blurted out statements in a loud voice and interrupted this Court requiring this Court to caution Mr. Vanisi about his conduct.").

[34] *See* Ex. 164 at 61-67 (describing medication history).

[35] *See, e.g.*, Ex. 33 at 1437.

[36] Ex. 180 at 2; Ex. 181 at 2.

d. Mr. Vanisi's severe mental illness has a double-edged nature that poses the risk that it will be improperly turned into aggravation.

24. *Atkins* recognized that intellectual disability was a double-edged sword as a possible mitigating circumstance because it "may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321. This consideration is stronger with severe mental illness, in a case like Mr. Vanisi's where his early incarceration led to disruptive and bizarre behavior that resulted in Mr. Vanisi being extracted from his cell.

e. The complexity and conflicting views of experts who have evaluated Mr. Vanisi are likely to generate confusion and misunderstanding among jurors.

25. Until recently, there has been considerable disagreement about the severity and existence of Mr. Vanisi's mental illness. Trial counsel initially believed "that this Defendant had a screw loose and the defense would shift in that direction," but after an early examination, trial counsel concluded, "he was competent, could assist counsel, was very aggressive, was very mean spirited and reasonably intelligent."[37] The first set of competency evaluations, in 1998, wavered between rule-out bipolar disorder and bipolar affective disorder.[38] The second set of

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[37] Ex. 33 at 1434; *see also id.* at 1419 ("The initial report was that Defendant is sane, mean, without compassion and remorse, and reasonably intelligent."). There are substantial reasons to question the efficacy of these conclusions. *See* Ex. 163 at 67 (discussing reference to Dr. Lynn and noting, "It is inappropriate for a psychologist or mental health professional to rely on test results wherein it is not proven who took the test or whether anyone coached the examinee. Leaving the MMPI test with the prison to mail and send back violates this security procedure and also violates test and test item security."); *see also* Ex. 164 at 5, 35.

[38] *See* Exs. 25, 190.

competency evaluations, in 1999, both concluded unequivocally that Mr. Vanisi was malingering.[39] During the third set of competency evaluations, in 2005, on expert diagnosed bipolar; the other expert noted he saw no basis to conclude incompetency, and offered no diagnoses.[40] In 2011, Dr. Mack and Dr. Foliaki, who both received necessary historical records and declarations from witnesses who knew Mr. Vanisi growing up, agreed that Mr. Vanisi suffered from schizoaffective disorder.[41] Dr. Zuchowski agreed with the schizoaffective diagnosis; Dr. Moulton agreed that Mr. Vanisi suffered from a severe mental illness.[42]

26. In *Roper*, the Court emphasized the difficulty in asking lay jurors to perform a task that is prohibitively difficult for trained psychological experts to do. *See Roper*, 543 U.S. at 573 (noting that experts refrain from diagnosing antisocial personality disorder, and thus, jurors should not have to render decision about penalty in juvenile cases). This same concern applies to Mr. Vanisi and his severe mental illness. The diagnosis of mental illness is complex: it requires reviewing historical documentation and accounts of Mr. Vanisi, sifting through objective testing, and understanding the effect of complicated medication regimes. This task, even among experts, invites disagreement: lay jurors cannot be expected to weigh and decide a matter so grave as death when not even trained diagnosticians can agree.

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[39] *See* Ex. 59; *see also* Frank Evarts, Ph.D, Evaluation (June 10, 1999).

[40] *See* Exs. 49, 50.

[41] *See* Exs. 163, 164.

[42] Hr'g Tr. 21, Sept. 24, 2018 10:00 a.m.; Hr'g Tr. 10, Sept. 24, 2018 1:48 p.m.

f. The brutality of the crime could preclude jurors from properly considering Mr. Vanisi's severe mental illness.

27. Finally, the brutality of the crime, itself evidence of Mr. Vanisi's severe mental illness, makes it difficult for jurors to properly weigh aggravating and mitigating circumstances. There can be no question that the brutality of the instant offense weighed heavily in jurors' minds. *See Vanisi v. State*, 117 Nev. 330, 334-35, 22 P.3d 1164, 1167-68 (2001).

28. Mr. Vanisi's severe mental illness has prevented a reliable sentencing proceeding in this case, as required by the Eighth Amendment. This Court, thus, should find that Mr. Vanisi is ineligible for the death penalty.

2. Because there is a national consensus that executing individuals with severe mental illness is improper, Mr. Vanisi is ineligible for the death penalty.

29. Excessive punishments are prohibited by the Eighth Amendment. *See, e.g.*, *Atkins*, 536 U.S. at 311. In determining whether a punishment is excessive, the Supreme Court applies not "the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Id.* This assessment relies on the "evolving standards of decency that mark the progress of a maturing society." *Id.* The Court, thus, assesses whether there is a national consensus that a sentence is excessive, looking to legislation, judicial decisions, prosecution and sentencing trends, polling data, consensus among professional organizations, and the views of the international community. *See Atkins*, 536 U.S. at 316; *see also id.* at n.21.

30. Here, there is a rising national consensus against executing those who suffer from severe mental illness. Professional organizations agree that those who

suffer from severe mental illness should be exempt from the death penalty.[43] The international community also disfavors the execution of those with severe mental illness.[44] Most importantly, between the states that do not have the death penalty and the actual practice of states that disfavor executing those with severe mental illness, there is a national consensus.[45]

31. Because there is a national consensus against executing those who suffer from severe mental illness, and Mr. Vanisi suffers from severe mental illness, this Court should grant Mr. Vanisi habeas relief.

3. Because no penological purpose is served by executing someone with severe mental illness, Mr. Vanisi is ineligible for the death penalty.

32. The Supreme Court has recognized two valid penological bases for the death penalty: retribution and deterrence. *See, e.g., Atkins*, 536 U.S. at 318-19. Neither purpose supports the death penalty for someone who suffers from severe mental illness.

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[43] *See, e.g.*, *Mental Disability and the Death Penalty*, American Psychological Association Council Policy Manual, Chapter IV (2006), *available at* http://www.apa.org/about/policy/chapter-4b.aspx#death-penalty (last visited Sept. 28, 2018); National Alliance on Mental Illness, https://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty (last visited Sept. 28, 2018); American Bar Association, *Severe Mental Illness and the Death Penalty*, at 7 (Dec. 2016), *available at* https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (last visited Sept. 28, 2018) [hereinafter ABA, *Severe Mental Illness and the Death Penalty*].

[44] *See* ABA, *Severe Mental Illness and the Death Penalty*, at 35.

[45] *See* Death Penalty Information Center, *States with and without the death penalty* (Nov. 9, 2016) *available at* https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited Sept. 28, 2018).

33. As the Court recognized in *Atkins*, "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.* at 319. The court went on to note that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* The same reasoning applies to someone who suffers from severe mental illness. Such a person is less culpable because his mental illness interferes with his thought processes. Indeed, the Nevada Supreme Court has recognized the longstanding tradition that someone with a reduced mental state is less culpable. *See Finger v. State*, 117 Nev. 548, 555, 27 P.3d 66, 71 (2001).

34. The other penological purpose supporting the death penalty is deterrence. *Atkins*, 536 U.S. at 319. The Court has recognized that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982)). In this regard, the Court concluded:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendant's less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon the information.

Atkins, 536 U.S. at 320. Though the Court was writing about intellectual disability, it could equally have been writing about individuals who suffer from severe mental

illness. Someone suffering from psychosis is unable to understand and process information, to learn from experiences, to engage in logical reasoning, control impulses, or process the possibility of future execution. Thus, someone suffering from severe mental illness—even more than someone suffering from intellectual disability—lacks the ability to be deterred from conduct.

35. Because neither justification for the death penalty supports the execution of someone suffering from severe mental illness, this Court should find that the Eighth Amendment prohibits execution of someone suffering from severe mental illness. And because Mr. Vanisi suffers from severe mental illness, this Court should grant Mr. Vanisi habeas relief.

4. Because international law prohibits the execution of someone with severe mental illness, Mr. Vanisi is ineligible for the death penalty.

36. The Interntional Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life and restricts the imposition of the death penalty in countries which have not abolished it to "only the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant . . . ." Art. 6, § 2. The Covenant further prohibits torture and "cruel, inhuman or degrading treatment or punishment" and guarantees everyone a fair and public hearing by a competent and independent, and impartial tribunal. Arts. 7, 14. These provisions prohibit the execution of someone

who suffers from severe mental illness. Additionally, other sources of international law prohibits the execution of someone who suffers from severe mental illness.[46]

37. Because international law prohibits the execution of someone who is suffering from severe mental illness, and Mr. Vanisi suffers from severe mental illness, this Court should grant Mr. Vanisi habeas relief.

5. The Nevada Constitution prohibits the execution of someone who suffers from severe mental illness.

38. Assuming this Court finds that neither federal law nor international law require recognizing that Mr. Vanisi's severe mental illness renders him ineligible for the death penalty, this Court should hold that the Nevada Constitution renders him ineligible. The text of the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added). The Nevada Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel *or* unusual punishments be inflicted . . . ." Nev. Const. Art. 1, § 6 (emphasis added). The U.S. Constitution prohibits cruel and unusual punishment; to be prohibited, the punishment must be both cruel and unusual. *See* U.S. Const. amend. VIII. In contrast, the Nevada Constitution prohibits punishment that is cruel or unusual; to be prohibited, a punishment need be either

[46] *See* Richard J. Wilson, *The Death Penalty & Mental Illness in International Human Rights Law: Toward Abolition*, 73 Wash. & Lee L. Rev. 1469, 1485-98 (2016) (discussing trends and status of international law with regard to mental illness and the death penalty); *see also* ABA, *Severe Mental Illness and the Death Penalty*, at 35-36.

cruel or unusual. *See* Nev. Const. Art. 1 § 6. The Nevada Constitution, thus offers broader protection than the U.S. Constitution.

39. Given this broader protection, this Court should recognize that, regardless of federal law, the Nevada Constitution prohibits the execution of someone who suffers from severe mental illness, for all the reasons listed above. Because Mr. Vanisi suffers from severe mental illness, this Court should grant him habeas relief.

C. Conclusion

40. Because Mr. Vanisi suffers from severe mental illness, this Court should hold that he is ineligible for the death penalty and grant him habeas relief.

PRAYER FOR RELIEF

Wherefore, Mr. Vanisi prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

DATED this 28th day of September, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

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

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

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
Assistant Federal Public Defender

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

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

DATED this 28th day of September, 2018.

RENE L. VALLADARES
Federal Public Defender

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

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

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v. Case No. CR98-0516

WILLIAM GITTERE, ACTING WARDEN, Dept. No. 4

Respondent.

_____/

OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS

Introduction

Petitioner's counsel moves the Court to supplement the petition he filed more than seven years ago on May 4, 2011. Specifically, counsel, against their client's wishes, request the Court to add Claim Twenty-Five—that Vanisi's death sentence is invalid because of his mental illness. The Court should deny the motion for a number of reasons: (1) Vanisi waived his remaining postconviction ground; (2) counsel has not shown that Vanisi desires to withdraw his waiver; (3) counsel fails to show good cause or actual innocence to overcome the procedural bar to pleading a new claim; (4) Vanisi's mental illness does not render his death sentence invalid; and (5) Vanisi's mental illness—as described by Drs. Moulton and Zuchowski—is not within the purview of the

Nevada Supreme Court's order to hold a hearing on possible mitigating evidence that trial counsel failed to present.

Vanisi has not permitted his counsel to pursue the present motion. Accordingly, counsels' present motion is against their client's wishes; they have no authority to pursue it; and the Court should therefore sanction counsel for their obstructive litigation tactics.

Facts

Vanisi sent a letter to the Court on July 24, 2018, and stated he wanted to waive the evidentiary hearing. He stated the same in another letter on August 13, 2018. Then he told the Court in person on September 5, 2018, that he still wanted to waive the hearing. Accordingly, the Court ordered a psychologist and a psychiatrist to evaluate Vanisi to determine if he was competent to waive his evidentiary hearing.

On September 25, 2018, Dr. Moulton and Dr. Zuchowski testified that Vanisi was competent to waive the evidentiary hearing. Their testimony was unrefuted. Dr. Zuchowski acknowledged Vanisi's mental illness—schizoaffective disorder, bipolar type—and Dr. Moulton merely assumed the existence of either schizoaffective disorder or bipolar disorder, although he was uncertain if Vanisi had either (September 24, 2019 Transcript, 11, 59).

After the doctors' testimony, the Court canvassed Vanisi, who unequivocally stated he wanted to waive his state-court proceedings. The Court permitted Vanisi to sleep on his decision, and continued the canvass until the next day. Vanisi remained steadfast, and told the Court the next day that he wanted to waive his habeas action in the state-court system because he wanted to pursue more complete relief in the federal system.

The Court told Vanisi several times that it disagreed with his decision and tried to persuade him to go forward with the evidentiary hearing, which his lawyers had

prepared. Vanisi refused. He was coherent and understood his situation and the consequences of his choice. Accordingly, the Court found Vanisi competent to waive the hearing. There has been no additional evidence since the waiver to suggest that the Court erred in finding that Vanisi validly waived his evidentiary hearing.

Argument

1. Counsel lacks Vanisi's consent to supplement his petition.

Against this backdrop, Vanisi's counsel seeks to add a claim that his death sentence is invalid because of "severe mental illness." "Severe mental illness" was not referred to by either Dr. Moulton or Dr. Zuchowski. More importantly, Vanisi clearly told this Court he did not want any form of penalty relief in state court. Dr. Moulton and Dr. Zuchowski found Vanisi competent. The Court found Vanisi competent. Vanisi's counsel have not presented any new information to challenge that finding. Counsel are thus unauthorized by either Vanisi or the law to request the Court to amend the petition because Vanisi is the sole person who decides the goal of his representation. Nevada Rules of Professional Conduct Rule 1.2(a) ("a lawyer shall abide by a client's decision concerning the objectives of representation"). Counsels' unauthorized action should be summarily denied and the Court should sanction counsel for pursuing litigation that lacks merit.

2. Counsels' new claim is procedurally barred.

Counsel also fails to show good cause to present his new claim. A petitioner must file a post-conviction petition for a writ of habeas corpus within one year after the Supreme Court issues its remittitur if an appeal is taken. NRS 34.726(1). Each claim in the petition must be timely. *See Rippo v. State*, 368 P.3d 729, 132 Nev. Adv. Op. 11 (2016) (a petition asserting ineffective assistance of postconviction counsel to excuse the procedural default of other claims has been filed within a reasonable time after the postconviction-counsel claim became available so long as it is filed within one year after

entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after the Supreme Court issues its remittitur). An untimely or successive petition is procedurally barred and must be dismissed absent a demonstration of good cause for the delay and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003) (application of the procedural default rules to post-conviction petitions for writs of habeas corpus is mandatory); *Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519, 530 (2001) (the Nevada Legislature "never intended for petitioners to have multiple opportunities to obtain post-conviction relief absent extraordinary circumstances.").

Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a timely petition or claim. *See Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998), *clarified by Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials,' made compliance impracticable.' " *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (*quoting Murray*, 477 U.S. at 488 (1986) (citations omitted)).

The failure to show good cause may be excused where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice." *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); *Hogan*, 109 Nev. at 959, 860 P.2d at 715–16; cf. NRS 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing that he is actually innocent of the crime or is ineligible for the death penalty. *See Mazzan*, 112 Nev. at 842, 921 P.2d at 922; *Hogan*, 109 Nev. at 954–55, 959, 860 P.2d at 712, 715–16. A claim that the petitioner is actually ineligible for the death penalty rests on a showing by clear and convincing evidence that, but for a

constitutional error, no reasonable juror would have found him death eligible, "and not on additional mitigating evidence that was prevented from being introduced as a result of claimed constitutional error[.]" *Sawyer v. Whitley*, 505 U.S. 333, 336, 347 (1992); *Hogan*, 109 Nev. at 960, 860 P.2d at 716. A defendant is eligible for the death penalty in Nevada when the elements of a capital offense and at least one aggravating circumstance have been shown. *Lisle v. State*, 351 P.3d 725, 734, 131 Nev. Adv. Op. 39 (2015) ("We therefore conclude that an actual innocence inquiry in Nevada must focus on the objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed" and not by showing the existence of new mitigating evidence.).

Here, counsel claims Vanisi is ineligible for the death penalty. But Vanisi's counsel makes no showing that Vanisi is not death eligible—i.e., that the elements of first-degree murder have not been met and at least one aggravator does not exist. Thus, their assertion that Vanisi is "severely mentally ill" is irrelevant. Furthermore, Vanisi made it quite clear that he does not want to challenge his death sentence. Yet, his counsel blatantly ignore that desire and do want they want, disregarding this Court's finding that Vanisi competently waived his hearing.

Counsel for Vanisi argue that they only have to show under *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2000), that the Court has discretion to allow a supplemental claim, "subject only to one condition, which is allowing the State an opportunity to respond." (Motion to file Supplement, 3). That is not true. *Barnhart* held that the district court did not abuse its discretion by not permitting a petitioner to raise a new claim at a postconviction habeas hearing because "[c]ounsel for petitioner provided no reason why that claim could not have been pleaded in the supplemental petition." *Id*. at 304, 130 P.3d at 652. Thus, good cause requires, after an evidentiary hearing has started (and certainly after it has concluded), a showing of why the claim

could not have been presented earlier. Counsel for Vanisi do not make that showing. Vanisi's mental illness has been known for years. It is simply absurd to allege that counsel did not know of this claim at an earlier time. Dr. Zuchowski based his opinion of Vanisi's schizoaffective disorder on the medical records and the opinions of other mental health professionals, not on his own independent testing and observations. It is simply too late to assert an additional claim at this juncture of the proceedings. Vanisi waived his hearing, and this Court found that Vanisi had competently waived the hearing.

3. "Mental illness" does not stay or bar Vanisi's death sentence.

Vanisi's "severe mental illness" that his counsel refer to—whatever that means—is not a bar to his execution. To bar or stay Vanisi's execution, there must be evidence that he is mentally retarded, *Atkins v. Virginia*, 536 U.S. 304 (2002), or that he is insane. *Ford v. Wainwright*, 477 U.S. 399, 409–410 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."); *Calambro By and Through Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 972, 964 P.2d 794, 801 (1998). There is no evidence of either. *Calambro*, 114 Nev. at 971, 964 P.2d at 800 ("[a] condemned person is sane if 'aware of his impending execution and of the reason for it.") (*quoting Demosthenes v. Baal*, 4954.5 731, 733 (1990)). Counsel's mere assertion that Vanisi is mentally ill is not a ground for relief. *See Calambro*, 114 Nev. At 972, 964 P.2d at 801 ("schizophrenics are not necessarily delusional and can be capable of understanding their situation.").

4. Vanisi's "mental illness" is not admissible because it is not presented as mitigating evidence.

Finally, whether Vanisi is mentally ill to stay his execution is not within the purview of the Nevada Supreme Court's order. The Supreme Court ordered a hearing to permit Vanisi to present additional mitigating evidence. The order was not intended to

address Vanisi's mental state in terms of whether he is competent to be executed. There are other mechanisms by which a capital defendant may challenge the execution of his sentence based on his current mental status. *See* NRS 176.425; NRS 176.455.

Conclusion

Vanisi's counsels' motion is not made in good faith. It should be denied. The Court should sanction counsel for wasting the Court's resources and for their dilatory tactics.

AFFIRMATION PURSUANT TO NRS 239B.030

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

DATED: October 8, 2018.

CHRISTOPHER J. HICKS
District Attorney

By /s/ JOSEPH R. PLATER
JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on October 8, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

SIAOSI VANISI, Petitioner, v. WILLIAM GITTERE, Acting Warden, et. al., Respondents.	Case No. CR98-0516 Dept. No. IV (Death Penalty Habeas Corpus Case) **REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS**

POINTS AND AUTHORITIES

I. BACKGROUND

After the Nevada Supreme Court remanded this case for an evidentiary hearing, Mr. Vanisi sent a letter to the Court indicating an interest in waiving the hearing.[1] Undersigned counsel requested a competency evaluation, which this Court granted.[2] After a competency hearing, in which both doctors acknowledged Mr. Vanisi's mental illness, this Court found Mr. Vanisi competent and then accepted his waiver of the hearing.[3]

On September 28, 2018, Mr. Vanisi, through counsel, filed a Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus, which included as an exhibit a claim that Mr. Vanisi's severe mental illness—evidenced multiple times in the record of his case—rendered him ineligible for the death penalty.[4] The State filed an opposition on October 8, 2018, raising, among other arguments, that this new claim is procedurally barred and meritless.[5]

This reply follows.

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[1] Request from Defendant (July 24, 2018).

[2] *See, e.g.,* Suggestion of Incompetency & Mot. for Evaluation (July 25, 2018); Order for Expedited Psychiatric Evaluations (Sept. 6, 2018).

[3] *See* Hr'g Tr. 86 (Sept. 24, 2018, 1:48 p.m.); Hr'g Tr. 23 (Sept. 25, 2018)

[4] *See* Mot. for Leave to File Supplement to Pet. for Writ of Habeas Corpus (Sept. 28, 2018) [*hereinafter* Mot.]

[5] *See* Opp. to Mot. for Leave to File Supplement to Pet. for Writ of Habeas Corpus (Oct. 8, 2018) [*hereinafter* Opp.].

II. ARGUMENT

Mr. Vanisi's mental illness has been the source of considerable problems in adjudicating his case. His mental illness has required counsel to seek competency evaluations[6]; his mental illness put trial counsel in the uncomfortable position of seeking to withdraw, and then having to represent Mr. Vanisi despite their belief they could not present a defense or cross-examine witnesses[7]; Mr. Vanisi's mental illness was distracting enough that initial post-conviction counsel failed to meet their obligations in representing Mr. Vanisi.[8]

The result of Mr. Vanisi's mental illness—and its interference with his case—is that no factfinder has had the opportunity to review the robust mitigating evidence supporting the fact that he suffers from severe mental illness, the relationship of that mental illness with the offense in this case, and whether that mental illness warrants a sentence less than death.

This is not constitutional, as the Eighth Amendment requires a reliable sentence. A reliable sentence requires that the penalty fact-finder must "be able to consider and give effect to" mitigating evidence. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J., Stewart, Powell, Stevens, JJ.) ("an individualized decision is essential in capital cases"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("By holding that the

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[6] *See, e.g.,* Hr'g Tr. 1-2, (June 1, 1999); *see also* Mot., Ex. 1 at 7-8 nn.2-12.
[7] *See* Pet. Exs. 35, 23.
[8] *See Vanisi v. Baker*, No. 65774, at 4-6 (Nev. Sept. 28, 2018).

sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.”).

Thus, this Court should find that Mr. Vanisi is ineligible for the death penalty, and grant his petition for writ of habeas corpus.

The State raises a number of arguments in opposition. None require rejection of Mr. Vanisi’s supplement.

A. This Court should recognize that the Eighth Amendment prohibits execution of those with severe mental illness.

The State misconstrues Claim Twenty-Five by noting that Mr. Vanisi neither suffers from intellectual disability nor is insane under *Ford v. Wainwright*, 477 U.S. 399 (1986).[9] Claim Twenty-Five, however, asks this Court to extend the protections of the Eighth Amendment, applying established principles from *Atkins*, *Roper*, and other Eighth Amendment cases.[10] The claim offers much more than merely stating that Mr. Vanisi is mentally ill. Rather, Claim Twenty-Five explains that the Eighth Amendment requires a reliable sentencing determination in death penalty cases, and because Mr. Vanisi’s mental illness prevents that reliability, he should be exempt from the death penalty.[11] The State’s refusal to engage with these arguments shows that the arguments accurately reflect the law and that this extension of Eighth Amendment jurisprudence is warranted.

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[9] Opp. at 6.
[10] *See* Mot., Ex. 1.
[11] *Id.*

B. Good cause supports excusing any applicable procedural default.

The State argues that this Court should dismiss Claim Twenty-Five because it is procedurally defaulted.[12] Failing to consider this claim would result in a miscarriage of justice, and thus this Court should not impose any procedural default to it. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). The Nevada Supreme Court has recognized that a petitioner shows a miscarriage of justice by making a "colorable showing he is actually innocent of the crime *or is ineligible for the death penalty*." *Id.* (emphasis added). Indeed, the State agrees that ineligibility for the death penalty would excuse any procedural default.[13]

The State disagrees, however, that Mr. Vanisi is ineligible for the death penalty.[14] But, the State's position is based on a misreading of "ineligible" under the actual innocence standard for excusing procedural default. That is, the State argues that if the elements of first-degree murder are met, and at least one aggravating circumstance exists, then a petitioner cannot show a miscarriage of justice.[15] This however is unsupported by Nevada law, and, tellingly, the State fails to cite to a case supporting this argument.[16] And it cannot be supported by Nevada law because it overlooks situations where a defendant is categorically ineligible for the death penalty, as would be the case for someone who suffers from intellectual disability or

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[12] Opp. at 3.

[13] *Id.* at 4.

[14] *Id.* at 5.

[15] *Id.* ("But Vanisi's counsel makes no showing that Vanisi is not death eligible—i.e., that the elements of first-degree murder have not been met and at least one aggravator does not exist.").

[16] *See id.*

was a juvenile at the time of the offense. *See, e.g., Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551. These individuals are actually innocent of the death penalty in that they are ineligible even if the elements of first-degree murder plus aggravating circumstances have been met. *See, e.g.*, *Guy v. State*, No. 65062, 2017 WL 5484322, at *3 (Nev. Nov. 14, 2017) (unpublished decision) (finding actual innocence of death penalty despite present elements of first-degree murder and an aggravating circumstance).[17]

Mr. Vanisi urges a similar exemption here. Claim Twenty-Five argues that because he suffers from severe mental illness, he should be exempt from the death penalty in the same way as someone who suffers from intellectual disability.

The State further argues that Mr. Vanisi has not met his burden under *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2000), to file a supplement because *Barnhart* requires "a showing of why the claim could not have been presented earlier."[18] This overstates the ruling in *Barnhart*. There, the Nevada Supreme Court explicitly recognized that a "district court may exercise its discretion under certain circumstances to permit a petitioner to assert claims not previously pleaded." *Barnhart*, 122 Nev. at 303, 130 P.3d at 651-52. The court went on to note that allowing such a supplement might be necessary because "there may be issues of which counsel was previously unaware that are brought to light by the evidence adduced at the hearing or implicated by some new law." *Id.* at 304, 130 P.3d at 652. Allowing

[17] This unpublished decision is cited for its persuasive value. *See* NRAP 36(c)(2).

[18] Opp. at 5-6.

supplements, the Court concluded, "will promote finality by furthering the policy of resolving all available claims for relief in a single proceeding." *Id.*

The State argues that because "Mr. Vanisi's mental illness has been known for years," counsel has not shown that the supplement is necessary. However, though the experts found Mr. Vanisi competent, they also acknowledged Mr. Vanisi's serious mental illness.[19] More importantly, Mr. Vanisi's successful waiver of his evidentiary hearing, leading to this Court's denial of his claim of ineffective assistance of counsel during the penalty phase, supports the need to find that his severe mental illness renders him exempt from the death penalty. Before the successful waiver, Mr. Vanisi still had a legal mechanism available to have a factfinder—for the first time since the beginning of his case—consider and weigh the mitigating value of his mental illness. Because he waived, however, his mental illness—though purportedly not enough to establish incompetency—prevented this Court, and any factfinder, from giving weight to his mitigating evidence.

C. This Court has jurisdiction to consider this claim.

Finally, the State argues that this Supplement is "not within the purview of the Nevada Supreme Court's order" because the Nevada Supreme Court "ordered a hearing to permit Vanisi to present additional mitigating evidence."[20] However, because Claim Twenty-Five arises from the very reason that Mr. Vanisi did not

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[19] Hr'g Tr. 21 (Sept. 24, 2018, 10:00 a.m.); Hr'g Tr. 10 (Sept. 24, 2018, 1:48 p.m.).

[20] Opp. at 6.

present additional mitigating evidence, Claim Twenty-Five is necessarily related to the Nevada Supreme Court's remand.[21]

Nor do NRS 176.425 and NRS 176.455 provide a mechanism for Mr. Vanisi to have Claim Twenty-Five addressed.[22] NRS 176.425 addresses when the Director for the Department of Prisons may petition for a sanity determination. NRS 176.425 is only triggered when "the convicted person has been delivered for execution." NRS 176.425(a). And the relief granted by NRS 176.425 is a stay, not a holding that the defendant is categorically ineligible for the death penalty. *See* NRS 176.455. These statutes do not provide for the categorical ineligibility that Claim Twenty-Five requests.

D. Determining which claims to raise in support of a petition is the responsibility of counsel and within the authority of counsel to decide.

In death penalty cases, counsel is under an obligation to "litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to competent capital defense representation."[23] This

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[21] Insofar as the State's argument is meant to indicate that the mandate doctrine prohibits consideration of the supplement, the State's implied argument is wrong. The mandate doctrine only prohibits this Court from acting contrary to the Nevada Supreme Court's order. *See State Engineer v. Eureka County*, No. 70157, 133 Nev. Adv. Op. 71, 402 P.3d 1249, 1251 (Sept. 27, 2017). Considering a supplement, that is related to why the hearing did not occur, is not contrary to the Nevada Supreme Court's order. *See Vanisi v. Baker*, No. 6577, Order (Nev. Sept. 28, 2017).

[22] *See* Opp. at 7.

[23] *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev. Oct. 16, 2008) [*hereinafter* ADKT No. 411], Standard 2-19(c); *see also id.*, Standard 2-10; American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 [*hereinafter* 2003 ABA Guidelines], Guideline 10.8; *id.*, Guideline 10.15.1(C).

responsibility further requires: "Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review."[24] Indeed, the controlling standards require that counsel contemplate the need to preserve issues for future review.[25] Thus, here, counsel has an obligation to raise Claim Twenty-Five.

Not only does counsel have an obligation to raise Claim Twenty-Five, nothing prohibits counsel from doing so, despite the State's contrary arguments.[26] The Nevada Rules of Professional Responsibility specify which decisions belong to a defendant: whether to settle a matter, what plea to enter, whether to waive jury trial, and whether the client will testify.[27] Whether to raise a claim in post-conviction proceedings is not an item on this list.[28]

Additionally, as shown on September 25, 2018, Mr. Vanisi suffers from diminished capacity.[29] The rules of professional responsibility, thus, require counsel to "determine, to the extent practicable, the measures needed to protect the client's interests."[30] In light of the Court's acceptance of Mr. Vanisi's waiver, and in light of the fact that Mr. Vanisi's waiver is itself evidence of how his severe mental illness

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[24] ADKT 411, Standard 2-19(c); 2003 ABA Guidelines, Guideline 10.15.1(C).

[25] ADKIT 411, Standard 2-10(a)(3); *see also* 2003 ABA Guidelines, Guideline 10.8(A)(3).

[26] *See* Opp. at 3.

[27] NRPC 1.2(a).

[28] *Id.*

[29] *See* Hr'g Tr. 24-25 (Sept. 25, 2018).

[30] David Siegel Opinion at 5 (Aug. 27, 2018) (filed in open court, *see* Hr'g Tr. 24-25 (Sept. 25, 2018).

has prevented consideration of his mitigation evidence, raising Claim Twenty-Five is necessary to protect Mr. Vanisi's interests.[31]

III. CONCLUSION

Mr. Vanisi respectfully requests that this Court allow Mr. Vanisi to supplement his petition, find that he suffers from severe mental illness, hold that the Eighth Amendment prohibits the execution of those suffering from severe mental illness, thus, find that the Eighth Amendment prohibits the execution of Mr. Vanisi, and grant Mr. Vanisi's Petition for Writ of Habeas Corpus. He accordingly requests that this Court vacate his death sentence.

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[31] The State argues that "the Court should sanction counsel for pursuing litigation that lacks merit." Opp. at 3. However, Claim Twenty-Five is not frivolous, and certainly not frivolous in the manner contemplated by NRCP 11(b) & (c). Claim Twenty-Five presents "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" by asking this Court, relying on established Eighth Amendment principles, to recognize an exemption from the death penalty for someone who suffers from severe mental illness. *See, e.g.*, Mot., Ex. 1 at 3-5 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002)). Additionally, this position is supported by scholars and professional organizations. *See* Mot., Ex. 1 at 6, 17 (citing Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill Rts. J. 487, 510-11 (Dec. 2014); *Mental Disability and the Death Penalty*, American Psychological Association Council Policy Manual, Chapter IV (2006); National Alliance on Mental Illness; American Bar Association, *Severe Mental Illness and the Death Penalty* (Dec. 2016). Claim Twenty-Five, thus, is meritorious, not frivolous. *See* Argument § A above.

DATED this 15th day of October, 2018.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

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

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

/s/ Scott Wisniewski
SCOTT WISNIEWSKI
Assistant Federal Public Defender

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

The undersigned does hereby affirm that the preceding REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS filed in the District Court Case No. CR98-0516 does not contain the social security number of any person.

DATED this 15th day of October, 2018.

/s/ Randolph M. Fiedler

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

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 15th day of October, 2018, a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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

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

/s/ Sara Jelinek
AN EMPLOYEE OF THE FEDERAL
PUBLIC DEFENDERS OFFICE

4185

JUDITH ANN SCHONLAU

CCR #18

75 COURT STREET

RENO, NEVADA

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

-o0o-

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

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENTS

FRIDAY, JANUARY 25, 2019, 9:00 A.M.

Reno, Nevada

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

1 A P P E A R A N C E S

2 FOR THE PLAINTIFF: OFFICE OF THE DISTRICT ATTORNEY

3 BY: JOSEPH R. PLATER, ESQ.

4 JENNIFER P. NOBLE, ESQ.

5 DEPUTY DISTRICT ATTORNEYS, ESQ.

6 1 S. SIERRA STREET

7 RENO, NEVADA

8

FOR THE DEFENDANT: FEDERAL PUBLIC DEFENDERS OFFICE

9

BY: RANDOLPH FIEDLER, ESQ.

10

SCOTT WISNIEWSKI, ESQ.

11

ASSISTANT FEDERAL PUBLIC DEFENDERS

12

411 E. BONNEVILLE AVENUE SUITE 250

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LAS VEGAS, NEVADA 89101

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RENO, NEVADA; FRIDAY, JANUARY 25, 2019; 9:00 A.M.

-oOo-

THE COURT: Thank you. Please be seated. Good morning. This is the time set for a Motion for Leave to Supplement Petition for Writ of Habeas Corpus. Go ahead and make your appearances for the record.

MR. FIEDLER: Good morning. Randy Fiedler and Scott Wisniewski, Federal Public Defenders with Mr. Vanisi who is present and in custody.

MR. PLATER: Good morning, Joe Plater for the State of Nevada, Your Honor.

MS. NOBLE: Good morning, Jennifer Noble on behalf of the State.

THE COURT: Good morning. Counsel, we have set this time for oral arguments on the Motion and the Opposition. So I am prepared to hear your arguments. Are you ready to argue?

MR. FIEDLER: Yes, Your Honor.

THE COURT: Go ahead.

MR. FIEDLER: Mr. Vanisi's mental illness in this case has been an issue for every attorney who has represented him. Every attorney has questioned his competency. And for every attorney, Mr. Vanisi's mental illness posed problems. The aggregate fact of these problems has been no fact finder

1 has had the opportunity to weigh compelling mitigation
2 evidence that is available in this case which, itself, creates
3 a constitutional problem.
4 In death penalty cases, the Eighth Amendment
5 requires a reliable sentence. Reliable in this context is a
6 term of art referring to how the fact finder must have the
7 opportunity to give weight to mitigating evidence. The Supreme
8 Court has recognized for certain categories of offenders this
9 reliability is impossible, because these offenders present
10 characteristics that undermine the ability for reliable
11 adjudication. For example, in the context of individuals that
12 suffer from intellectual disability, the Supreme Court
13 recognizes those individuals have trouble communicating with
14 their counsel. As a result of that, counsel is at a
15 disadvantage at presenting their mitigation evidence. It is a
16 double edge sword. The difficulty for counsel to present that
17 status, itself, as mitigating evidence, because some jurors
18 might view it as aggravating.
19 With regard to juvenile offenders, the Supreme Court
20 recognized the same problems. The Supreme Court recognized
21 juveniles are more prone to make impetuous and unconsidered
22 decisions, and that juveniles also have reduced ability to
23 resist negative influences. As a result, juveniles, too, are
24 classified as not to be reliably adjudicated for death

1 penalty.

2 The concerns Atkins and Roper addressed are just as
3 present for someone who suffers from severe mental illness.
4 Someone who suffers from severe mental illness has difficulty
5 communicating with counsel which compromises counsel's ability
6 to present that mitigating evidence. As with juvenile
7 offenders, someone who suffers from severe mental illness is
8 more prone to make unconsidered and impetuous decisions. These
9 concerns are also evident in Mr. Vanisi's case. Specifically,
10 where we see in the record that trial counsel had problems
11 with Mr. Vanisi resulting in trial counsel attempting to
12 withdraw from the case because they could not agree how to
13 approach the defense. We see initial post conviction counsel
14 focused solely on Mr. Vanisi's competency to the exclusion of
15 any other issue in the case. Of course, most recently, this
16 Court accepted Mr. Vanisi's waiver effectively preventing
17 anyone from ever being able to fully present the mitigating
18 evidence that could have been presented to a jury in this
19 case.

20 The effect of all of these actions all connected to
21 Mr. Vanisi's mental illness, no fact finder had the
22 opportunity to address the issue and/or been able to provide
23 the reliability the Eighth Amendment requires.

24 Before I conclude, I want to make one last point

about the Nevada State Constitution which offers in the form of its prohibition against cruel and unusual punishment, offers a broader prohibition than the U.S. Constitution's Eighth Amendment. The reason is that the Nevada State Constitution uses "or." It prohibits infliction of cruel or unusual punishment, whereas the Eighth Amendment prohibits infliction of cruel "and" unusual punishment. Even if the Court doesn't accept our argument pursuant to the Eighth Amendment, we urge the court to consider this question under the Nevada Constitution.

THE COURT: Mr. Plater.

MR. PLATER: Judge, I want to be courteous. I want to be dignified. I don't understand what that argument just was. We are here on a motion to add an additional ground to the post conviction petition. What you just heard was an argument to find him ineligible for the death penalty on its merits based on mental illness. There was not even a mention about his Motion to Amend to add that ground. He's wrong as a matter law. Sever mental illness as a matter of law has never been deemed a condition that renders one ineligible for the death penalty. There are certain categories of people automatically by law deemed ineligible. For instance juveniles. Other mentally incompetent people the Supreme Court said who are ineligible are mentally retarded. It is a

1 term of art. It is not in vogue anymore. I understand as a
2 legal term of art what that means. The Supreme Court never
3 said severe mental illness renders one ineligible for the
4 death penalty. In fact in Calambro, the Nevada Supreme
5 recognized the fact certain people may be mentally ill,
6 schizophrenic, that may determine them ineligible for the
7 death penalty. I am bringing this all up because I guess I am
8 surprised what you just heard was an argument to hold him
9 ineligible for the death penalty based on mental illness.
10 That has never been held as a matter of law to render one
11 ineligible under the Supreme Court juris prudence, at the
12 Federal level or the State level.
13 So what was the effect of the waiver that you found
14 valid last time? They are in essence arguing that waiver that
15 you found shouldn't apply. You should just -- They can ignore
16 it and keep arguing the merits of his case. That is why we ask
17 you, Judge, I don't say this lightly, to sanction that type of
18 conduct. There has been a valid waiver, and there has been no
19 evidence since you made that finding that waiver was not valid
20 whatsoever. There has been no proffer Mr. Vanisi changed his
21 mind. There is no proffer he's developed some type of mental
22 illness since that valid waiver, that he is not competent at
23 this time either.
24 So what are we here for? I thought we were here for

1 that Motion to Amend the Post Conviction Petition. I am going
2 to address that. I think that is what we are here for. You
3 should not grant the motion to supplement the petition for
4 several reasons. One, as I referenced already, he waived any
5 desire to go forward in State court proceedings to challenge
6 his death sentence. And you remember at the backdrop of all
7 that in July he sent you a letter that said I don't want an
8 evidentiary hearing. In August he sent you another letter
9 saying the same thing. In September he appeared before you
10 personally and said the same thing. I don't want to have any
11 State court proceedings that challenges my death sentence. So
12 then you ordered a competency hearing, and in September, I
13 think September 25th, we had that hearing. Mr. Moulton
14 appeared and Dr. Zuchowski appeared. They both said they
15 found him competent to waive the hearing. Doctor Zuchowski
16 based his finding of mental illness not on any new evidence
17 but on old doctors' reports that he had reviewed. Doctor
18 Mouton just acknowledged the possible presence of mental
19 illness, but he didn't know whether it actually existed one
20 way or the other. Again, that backdrop, we had a hearing and
21 you determined you would accept their evidence. It was
22 un-refuted. And you found there was a valid waiver. Now we
23 have this petition or motion to amend the petition. There has
24 been no finding, there has been no proffer that Mr. Vanisi

1 wants to go forward with an amendment. And you can call that
2 amendment anything you want. You can call it, as I just
3 heard, as they did plead, an attempt to find him, as a matter
4 of law, ineligible for the death penalty; or, if you want to
5 deem it as one of their arguments say toward the end of their
6 pleading simply an attempt to add to the record to make sure
7 the record is full and complete. Whatever you want to call
8 it, it is still an attempt to litigate on his behalf.
9 Mr. Vanisi told you he doesn't want anymore litigation in
10 State court. He doesn't want any more, you can call it
11 whatever you want, adding to the record or addressing the
12 argument on its merits. But it is an attempt to further
13 litigate his Petition. He doesn't want that. And you
14 explained that to him. After he was found competent, you had
15 another canvass with him, and he remained steadfast. He said I
16 don't want to pursue these hearings. It was that time of the
17 day, he was tired, and you said let's sleep on it. You
18 brought him back the next day. He said I want to waive. I
19 don't want to come with these things. You tried to talk him
20 out of it. These are my perceptions, my words. Maybe you
21 didn't see it that way. You re-canvassed him and said,
22 Mr. Vanisi, your lawyers are prepared, ready to go. They can
23 present evidence right now challenging your death sentence.
24 My words, you tried to talk him out of it. He wouldn't go for

1 it. So you found, at the end of the day, there was valid
2 waiver.
3 Counsel has an obligation to vigorously represent
4 their client. We understand that. We accept that. What they
5 don't have is the power to choose the outcome of the
6 litigation, because that is left to the client. The client
7 gets to choose the desired goal of his litigation. We know
8 what Mr. Vanisi's desired goal in the State court proceedings
9 is. He doesn't want to litigate anymore.
10 A waiver is a waiver, Judge. You can't waive the
11 proceedings on one hand and yet reserve the ability to keep
12 litigating on the other. That is what they are trying to do.
13 They understand that you entered a valid order. I want to say
14 they don't challenge the validity of your order, but they kind
15 of do when they say, well, the waiver was the product of a
16 severe mental illness. But the waiver is valid at this point,
17 and so they can't represent him on a valid waiver and at the
18 same time suggest that they can go forward with the
19 litigation. And make no mistake about it, what they are
20 trying to litigate is finding him ineligible for the death
21 penalty. I don't think that is consistent with the Rules of
22 Professional Conduct.
23 This new claim is also late. Every claim in a Habeas
24 Petition has to be timely, and it has got to overcome any

1 procedural bars. This one is untimely and excessive. To
2 overcome that procedural bar, they have to show good cause and
3 prejudice or actual innocence. They can't show good cause
4 because it is not based on anything new. This idea he's
5 severely mentally ill was based on these doctors' testimony
6 which was based on a lot of other doctors in medical reports
7 they reviewed, so it is not new. They have always known about
8 the severe mental illness he supposedly has, whatever that is.
9 I don't know what severe mental illness is. That is not
10 defined for us. He's not actually innocent to overcome the
11 Lisle bar. In Lisle, L-I-S-L-E versus State, the Nevada
12 Supreme Court told us actual innocence in a death penalty case
13 requires a showing that there is no prima facie case of
14 murder, first degree murder, and no valid aggravator. I did
15 cite Lisel. The contrary argument notwithstanding, that is
16 what we believe Lisel stands for. There is no actual
17 innocence, no way to overcome the procedural bar to this new
18 claim either.
19 I have already addressed the idea of Vanisi's mental
20 illness doesn't render his death sentence, as a matter of law,
21 invalid. That is pretty clear from our juris prudence.
22 So, Judge, I don't understand what we are doing
23 here.
24 THE COURT: I have a question for you. Maybe I

1 don't. Maybe you addressed it. I think you did. You did
2 address it. Thank you. Counsel.
3 MR. FIEDLER: Couple of points in response. There
4 are two reasons why the court should grant us leave to file
5 the supplement. First, the evidentiary hearing scheduled in
6 October was Mr. Vanisi's, essentially his last opportunity to
7 present this mitigating evidence to a State court and have a
8 State court consider that evidence. And because, I understand
9 the Court found Mr. Vanisi competent, but we are suggesting
10 there are two different things going on. One is the competency
11 which we are not trying to relitigate. The other is the
12 categorical status. He suffers from severe mental illness.
13 Because his categorical status contributed to him waiving the
14 hearing, the fact that was his last opportunity to present
15 this evidence is what offers good cause for this Court to
16 grant leave.
17 THE COURT: So I have a couple of questions for you.
18 Throughout the hearings that we have had from July till now,
19 every time Mr. Vanisi has expressed his opinion, he has made
20 it very clear he has no desire to litigate in State court, and
21 he gave a valid reason for that. He said I don't want to spend
22 the rest of my life in the State penitentiary, and I want a
23 new trial. I am not going to get a new trial in State court.
24 It is about changing my penalty. I want to go to Federal

1 court. And you continually say that means he's incompetent,
2 he's insane, he's severely mentally ill. You discount any
3 validity to his thought process there, and I don't understand
4 what your basis of that is except for your own personal desire
5 to see that the death penalty not be imposed. I don't know how
6 you relate that to anything that doctors have told me. They
7 haven't told me that it is inherently severely mentally ill to
8 say you don't want to spend the rest of your life in prison.
9 But that is what you argue continually. So what proof do you
10 have from any medical professional that this is an inherently
11 severely mentally ill decision, that only people who are
12 severely mentally ill could possibly make such a decision and,
13 therefore the decision is based on incompetence?
14 MR. FIEDLER: Well, Your Honor, our position is more
15 that, they are separate things, Mr. Vanisi suffers from mental
16 illness and correlating with that his attorneys have had
17 difficulties pursuing his claims.
18 THE COURT: I understand that. That is not my
19 question for you.
20 MR. FIEDLER: Understood. I guess all I can offer is
21 that we do feel, and I understand this Court already ruled, we
22 believe Mr. Vanisi suffered from diminished capacity under the
23 rules, so we have an obligation to preserve what we think are
24 meritorious claims on his behalf.

1 THE COURT: In your pleadings, you know, the State
2 requested that I sanction you. We have had issues before
3 where I have had some concerns about some of the things that
4 you have said in your pleadings or on the record. So in your
5 pleadings, you indicate that on page 9 of your Reply, you say:
6 "Mr. Vanisi suffers from diminished capacity," and you put a
7 Footnote 29. Footnote 29 says: "See hearing transcript pages
8 24 through 25, September 25, 2018." When I look at the
9 transcript, pages 24 and 25, that is an argument by you. An
10 argument by you. It is no evidence of any kind of diminished
11 capacity. Yet you cite it in your pleadings as though that is
12 proof, your own argument is proof for what you're now arguing
13 again. Counsel, that is improper. And that is just one thing
14 I found in this and looked at this morning, because I was
15 concerned. I don't remember any finding of diminished
16 capacity. I don't remember any doctor, and I certainly didn't
17 reach that conclusion, yet when I read the transcript, I
18 remembered you argued it, so you can't cite your own argument
19 as precedent for the new argument. That is just not proper,
20 counsel, and so you need to stop doing that.
21 MR. FIEDLER: I apologize Your Honor.
22 THE COURT: Mr. Vanisi, how are you today?
23 THE DEFENDANT: Good. Good.
24 THE COURT: So did you understand what everybody is

1 arguing today?
2 THE DEFENDANT: Yes, I do.
3 THE COURT: Do you have anything you want to say
4 about it?
5 THE DEFENDANT: I just want to add you get a sense
6 of what I am trying to deal with every time I get on the phone
7 to talk about which direction I want my appeal to go in. I am
8 glad the Court has the experience of what it is like to
9 communicate with them. It goes on and on, Judge, and it goes
10 on and on.
11 THE COURT: Circular.
12 THE DEFENDANT: It goes circular, right.
13 THE COURT: Do you still feel the way you felt when
14 you talked to me in September about not going forward?
15 THE DEFENDANT: Still feel the same way.
16 THE COURT: Okay. Did you have any concern this
17 morning? Were you confused about anything?
18 THE DEFENDANT: No, I wasn't confused, Judge.
19 THE COURT: All right. Thank you, Mr. Vanisi.
20 I understand that the amendment is an amendment to
21 the Petition that was filed in 2011. That has been completely
22 litigated to the Supreme Court and remanded to this Court for
23 a very limited purpose. It was not remanded to this Court for
24 purposes of augmenting the alleged new claims, addressing

1 anything new. Therefore, an amendment to it at this stage in
2 the proceedings is improper.
3 I am not saying you couldn't have filed a new Habeas
4 and argue all the things why it wasn't timely, why you should
5 be entitled to file Habeas again. I don't know if that
6 might -- I mean I am not sure you would have been successful.
7 I don't mean to imply you would be successful. But in all of
8 the pleadings on the motion, I don't see any basis for this
9 Court to extend jurisdiction that was provided to me by the
10 Supreme Court on the 2011 Habeas. The Supreme Court said 1
11 through 24 except for number 22 claims of error were affirmed.
12 Judge, handle Claim 22. Have an evidentiary hearing, and
13 talked about the specific things I was suppose to do in that
14 evidentiary hearing. We had that set, and your client wished
15 to waive it. We certainly gave him every opportunity and you
16 every opportunity to litigate why he should not be allowed to
17 waive it. Every opportunity, physicians, examinations,
18 hearing, argument. I think we must have had two or three
19 arguments giving you an opportunity to convince me, explain to
20 me how the law would support your position. In the end, I made
21 the ruling I made.
22 I understand your frustration at not wanting to end
23 the State court litigation. I understand that you want to
24 proceed on whatever issue you can find, and I think your

1 argument is somewhat creative. But you are asking this Court
2 in an amendment to a Petition that has already been decided,
3 to extend the juris prudence beyond what any court, the
4 Supreme Court of the United States or the Supreme Court of
5 Nevada has ever done. And so it is really without, I think it
6 is going to ultimately be without merit. But I am not going
7 to decide it on its merits. I am going to decide it on
8 procedural grounds. I do not think it is appropriate for you
9 to file an amendment at this stage of the proceedings.
10 So I am going to deny your motion to file the
11 amendment. Mr. Plater, I ask you prepare an order in
12 conformity to do that.
13 Counsel, I do not want to chill your zealous
14 representation of Mr. Vanisi. I appreciate that, and I know
15 that you have some personal beliefs that help you to continue
16 with this. However, you must follow the rules. You cannot
17 allow that zealousness to go beyond what is permitted, and you
18 have been really pushing the window, and you have filed things
19 you probably shouldn't have. And as I noted today in one line
20 in this brief, and I have not checked all your cites, it is
21 clear you were not appropriately citing things. I don't know
22 what else you might have cited in your brief that was
23 inappropriate. So I am certainly making a record that anybody
24 looking at this argument that you presented should carefully

1 review the cites and the record that you tried to present
2 here, because the conclusions that you reached in your brief
3 are not supported by the evidence that I have seen in many
4 instances.
5 So your request to supplement is denied. The other
6 request for relief that you have in the proposed amendment
7 will not be addressed at this stage in the proceedings.
8 Anything further with regard to my findings that
9 counsel would request?
10 MR. FIEDLER: Nothing on our side, Your Honor.
11 MR. PLATER: No thank you, Your Honor.
12 THE COURT: All right. Then at this time I am going
13 to make sure that all the orders get signed. Mr. Plater will
14 prepare this, show it to you, counsel, then I will get it with
15 your objections or whatever or stipulation this is my
16 decision. We'll get everything entered. I want to get
17 everything entered in the next week to ten days so we are sure
18 that all of the oral pronouncements that I made have made it
19 into being codified in written form so the next steps can
20 proceed.
21 Yes, Mr. Vanisi?
22 THE DEFENDANT: Judge, you know, I travel back and
23 forth from Ely. Is there a way to keep me down here a little
24 bit longer until after you finish your order, see if my

1 counsel has anymore motions to file? Is there a way to keep
2 me here a bit longer?
3 THE COURT: I don't think so. When did you come
4 down?
5 THE DEFENDANT: I came down on January 17th.
6 THE COURT: You have been here for almost a week?
7 THE DEFENDANT: Yeah.
8 THE COURT: Unless we have a hearing set, I don't
9 think the Warden will keep you. I don't know when he will send
10 you back. I just don't think you will stay since there is
11 nothing pending. I don't think so. Is there going to be any
12 further -- I think we stopped all of this because there was an
13 indication perhaps we needed to do an execution date. Did
14 someone say you are going to do a notice? I'm not sure,
15 counsel.
16 MR. FIEDLER: That is something we are certainly
17 considering.
18 THE COURT: You already have a Federal petition
19 filed?
20 MR. FIEDLER: Yes.
21 THE COURT: I just wanted to make sure what the
22 status was. I think I can just enter these orders. It
23 doesn't sound to me like there is anything else you have to do
24 to have Mr. Vanisi here in northern Nevada.

1 MR. FIEDLER: We certainly don't expect anything.
2 THE COURT: Counsel, do you know of anything else
3 that needs to happen here?
4 MR. PLATER: No, Your Honor.
5 THE COURT: Mr. Vanisi, you are going to be all
6 done. I think they are going to send you back.
7 THE DEFENDANT: Okay. Thank you, Your Honor.
8 THE COURT: Anything further for this Court?
9 Court's in recess.
10 (Whereupon, the proceedings were concluded.)
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STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

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

That as such reporter I was present in Department No. 4 of the above-entitled court on Friday, January 25, 2019 at the hour of 9:00 a.m. of said day and that I then and there took verbatim stenotype notes of the proceedings had in the matter of THE STATE OF NEVADA vs. SIAOSI VANISI, Case Number CR9809516.

That the foregoing transcript, consisting of pages numbered 1-21 inclusive, is a full, true and correct transcription of my said stenotypy notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada this 25th day of January, 2019.

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

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2019-02-06 01:18:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7105196

CODE No. 3105

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

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v. **Case No. CR98-0516**

WILLIAM GITTERE, Warden, et. al., **Dept. No. 4**

Respondent.

_____/

ORDER GRANTING WAIVER OF EVIDENTIARY HEARING

The Court has read and considered 1) the Request from Defendant to Waive Evidentiary Hearing, filed in proper person by Petitioner Siaosi Vanisi on July 24, 2018; 2) the Federal Public Defender's Suggestion of Incompetency and Motion for Evaluation, filed July 25, 2018; 3) the State's Response to Suggestion of Incompetency and Motion for Evaluation, filed July 30, 2018; 4) the Federal Public Defender's Reply to State's Response to Petitioner's Suggestion of Incompetence and Motion for Evaluation, and the supporting exhibit attached thereto, filed August 6, 2018; 5) the State's Motion to Set Hearing Regarding Vanisi's Request to Waive Evidentiary Hearing, filed July 25, 2018; and 6) the State's Addendum to Motion to Set Hearing Regarding Vanisi's Requests to Waive Evidentiary Hearing, and the exhibit attached thereto, filed August 20, 2018. Additionally, the Court has considered the written evaluations of Dr. Moulton and Dr. Zuchowski, as well as their testimony during the evidentiary

hearing held September 24, 2018. The Court has also considered the arguments of the parties, and Petitioner's own statements, made in open court on September 24 and September 25, 2018.

I. Procedural History

Petitioner was convicted of first degree murder and sentenced to death by a jury in 1999. His direct appeal was denied on May 17, 2001. *See Vanisi v. State*, 117 Nev. 330, 22 P.3d 1164 (2001). Petitioner filed his first post-conviction petition for writ of habeas corpus in 2002, and this Court denied it after an evidentiary hearing. The Nevada Supreme Court affirmed that order on April 20, 2010. *See* Order of Affirmance, April 20, Dkt. No. 50607. Petitioner then filed a second petition for writ of habeas corpus challenging the performance of post-conviction counsel Scott Edwards and Thomas Qualls. On April 20, 2014, this Court entered its Findings of Fact, Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus, which dismissed Petitioner's second petition for writ of habeas corpus (post-conviction). On September 28, 2017, the Nevada Supreme Court entered its Order Affirming in Part, Reversing in Part and Remanding (hereafter "the Order"). The Order affirmed the bulk of this Court's 2014 decision dismissing the petition, agreeing with its analysis on 21 out of the 22 asserted grounds for relief. *Id.* The only exception was Ground 20, which was Petitioner's claim that his first post-conviction counsel were ineffective for failing to challenge the trial attorneys' approach to mitigation evidence during the penalty phase. The Order remanded the matter to district court for an evidentiary hearing focused on the question of whether or not trial counsel were ineffective with respect to their investigation and strategy regarding sentencing phase mitigation.

Pursuant to the Order, this Court set an evidentiary hearing, scheduled to begin in early October, 2018. On May 30, 2018, this Court canvassed Petitioner in open court regarding his desire to waive his appearance during the evidentiary hearing, and accepted Petitioner's decision to waive his presence. Subsequently, this Court received a letter from Petitioner

dated July 24, 2018. The letter indicated to the Court that he wished to waive the evidentiary hearing altogether. The letter also indicated that the remaining ground pursued by the Federal Public Defender ("FPD") was inconsistent with Petitioner's wishes, and without his consent.

Subsequently, Petitioner sent a second letter dated August 13, 2018, addressed to the prosecutors assigned to his case, which was provided to this Court by counsel for the State. In the letter Petitioner made it clear he desired to pursue a waiver of the upcoming evidentiary hearing, but that the Federal Public Defender has rebuffed his requests for research on this issue. On September 5, 2018, Petitioner appeared before this Court with his counsel. He told the Court that he wanted to waive the evidentiary hearing, and that he did not agree with the strategy of the FPD. *See* Transcript of Proceedings, September 5, 2018. Petitioner argued that he was oriented to time and place, and understood the proceedings against him. *Id.*, 35-36. He argued that a competency evaluation would be a waste of resources, but that he would cooperate with an evaluation if this Court ordered one. *Id.*

This Court observed that Petitioner appeared to be competent during the September 5, 2018 hearing, articulating his position cogently. In an abundance of caution, the Court ordered that Petitioner be evaluated for competency. The Order For Expedited Psychiatric Evaluations required the evaluators to make the inquiry contemplated by *Calambro v. District Court*, 114 Nev. 961 (1998): 1) whether Petitioner has the capacity to appreciate his position and make a rational choice with respect to waiving the scheduled evidentiary hearing; or 2) whether Petitioner has such a mental disease, disorder, or defect that his capacity to make that decision might be substantially affected. *See* Order for Expedited Psychiatric Evaluations, filed September 6, 2018. Two written evaluations were provided to this Court, both opining that Petitioner had the capacity to appreciate his position, and that his choice to waive the evidentiary hearing was rational. A hearing on the evaluations was conducted on September 24, 2018, and counsel for the State and Petitioner had the opportunity to traverse the findings. *See* Transcript of Proceedings, September 24, 2018.

II. Findings of Fact and Conclusions of Law

A. Petitioner Has the Capacity to Appreciate His Position, and To Make a Rational Choice Regarding His Litigation Options.

The Court has received the report from Dr. Steven Zuchowski indicating that Petitioner has the capacity to appreciate his decision, and to make a rational choice with respect to his desire to waive the evidentiary hearing. On September 24, 2018, Dr. Zuchowski testified regarding his findings. *See* Transcript of Proceedings, Competency for Petitioner to Waive Evidentiary Hearing. Dr. Zuchowski testified that he is a forensic psychiatrist, and has testified as an expert regarding the subject of competency approximately 100 times. He has been recognized as an expert in this subject in the Second Judicial District Court, Eighth Judicial District Court, and the Federal District of Nevada. *Id.*, 9.

Dr. Zuchowski testified that Petitioner has schizoaffective disorder, bipolar type, but that the symptoms of Petitioner's mental illness were in good remission at the time of the interview. *Id.*, 22, 52. He observed Petitioner to be alert and cooperative, with linear thought processes and no suicidal ideation. *Id.*, 70-71; 81. Petitioner told Dr. Zuchowski that his intent in waiving the remaining penalty phase claim is to more quickly exhaust his state habeas claims and related state appeals, so that his trial phase claims can be considered by the federal courts. *Id.*, 42-43; 58-59. Dr. Zuchowski explained that Petitioner was not interested in a lesser sentence, and that Petitioner felt that the FPD's efforts were directed at the goal of avoiding the death penalty, while Petitioner's goal is to avoid lingering in prison for the rest of his life. *Id.*, 68, 86.

Dr. Zuchowski was confident that Petitioner understood his position, and that Petitioner's expressed intent was the product of rational thought, and not that Petitioner's decision was impacted by Petitioner's mental illness. *Id.*, 10-11. Dr. Zuchowski opined that Petitioner's decision was not the product of mania, grandiosity, or delusional thinking. *Id.*, 19-

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20; 63. Petitioner acknowledged to Dr. Zuchowski that he has no influence over the federal courts, and that he could lose in in federal court and ultimately face execution. *Id.*, 64.

Dr. Moulton, a forensic psychologist, also evaluated Petitioner. Dr. Moulton testified that though he also has experience in the area of correctional psychology, the bulk of his work is in the area of adjudicative competence. *See* Transcript of Proceedings, Report on Psychiatric Evaluation, September 24, 2018, 5-7. He has been recognized as an expert in the area of competency by courts in the Second, Eighth, and Tenth Judicial Districts. *Id.*, 53-54.

Dr. Moulton explained that during the evaluation, he did not assess Petitioner's mental illness to be active to the degree that rendered him unfit to make decisions about his case. *Id.*, 13. He noted that Petitioner was forthcoming during the interview, and explained that Petitioner explained his own perspective on how Petitioner would like to proceed, which Petitioner believes to be at odds with what the current course of FPD's representation. *Id.*, 33. Dr. Moulton testified that Petitioner expressed his dissatisfaction with the FPD's strategy of continuing to pursue penalty phase relief, and expressed his desire to pursue relief in the federal courts, with Petitioner's goal being a new trial. *Id.*, 44-45; 64-66. Dr. Moulton further explained that Petitioner was concerned about the additional time that litigation of the remaining state court claim would take, including the resulting state appellate litigation. *Id.*, 67.

Dr. Moulton was clear in his assessment that Petitioner's desired course of action is rational, and does not flow from any delusion or other aspect of Petitioner's mental illness. *Id.*, 66-69. Dr. Moulton further testified that instead, Petitioner understands that he is in a life or death situation, understands that his attorneys advise against waiving the upcoming hearing, and wishes to take that chance nonetheless. *Id.* According to Dr. Moulton, Petitioner simply does not share the priority of penalty phase relief, and wishes to instead waive his state court claims so that he can return to pursuing trial phase relief via the federal courts. *Id.*, 44, 64-66.

Based on the reports and testimony of Dr. Zuchowski and Dr. Moulton, the Court finds that Petitioner has the capacity to appreciate his position and to make a rational choice with

respect to waiving the scheduled evidentiary hearing. While the decision may be contrary to the advice of the FPD, based on the experts' unequivocal reports and testimony, the Court is confident that Petitioner's capacity to make this decision is not substantially affected by a mental disease, disorder, or defect.

B. Petitioner May Properly Decide His Litigation Objective.

Having determined that Petitioner is competent to make decisions about his case, the Court turns to the question of whether waiver of the evidentiary hearing is the sort of decision that a client can make. The Federal Public Defender asserts that waiver of the evidentiary hearing is a strategic decision within the exclusive purview of counsel, and that Petitioner may not properly waive the hearing against the advice of counsel. The FPD cites to NRPC 1.2 (a) and NRPC 1.14. The FPD asserts that Petitioner is suffering from a diminished capacity, and therefore decisions such as the waiver of the evidentiary hearing should be left to the FPD, not to Petitioner himself. Having determined, based on the competency evaluations and the experts' testimony, that Petitioner's capacity is not diminished, the Court is not persuaded by this argument.

The State asserts that pursuant to NRPC 1.2(a), the FPD is obligated to abide by its client's decision concerning the objectives of representation. The Court agrees. Petitioner is competent, and clearly expressed that he is not interested in the objective of penalty phase relief. Instead, he wishes to exhaust his State penalty-phase claim faster by waiving the evidentiary hearing ordered by the Nevada Supreme Court, as well as the appeals that would normally follow. Petitioner has the right to decide the goals of his litigation, even if his choice were to submit to a death sentence. *Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 964 P.2d 794 (1998), *cert. denied*, 525 U.S. 1149, 119 S.Ct. 1048 (1999). The FPD wishes to continue litigating the penalty-phase claim regarding mitigation, but Petitioner is their client, and the client does not authorize that action. While this Court informed Petitioner that the Court believes his decision is ill-advised, it is Petitioner's decision to make.

C. Petitioner Made a Knowing, Voluntary, and Intelligent Waiver of the Evidentiary Hearing.

Having found that Petitioner possesses the capacity to make decisions about his case, the Court canvassed Petitioner about his desire to waive the upcoming evidentiary hearing. The canvass began in the afternoon on September 24, 2018. Transcript of Proceedings, Competency for Petitioner to Waive Evidentiary Hearing, 90-94. The Court explained to Petitioner that such a waiver would mean that Petitioner would not prevail regarding the remaining ground for relief, and this Court would have to set a new execution date for him. *Id.* At that time, Petitioner expressed a clear desire to waive the hearing. *Id.* Nonetheless, this Court took a recess so that Petitioner could discuss his decision further with his attorneys. *Id.*, 94-95. When the Court reconvened the proceedings, Petitioner had not changed his mind. *Id.* The Court explained to Petitioner that without the scheduled hearing, it would not have any evidence to consider regarding the mitigation claim, and would not be able to rule in Petitioner's favor. *Id.*, 104-105. Petitioner indicated that he understood. *Id.* The Court then recessed overnight in order to allow Petitioner to have additional time to consider his decision. *Id.*, 108.

The next day, Petitioner again appeared with his counsel. *See* Transcript of Proceedings, Report on Psychiatric Evaluation, September 25, 2018. This Court asked Petitioner if he understood that he could ultimately lose his federal appeals. *Id.*, 4. Petitioner acknowledged the end result of exhausting his federal appeals: "I would be executed." *Id.* This Court emphasized to Petitioner that his attorneys advised against taking such a risk, and that his attorneys did not necessarily anticipate that Petitioner would prevail in federal court. 5-7. The Court then further advised Petitioner that if he were to prevail on his remaining State court claim, he would be eligible for resentencing, and that possible sentences included life with the possibility of parole, or a term of years. Petitioner indicated that he still wanted to waive the evidentiary hearing, and repeated that he was not interested in "penalty phase relief." *Id.*

THE COURT: If you keep going with your appeal and finish out your state court appeal and then go to the federal court, do you understand that you might—it might be another period of time in the federal court that would prolong the death sentence, even if you lose?

THE DEFENDANT: Yes, I understand my prolonged—but my life clock is ticking, your honor. I want to be able to go into federal court to see what they will give me. I'm willing to take my chances in federal courts.

THE COURT: And federal court, what if federal court says, No, we're not going to grant any relief to you?

THE DEFENDANT: That's fine, your Honor. I'm going to accept that.

Id., 8-9.

The Court then recessed again to allow Petitioner to review the Nevada Supreme Court's Order Affirming in Part, Reversing in Part and Remanding. *Id.*, 9-14. After the recess, Petitioner indicated that he still had not changed his mind. *Id.*, 14. This Court then canvassed Petitioner to ensure he understood that if he waived the evidentiary hearing, he would not be able to take a substantive appeal on this Court's ruling regarding the mitigation claim. *Id.*, 17. The Court informed Petitioner that he would not be entitled to an evidentiary hearing in the future on his mitigation claim. The Court also canvassed Petitioner regarding the possible penalties for which he might be eligible if he were to receive penalty-phase relief. *Id.*, 18-21. Petitioner advised the Court that he had not been forced to make his decision, and agreed that no one had guaranteed him anything. *Id.*, 21. The Court then accepted Petitioner's waiver of the evidentiary hearing.

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The Court finds that Petitioner's decision to waive the evidentiary hearing on the remaining state habeas claim, which alleged ineffective assistance with respect to mitigation during the penalty phase, was knowing, voluntary, and intelligent.

DATED this 5 day of February, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 6th day of February, 2019, I filed the attached document with the Clerk of the Court.

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

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

X **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:**

Jenny Noble, Esq.
Chief Deputy District Attorney

Randolph Fiedler, Esq.
Assistant Federal Public Defender

X **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:**

Siaosi Vanisi
Inmate no. 63376
NNCC
P.O. Box 7000
Carson City, Nevada 89702

_____ **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 6th day of February, 2019.

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Jacqueline Bryant
Clerk of the Court
Transaction # 7105974

CODE 2540

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

SIAOSI VANISI,

Defendant.

Case No: CR98-0516

Dept. No: 4

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on February 6, 2019 the Court entered a decision or order in this matter, a true and correct copy of which is attached hereto.

You may appeal to the Supreme Court from the decision or Order of the Court. If you wish to appeal, you must file a Notice of Appeal with the Clerk of this Court within thirty-three (33) days after the date this notice is mailed to you.

Dated February 6, 2019.

JACQUELINE BRYANT
Clerk of the Court

/s/N. Mason
N. Mason-Deputy Clerk

CERTIFICATE OF SERVICE

Case No. CR98-0516

Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court; that on February 6, 2019, I electronically filed the Notice of Entry of Order with the Court System which will send a notice of electronic filing to the following:

JOANNE L. DIAMOND, ESQ. for SIAOSI VANISI

JENNIFER P. NOBLE, ESQ. for STATE OF NEVADA

RANDOLPH FIEDLER, ESQ. for SIAOSI VANISI

JOSEPH R. PLATER, III, ESQ. for STATE OF NEVADA

I further certify that on February 6, 2019, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addressed to:

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

Siaosi Vanisi # 63376
NNCC
P. O. Box 7000
Carson City, NV 89702

The undersigned does hereby affirm that pursuant to NRS 239B.030 and NRS 603A.040, the preceding document does not contain the personal information of any person.

Dated February 6, 2019.

/s/N. Mason
N. Mason- Deputy Clerk

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Jacqueline Bryant
Clerk of the Court
Transaction # 7105198

CODE No. 2827

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

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v. **Case No. CR98-0516**

WILLIAM GITTERE, Warden, et. al., **Dept. No. 4**

Respondent.

_____/

ORDER DENYING RELIEF

On April 10, 2014, this Court entered its Findings of Fact, Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus, which dismissed Petitioner's second petition for writ of habeas corpus (post-conviction). On September 28, 2017, the Nevada Supreme Court entered its Order Affirming in Part, Reversing in Part and Remanding (hereafter "the Order"). The Order affirmed the bulk of this Court's 2014 decision dismissing the petition, agreeing with its analysis on 21 out of the 22 asserted grounds for relief. *Id.* The only exception was Ground 20, which was Petitioner's claim that his first post-conviction counsel were ineffective for failing to challenge the trial attorneys' approach to mitigation evidence during the penalty phase. The Order remanded the matter to the district court for an evidentiary hearing focused on the question of whether or not trial counsel were ineffective with respect to their investigation and strategy regarding sentencing-phase mitigation.

Pursuant to the Order, this Court set an evidentiary hearing, scheduled to begin in early October, 2018. Subsequently, this Court received a letter from Petitioner dated July 24, 2018. The letter indicated to the Court that he wished to waived the evidentiary hearing altogether. The letter also indicated that the remaining ground pursued by the Federal Public Defender ("FPD") was inconsistent with Petitioner's wishes, and without his consent. Petitioner also sent a second letter, dated August 13, 2018, addressed to the prosecutors assigned to his case, which was provided to this Court by counsel for the State. In the letter Petitioner made it clear he desired to pursue a waiver of the upcoming evidentiary hearing, but that the Federal Public Defender has rebuffed his requests for research on this issue. On September 5, 2018, Petitioner appeared before this Court with his counsel. He told the Court that he wanted to waive the evidentiary hearing, and that he did not agree with the strategy of the FPD. *See* Transcript of Proceedings, September 5, 2018. Petitioner argued that he was oriented to time and place, and understood the proceedings against him. *Id.*, 35- 36. He argued that a competency evaluation requested by his counsel would be a waste of resources, but that he would cooperate with an evaluation if this Court ordered one. *Id.*

This Court observed that Petitioner appeared to be competent during the September 5, 2018 hearing, and that he articulated his position cogently. In an abundance of caution, the Court ordered that Petitioner be evaluated by two mental health experts. The Order For Expedited Psychiatric Evaluations required the evaluators to make the inquiry contemplated by *Calambro v. District Court*, 114 Nev. 961 (1998): 1) whether Petitioner has the capacity to appreciate his position and make a rational choice with respect to waiving the scheduled evidentiary hearing; or 2) whether Petitioner has such a mental disease, disorder, or defect that his capacity to make that decision might be substantially affected. *See* Order for Expedited Psychiatric Evaluations, filed September 6, 2018.

Two written evaluations were provided to this Court, both opining that Petitioner had the capacity to appreciate his position, and that his choice to waive the evidentiary hearing was

rational. A hearing on the evaluations was conducted on September 24, 2018, and counsel for the State and Petitioner had the opportunity to traverse the findings. This Court canvassed Petitioner about his desire to waive the hearing on September 24 and September 25, 2018. Ultimately, this Court concluded that Petitioner had the capacity to make the decision, and the right to make decisions regarding his litigation objective. *See* Order Granting Waiver of Evidentiary Hearing.

The Court now turns to Petitioner's sole remaining State-court claim, which contends that post-conviction counsel were ineffective for failing to investigate mitigation evidence to substantiate an ineffective assistance of trial counsel claim. The Nevada Supreme Court's Order held that post-conviction counsel's performance was deficient in failing to pursue such a claim, but remanded for an evidentiary hearing so that this Court could hear evidence regarding prejudice. Order, pp. 6-7. Specifically, the evidentiary hearing was an opportunity for Petitioner to establish that trial counsel could have discovered and presented mitigation evidence that would have established the reasonable probability of a different outcome at the penalty hearing. *Id.*

Petitioner has waived his right to the hearing ordered by the Nevada Supreme Court. To be entitled to relief based upon a claim of ineffective assistance of counsel, a petitioner must demonstrate, by a preponderance of evidence, that his counsel's performance was deficient, falling below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defense. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Because Petitioner has

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not presented any evidence that the outcome of the proceedings would have been different had additional mitigation evidence been presented, he has failed to demonstrate prejudice. This Court therefore finds that Petitioner is not entitled to relief.

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) filed on May 5, 2011 as to ground 20 is DENIED.

DATED this 5 day of February, 2019.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 6th day of February, 2019, I filed the attached document with the Clerk of the Court.

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

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

_X_ **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:**

Jenny Noble, Esq.
Chief Deputy District Attorney

Randolph Fiedler, Esq.
Assistant Federal Public Defender

_X_ **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:**

Siaosi Vanisi
Inmate no. 63376
NNCC
P.O. Box 7000
Carson City, Nevada 89702

_____ **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 6th day of February, 2019.

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Jacqueline Bryant
Clerk of the Court
Transaction # 7131369

CODE 2540

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

SIAOSI VANISI,

Defendant.

Case No: CR98-0516

Dept. No: 4

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on February 15, 2019 the Court entered a decision or order in this matter, a true and correct copy of which is attached hereto.

You may appeal to the Supreme Court from the decision or Order of the Court. If you wish to appeal, you must file a Notice of Appeal with the Clerk of this Court within thirty-three (33) days after the date this notice is mailed to you.

Dated February 22, 2019.

JACQUELINE BRYANT
Clerk of the Court

/s/N. Mason
N. Mason-Deputy Clerk

CERTIFICATE OF SERVICE

Case No. CR98-0516

Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court; that on February 22, 2019, I electronically filed the Notice of Entry of Order with the Court System which will send a notice of electronic filing to the following:

JOANNE L. DIAMOND, ESQ. for SIAOSI VANISI

JENNIFER P. NOBLE, ESQ. for STATE OF NEVADA

RANDOLPH FIEDLER, ESQ. for SIAOSI VANISI

JOSEPH R. PLATER, III, ESQ. for STATE OF NEVADA

I further certify that on February 22, 2019, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addressed to:

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

Siaosi Vanisi (#63376)
NNCC
P.O. Box 7000
Carson City, NV 89702

The undersigned does hereby affirm that pursuant to NRS 239B.030 and NRS 603A.040, the preceding document does not contain the personal information of any person.

Dated February 22, 2019.

/s/N. Mason
N. Mason- Deputy Clerk

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Clerk of the Court
Transaction # 7121368

CODE No. 2840

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

IN AND FOR THE COUNTY OF WASHOE

* * *

SIAOSI VANISI,

Petitioner,

v. **Case No. CR98-0516**

WILLIAM GITTERE, Warden, et. al., **Dept. No. 4**

Respondent.

_____/

ORDER DENYING MOTION FOR LEAVE TO FILE SUPPLEMENT

Vanisi filed a postconviction petition for a writ of habeas corpus on May 4, 2011. On September 24, 2018, this Court found Vanisi competent to waive all further proceedings associated with his petition. The Court also found that Vanisi's desire to waive his habeas remedies in this Court constituted a valid waiver. On September 28, 2018, Vanisi's counsel filed a Motion For Leave To File Supplement To Petition For Writ Of Habeas Corpus. The State opposed the motion on October 8, 2018, and Vanisi's counsel responded to the State's opposition on October 15, 2018. The Court denies Vanisi's motion for the following reasons:

In his motion to supplement his petition, counsel for Vanisi requests to add claim Twenty-Five—that Vanisi's death sentence is invalid because he has severe mental illness. Vanisi, however, waived all postconviction habeas remedies in this Court on September 24, 2018. The Court found Vanisi competent to do so. Since then, Vanisi has not personally

indicated that his waiver was not valid or that he wanted to withdraw it. In fact, on January 25, 2019, at the hearing on the present motion, Vanisi personally told the Court that he still wanted to waive all further state postconviction habeas proceedings. He intimated that his counsel did not have his consent to add a supplemental claim. Neither Vanisi nor his counsel have presented additional evidence or reason to question the Court's order that Vanisi validly waived his state postconviction habeas remedies. Vanisi's counsel has no authority to override petitioner's desire to waive further litigation in this matter. *See* Nevada Rules of Professional Conduct Rule 1.2(a) ("a lawyer shall abide by a client's decision concerning the objectives of representation").

The new claim is also procedurally barred. A petitioner must file a post-conviction petition for a writ of habeas corpus within one year after the Supreme Court issues its remittitur if an appeal is taken. NRS 34.726(1). Each claim in the petition must be timely. *See Rippo v. State*, 368 P.3d 729, 132 Nev. Adv. Op. 11 (2016). An untimely or successive petition is procedurally barred and must be dismissed absent a demonstration of good cause for the delay and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a timely petition or claim. *See Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998), *clarified by Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

"The failure to show good cause may be excused where the prejudice from a failure to consider the claim amounts to a "fundamental miscarriage of justice." *Mazzan v. Warden,* 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); NRS 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing that he is actually innocent of the crime or is ineligible for the death penalty. *See Mazzan*, 112 Nev. at 842, 921 P.2d at 922; *Hogan*, 109 Nev. at 954–55, 959, 860 P.2d at 712, 715–16. A claim that the petitioner is actually ineligible for the death penalty rests on a showing by clear and convincing evidence that, but for a

constitutional error, no reasonable juror would have found him death eligible, "and not on additional mitigating evidence that was prevented from being introduced as a result of claimed constitutional error[.]" *Sawyer v. Whitley*, 505 U.S. 333, 336, 347 (1992); *Hogan v. State*, 109 Nev.952, 960, 860 P.2d 710, 716 (1993). A defendant is eligible for the death penalty in Nevada when the elements of a capital offense and at least one aggravating circumstance have been shown. *Lisle v. State*, 351 P.3d 725, 734, 131 Nev. Adv. Op. 39 (2015) ("We therefore conclude that an actual innocence inquiry in Nevada must focus on the objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed" and not by showing the existence of new mitigating evidence.).

Here, Vanisi's counsel claim that Vanisi is ineligible for the death penalty. But Vanisi's counsel makes no showing that Vanisi is not death eligible—i.e., that the elements of first-degree murder have not been met and at least one aggravator does not exist. Vanisi has not shown good cause to overcome the procedural bar.

Counsel for Vanisi argue that they only have to show under *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2000), that the court has discretion to allow a supplemental claim, "subject only to one condition, which is allowing the State an opportunity to respond." (Motion to file Supplement, 3). The Court disagrees. *Barnhart* held that the district court did not abuse its discretion by not permitting a petitioner to raise a new claim at a postconviction habeas hearing because "[c]ounsel for petitioner provided no reason why that claim could not have been pleaded in the supplemental petition." *Id.* at 304, 130 P.3d at 652. Thus, good cause requires, that, after the proceeding has started, counsel must demonstrate that the new claim could not have been presented earlier. Counsel for Vanisi do not make that showing. Vanisi's mental illness has been known for years, and could have been raised as a claim that renders him ineligible for the death penalty many years ago.

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Finally, whether Vanisi is mentally ill to stay his execution is not within the purview of the Nevada Supreme Court's order. The Supreme Court ordered a hearing to permit Vanisi to present additional mitigating evidence. The order was not intended to address Vanisi's mental state in terms of whether he is eligible for the death penalty. There are other mechanisms by which a capital defendant may challenge the execution of his sentence based on his current mental status. *See* NRS 176.425; NRS 176.455.

For the foregoing reasons, the Court denies the Motion For Leave To File Supplement To Petition For Writ Of Habeas Corpus.

DATED this 14 day of February, 2019.

Connie J. Steinheimer
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 15th day of February, 2019, I filed the attached document with the Clerk of the Court.

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

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

X **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,
Assistant Federal Public Defender

X **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:**

Siaosi Vanisi
Inmate no. 63376
NNCC
P.O. Box 7000
Carson City, Nevada 89702

_____ **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 15th day of February, 2019.

M Stone

F I L E D
Electronically
CR98-0516
2019-02-25 02:39:09 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7133984 : yviloria

Electronically Filed
Feb 28 2019 09:02 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

2515
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Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, v. WILLIAM GITTERE, Warden, et. al., Respondents.	Case No. CR96-0516 Dept. No. IV (Death Penalty Habeas Corpus Case) **NOTICE OF APPEAL**

Docket 78209 Document 2019-09152

Notice is hereby given that Siaosi Vanisi appeals to the Nevada Supreme Court from the Order Granting Waiver of Evidentiary Hearing, Order Denying Relief, and the Order Denying Motion for Leave to File Supplement. The Notice of Entry of Order was filed on February 6, 2019; another Notice of Entry of Order was filed on February 22, 2019.

DATED this 25th day of February, 2019.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

Randolph M. Fiedler
Assistant Federal Public Defender

Joanne L. Diamond
Assistant Federal Public Defender

Scott Wisniewski
Assistant Federal Public Defender

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

The undersigned does hereby affirm that the preceding NOTICE OF APPEAL filed in the District Court Case No. CR96-0516 does not contain the social security number of any person.

DATED this 25th day of February, 2019.

Randolph M. Fiedler

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

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 25th day of February, 2019, a true and correct copy of the foregoing NOTICE OF APPEAL was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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

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

/s/Jessica Pillsbury
An Employee of the Federal
Public Defender

F I L E D
Electronically
CR98-0516
2019-02-25 02:40:26 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7133998 : yviloria

1310
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Attorneys for Petitioner

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

SIAOSI VANISI, Petitioner, v. WILLIAM GITTERE, Warden, et. al., Respondents.	Case No. CR96-0516 Dept. No. IV (Death Penalty Habeas Corpus Case) **CASE APPEAL STATEMENT**

1. **Name of appellant filing this case appeal statement:**

   Siaosi Vanisi

2. **Identify the judge issuing the decision, judgment, or order appeals from:**

   Hon. Connie Steinheimer

3. **Identify each appellant and the name and address of counsel for each appellant:**

   Rene Valladares
   Federal Public Defender

   Randolph M. Fiedler
   Joanne L. Diamond
   Scott Wisniewski
   Assistants Federal Public Defender
   411 E. Bonneville Ave., Suite 250
   Las Vegas, Nevada 89101

   Counsel for Appellant Siaosi Vanisi

4. **Identify each respondent and the name and address of appellate counsel, if known, for each respondent:**

   Chris Hicks
   Washoe County District Attorney

   Jennifer P. Noble
   Chief Appellate Deputy
   Joseph Plater
   Appellate Deputy
   P.O. Box 11130
   Reno, Nevada 89520-0027

   Counsel for Respondent William Gittere, Warden, Ely State Prison
   Counsel for Respondent Aaron Ford, Attorney General

5. **Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):**

All attorneys are licensed to practice in Nevada.

6. **Indicate whether appellant was represented by appointed or retained counsel in the district court:**

The United States District Court for the District of Nevada appointed counsel for Vanisi on August 5, 2010. *See Vanisi v. Filson*, No. 3:10-cv-00448-MMD-CBC, Docket No. 5. Pursuant to our appointment in federal court, undersigned counsel remained Vanisi's appointed counsel for these state proceedings.

7. **Indicate whether appellant is represented by appointed or retained counsel on appeal:**

Appellant is represented by appointed counsel, the Federal Public Defender for the District of Nevada.

8. **Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:**

The United States District Court granted Vanisi leave to proceed in forma pauperis on August 5, 2010.

9. **Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):**

The Petition for Writ of Habeas Corpus (Post-Conviction) was filed on May 4, 2011.

10. **Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:**

Vanisi filed the instant petition, which the district court originally denied on April 10, 2014; the Notice of Entry of Order was filed on April 25, 2014. The Nevada Supreme Court reversed and remanded for the district court to conduct an evidentiary hearing "concerning whether Vanisi was prejudiced by postconviction

counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce mitigation evidence."[1]

On remand, after Vanisi indicated an interest in waiving his evidentiary hearing, the district court conducted a competency hearing, found Vanisi competent, and allowed him to waive his evidentiary hearing. The district court then denied Vanisi's remaining claim on its merits.

Vanisi then moved to supplement his petition to consider a claim that he is categorically ineligible for the death penalty. The district court denied this motion. A Notice of Entry of Order was filed on February 6, 2019; a second Notice of Entry of Order was filed on February 22, 2019.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

Vanisi v. District Court, No. 34771

Vanisi v. State, No. 35429

Vanisi v. District Court, No. 45061

Vanisi v. State, No. 50607

Vanisi v. Warden, No. 65774

12. Indicate whether this appeal involves child custody or visitation:

This appeal does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

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[1] *Vanisi v. Baker*, No. 6577, Order Affirming in Part, Reversing in Part, and Remanding (Nev. Sept. 28, 2017)

This is not a civil case.

DATED this 25th day of February, 2019.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

Randolph M. Fiedler
Assistant Federal Public Defender

Joanne L. Diamond
Assistant Federal Public Defender

Scott Wisniewski
Assistant Federal Public Defender

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

The undersigned does hereby affirm that the preceding CASE APPEAL STATEMENT filed in the District Court Case No. CR96-0516 does not contain the social security number of any person.

DATED this 25th day of February, 2019.

Randolph M. Fiedler

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

CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 25th day of February, 2019, a true and correct copy of the foregoing CASE APPEAL STATEMENT was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

Jennifer Noble
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P.O. Box 11130
Reno, NV 89520-0027

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

/s/Jessica Pillsbury
An Employee of the Federal
Public Defenders Office