IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,

Appellant, No. 78209

v.

WILLIAM A. GITTERE, WARDEN,

Respondent.
_____/

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 4

III. STATEMENT OF FACTS 11

A. Facts Underlying the Conviction 11

B. Facts and Events After 2017 Remand 13

IV. SUMMARY OF ARGUMENT 15

V. STATEMENT OF ISSUES 16

VI. ARGUMENT 17

A. The District Court Properly Found Vanisi Competent to Waive the Evidentiary Hearing Contemplated By This Court's Order of Remand. 17

1. Standard of Review 17

2. Discussion 17

a. Vanisi retains the right to determine the goals of his litigation. 17

b. Substantial evidence supports the finding that Vanisi was competent to waive the evidentiary hearing. 20

i. Dr. Zuchowski found Vanisi competent to waive the hearing. 21

ii. Dr. Moulton found Vanisi competent to waive the hearing. 26

TABLE OF CONTENTS (Continued)

c. The court canvassed Vanisi and found that he had a rational understanding of his decision to waive the evidentiary hearing. 29

B. The District Court Properly Denied the Motion to Disqualify the Washoe County District Attorney's Office. 33

1. Standard of Review 33

2. Discussion 34

a. No disqualification was warranted due to the WCDA obtaining a memorandum at the behest of first post-conviction counsel. 34

b. No disqualification was warranted due to the WCDA contacting the Public Defender's former investigator in anticipation of the 2019 evidentiary hearing. 39

c. The FPD's Claims of Confidentiality Are Disingenuous As the FPD Made Nearly Two Hundred Pages of Privileged, Confidential, and Sensitive Client Information Part of the Public Record. 42

C. The Question of Vanisi's Right to Self-Representation Was Decided By the Nevada Supreme Court in 2001, and Falls Outside the Narrow Scope of the Remand Order. 44

1. Standard of Review 44

2. Discussion 44

D. The District Court Appropriately Denied the FPD's 2018 Motion to File An Untimely, Procedurally Barred Supplemental Petition. 47

TABLE OF CONTENTS (Continued)

1. Standard of Review 47

2. Discussion 47

a. The supplemental petition was pursued against the competent client's consent. 47

b. The proposed supplemental petition was procedurally barred without good cause for the delay, because the FPD knew for years that Vanisi had been diagnosed with mental health conditions, and had displayed bizarre behavior 48

c. Mental illness does not operate to stay or bar execution. 53

VII. CONCLUSION 54

VIII. ROUTING STATEMENT 54

TABLE OF AUTHORITIES

Pages

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 53

Barnhart v. State,
122 Nev. 301, 130 P.3d 650 (2006) 51

Bejarano v. State,
122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006) 46

Bittaker v. Woodford,
331 F.3d 715, 716 (9th Cir. 2003) 41

Calambro v. District Court,
114 Nev. 961, 971, 964 P.2d 794, 800 (1998) 20, 53

Calvin v. State,
122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006) 17

Colley v. State,
105 Nev. 235, 773 P.2d 1229 (1989) 47

Collier v. Legakes,
98 Nev. 307, 309, 646 P.2d 1219 (1982) 33

Cronin v. Eighth Judicial Dist. Court,
In and For County of Clark,
105 Nev. 635, 641, 781 P.2d 1150 (1989) 39

Demosthenes v. Baal,
4954.5 731, 733 (1990) 53

E.E.O.C. v. Kronos Inc.,
694 F.3d 351, 361 (3d Cir. 2012) 44

TABLE OF AUTHORITIES (Continued)

Faretta v. California,
422 US 806, 833-34 (1975) 45

Ford v. Wainwright,
477 U.S. 399, 409–410 (1986) 53

Harris v. Warden,
114 Nev. 956, 959, 964 P.2d 785, 787 (1998) 49

Hathaway v. State,
119 Nev. 248, 71 P.3d 503 (2003)..... 49

Lisle v. State,
351 P.3d 725, 734, 131 Nev. Adv. Op. 39 (2015) 50

Mazzan v. Warden,
112 Nev. 838, 842, 921 P.2d 920, 922 (1996)..... 50

McCoy v. Louisiana,
138 S.Ct. 1500, 1508 (2018) 19

Molina v. State,
120 Nev. 185, 87 P.3d 533 (2004) 40

Murray v. Carrier,
477 U.S. 478, 488 (1986)..... 49

Pellegrini v. State,
117 Nev. 860, 34 P.3d 519 (2001) 38, 49

Rees v. Peyton,
384 US 312, 314, 86 S.Ct. 1505 (1966) 20

Rippo v. State,
368 P.3d 729, 132 Nev. Adv. Op. 11 (2016) 48

TABLE OF AUTHORITIES (Continued)

Sawyer v. Whitley,
505 U.S. 333, 336, 347 (1992) 50

Stacy v. Colvin,
825 F.3d 563, 568 (9th Cir. 2016) 44

State Engineer v. Eureka County,
133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) 44, 45

State v. Eighth Judicial District Court (Zogheib),
130 Nev. 158321 P.3d 882 (2014) 33

State v. Haberstroh,
119 Nev. 173, 180, 69 P.3d 676, 681 (2003) 49

Vanisi v. State,
117 Nev. 330, 336, 22 P.3d 1164, 1168 (2001) 4, 11, 46

Vanisi v. State,
126 Nev. 765, 367 P.3d 830 (table),
2010 WL 3270985 (2010) (unpublished) 3, 5, 40, 46

Weaver v. Massachusetts,
137 S.Ct. 1899 (2017) 19

Statutes

NRS 34.726(1) 48

NRS 34.735 40

NRS 34.735 (23) 40

NRS 34.735 (6) 40

/ / /

TABLE OF AUTHORITIES (Continued)

NRS 34.800(1)(b).....50

NRS 34.810(1)(b)(2).....49

Rules

NRPC Rule 1.2(a).....17, 18, 48

NRPC Rule 1.6(b)(5).....41

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RESPONDENT'S ANSWERING BRIEF

I. INTRODUCTION

In 1998, Siaosi Vanisi (hereafter "Vanisi") brutally murdered University of Nevada Reno Police Sergeant George Sullivan in an unprovoked and planned attack. He was sentenced to death by a jury. In 2011, after affirming the district court's rejection of the bulk of the claims contained in his second post-conviction petition, this Court remanded the matter for a very narrow purpose:

> ...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. The hearing should address whether trial counsel could have discovered and presented the evidence as well as whether there was a

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> reasonable probability of a different outcome at the penalty hearing had this additional mitigation evidence been presented.

34 AA 7299.

In 2018, the parties prepared for the limited evidentiary hearing pursuant to the order of this Court. But before the hearing was conducted, something unexpected happened: Vanisi explained that he no longer wished to pursue litigation in state court, and that he was not interested in penalty-phase relief. 38AA 7988-7991; 8036-8037. Instead, Vanisi was interested in moving to federal court faster, to continue pursuing trial-phase claims, even if that choice meant potentially hastening his execution. He asserted, repeatedly, that the Federal Public Defender's Office (hereafter "FPD,") would not listen to him or honor his litigation goal. *Id*. It quickly became apparent that Vanisi's description of the FPD's conflicting agenda was accurate.

The district court was reluctant to accept Vanisi's waiver, and wisely ordered two evaluations by mental health experts to ascertain his mental status and understanding of the proposed waiver. 37AA 7782.-7784. Both experts found Vanisi to be competent, despite his mental illness. Both experts also found Vanisi appreciated that the possibility of the federal courts granting him a new trial was remote, but wanted to proceed because

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a mere reduction of his death sentence was not Vanisi's goal.[1] After a thorough hearing on the evaluations, and an extensive canvass, the district court accepted Vanisi's waiver. 38AA 8157-8166. It found that as the client, Vanisi had the right to decide the goals of his litigation. *Id*.

The Opening Brief, filed by the FPD against Vanisi's wishes, and without his consent, approaches the issue of Vanisi's desired waiver—which was central to the proceedings below—as a mere afterthought. It buries the only issue properly before this Court in over a hundred pages of other arguments previously rejected on appeal, or not considered by the district court in the proceedings giving rise to this appeal. [2]

This litigation has now spanned over two decades. Vanisi, the client, has repeatedly been deemed competent and not insane by mental health experts. He has made his litigation objective known: he is not interested in penalty-phase relief. He has waived his right to the limited evidentiary hearing that was the subject of this Court's 2017 remand. He does not wish

[1] Consistent with his position at the district court, Vanisi attempted to file a pro se motion to dismiss this appeal, which this Court returned to him on October 31, 2019.

[2] In 2010, this Court found that the district court's conclusion that Vanisi was competent to be supported by substantial evidence, and the FPD's argument that the death penalty violates the Eighth Amendment to be procedurally barred. *Vanisi v. State*, 126 Nev. 765, 367 P.3d 830 (table), 2010 WL 3270985 (2010)(unpublished).

to further pursue state court litigation, including the instant appeal filed by the FPD against their client's wishes. This Court should find the waiver was validly made, and reject the rest of the Opening Brief's claims for relief.

II. STATEMENT OF THE CASE

Two decades ago, Vanisi was convicted by a jury of murdering University of Nevada Police Sergeant George Sullivan. 18AA 03817-03818. Vanisi was also convicted of three counts of Robbery with the Use of a Deadly Weapon and one count of Grand Larceny. 18AA 03819-03821, *Vanisi v. State*, 117 Nev. 330, 336, 22 P.3d 1164, 1168 (2001). Vanisi was subsequently sentenced to death. 18AA 03823-03824.

Vanisi appealed his conviction and this Court affirmed both the conviction and death sentence, noting that "[t]he evidence of Vanisi's guilt in this case is overwhelming." *Vanisi*, 117 Nev. at 334, 22 P.3d at 1167. Vanisi subsequently sought postconviction relief via a Petition for Writ of Habeas Corpus (Post-Conviction) ("First Petition") filed on January 18, 2002. 19AA 03933-03938. Counsel was appointed and filed Supplemental Points & Authorities to Petition for Writ of Habeas Corpus (Post-Conviction) ("First Supplemental") on February 22, 2005. 19AA 03954-04079. The district court denied the First Petition in its Findings of Fact, Conclusions of Law and Judgment filed on November 8, 2007. 21AA

04382-04396. Vanisi appealed and this Court affirmed the denial of his First Petition. *Vanisi v. State*, 126 Nev. 765, 367 P.3d 830 (table), 2010 WL 3270985 (2010) (unpublished).

Vanisi filed another Petition for a Writ of Habeas Corpus (Post-Conviction) ("Second Petition") through counsel on May 4, 2011. 15AA 03033 – 16AA 03269. The State filed a Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) ("Motion to Dismiss") on July 15, 2011. 32AA 06759-06764. Vanisi opposed the Motion to Dismiss on September 30, 2011, and the State filed a Response on October 7, 2011. 32AA 06765-06844. Following two days of hearings, the district court entered its Findings of Fact, Conclusions of Law and Judgment Dismissing Petition for Writ of Habeas Corpus on April 10, 2014. 34AA 07103-07108. Vanisi appealed. On September 28, 2017, this Court entered its Order Affirming in Part, Reversing in Part and Remanding. 34AA 07294-007318. The Court explained the singular purpose for which the case was remanded: to evaluate whether or not Vanisi was prejudiced by first post-conviction counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce additional mitigation evidence. 34AA 07300.

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After remand to the district court, a four-week long evidentiary hearing was scheduled to begin on October 1, 2018. 35AA 07324. Upon application by the State, the court found that Vanisi's presence was necessary at the hearing and entered an Order to Produce Prisoner to secure Vanisi's presence. 35AA 07325-07326. On April 2, 2018, the FPD requested reconsideration of the Order to Produce Prisoner based upon a Declaration executed by Vanisi on January 24, 2012. 35AA 07327-07335. In that Declaration, Vanisi sought to waive his appearance at an evidentiary hearing scheduled for February 23, 2012, while retaining his "right to be present at any evidentiary hearings which this Court may order in the future...." 35AA 07334. Specifically, Vanisi noted that "by waiving my right to attend the February 23, 2012 hearing, I do not wish to waive my right to be present at later hearings." *Id*. The State opposed the Motion for Reconsideration. 35AA 07347-07355. The FPD filed a Reply accompanied by a new Declaration from Vanisi seeking to waive his appearance at the October 2018 evidentiary hearing. 35AA 07356-07371. The court conducted a conference call with the attorneys for both sides and ruled that Vanisi needed to be transported so that the court "can weigh whether or not he totally understands what he's giving up in terms of not to be here." 35AA 07377.

Vanisi was ordered to be transported from the Ely State Prison to the Second Judicial District Court for a hearing on May 30, 2018, so that the court could determine whether he wished to waive his appearance at the evidentiary hearing. 35AA07385-07389. After canvassing Vanisi at that hearing on May 30, the court accepted his waiver of his appearance at the evidentiary hearing scheduled to begin on October 1 and for all future hearings until such time as Vanisi advised his attorneys otherwise. 35AA 07393-07400.

On July 24, 2018, the court filed a Request From Defendant that consisted of a handwritten letter from Vanisi that purported to be written on July 20, 2018. 36AA 07605-07606. In his Request, Vanisi told the court that he was "writing you to see if I can waive my evidentiary hearing." 36AA 07606.

The next day, the State filed a Motion to Set Hearing Regarding Vanisi's Request to Waive Evidentiary Hearing. 36AA 07607-07610. That same day, shortly after allowing Vanisi to sign a document waiving his right to be present at a critical proceeding, the FPD filed a Suggestion of Incompetency and Motion for Evaluation making the bare allegation that there was a good faith doubt about Vanisi's competency. 36AA 07611-07614. The State filed a Response on July 30, 2018, requesting additional

information for the good faith belief that Vanisi was not competent. 36AA 07667-07670.

Vanisi's attorneys filed a Reply on August 6, 2018, accompanied by a Declaration from FPD Randolph Fiedler, wherein Fiedler declared that he had difficulties advising Vanisi because of "an apparent delusion about the reality of Mr. Vanisi's case, the nature of the charges in this case, and the seriousness of the penalty that Mr. Vanisi faces." 36AA 07671-07684. Fiedler stated his apparently new-founded belief that his client was not competent to make decisions related to the litigation, stating that Vanisi's "mental illness is substantially affecting his capacity to appreciate his position" and that "he cannot make a rational choice about whether to continue or forego litigation in this case." 36AA 07684.

On August 20, 2018, the State filed an Addendum and provided the court with a letter that Vanisi wrote to the State's attorneys dated August 13, 2018. 36AA 07685-07690. In that letter, Vanisi indicated that he is "trying to waive my evidentiary hearing" and that he has "made repeated attempts to go through my attorney but they have rebuffed my request." 36AA 07690.

The court took up the competency and evaluation issue at a status conference on September 5, 2018. 37AA 07748-07775. The court spoke to

Vanisi directly who requested that the court "shoot down my lawyers' request for competency evaluation" as he believed they only wanted him evaluated "[b]ecause I said something contrary to what my lawyers were thinking." 37AA 07758-07759. Vanisi astutely predicted that "if I were to see a doctor again, I am quite sure they would find me competent. It would be a waste of resources, a waste of time on the Court's behalf if I were to see a doctor again." 37AA 07760. Vanisi clarified that he wanted to waive the hearing as a "tactical decision" because he did not want to pursue "any guilt phase penalty claim issues" but that his attorneys "are doing it anyway against my wishes." 37AA 07763. The court decided that competency evaluations were appropriate to determine whether Vanisi was competent to waive the evidentiary hearing. 37AA 07766. A hearing on those evaluations was scheduled for September 24, 2018. 37AA 07772-07773.

On September 24 and 25, 2018, the court conducted a hearing on the competency evaluations. 36AA 07830 – 38AA 08080. Drs. Steven Zuchowski and John Moulton both testified in support of their evaluations of Vanisi's competency. *Id.* Dr. Zuchowski concluded that Vanisi had the ability to appreciate his position to make a rational choice as to waiving his hearing, and that Vanisi's mental illness was in remission and did not affect his ability to engage in the process and make a rational decision. 37AA

07881-07882. Dr. Moulton similarly testified that Vanisi "has the capacity to waive the hearing," his thinking is not inherently irrational, and that he did not "see evidence that that mental illness is active to the degree that it would impair his ability to make this decision." 38AA 07994. After hearing the testimony of both doctors, the court ruled that Vanisi was competent to make the decision as to whether or not he wanted to waive his evidentiary hearing. 38AA 08008-08010.

Upon finding Vanisi was competent, the court inquired with Vanisi to determine whether he fully understood the consequences of his decision to waive the evidentiary hearing. 38AA 08011-08056. The court concluded that Vanisi was competent, aware of his position, and able to make the rational choice to waive the evidentiary hearing. 38AA 08055-08056.

The court later entered a written Order Granting Waiver of Evidentiary Hearing on February 6, 2019. 38AA 08157-08166. The court also entered a written Order Denying Relief. 38AA 08169-08173. The FPD filed a timely Notice of Appeal on February 25, 2019. 38AA 08181-08184.

Between the hearing and the entry of the written orders, the FPD filed a Motion for Leave to File Supplement to Petition for Writ of Habeas Corpus on September 28, 2018. 38AA 08083-08114. The State opposed on October 8, 2018. 38AA 08115-08122. The FPD filed a Reply on October 15,

2018. 38AA 08123-08135. Oral arguments on the Motion were held on January 25, 2019. 38AA 08136-08156. After hearing argument, the court denied the Motion. 38AA 08150-08152. The court entered a written Order Denying Motion for Leave to File Supplement on February 15, 2019. 38AA 08176-08180. Vanisi filed a timely Notice of Appeal on February 25, 2019. 38AA 08181-08184.

III. STATEMENT OF FACTS

A. Facts Underlying the Conviction

The following facts were recognized by this Court's 2001 decision denying Vanisi's direct appeal. *See Vanisi v. State*, 117 Nev. 330, 334-336, 22 P.3d 1164 (2001). During a visit to Reno in January 1998, Vanisi told several people that he wanted to murder and rob a police officer and take his badge, radio, gun and belt. Vanisi elaborated that he would kill the officer with an axe. *Id*. He bought gloves and a hatchet, and told family members he wanted to kill police officers. *Id*.

Early on January 13, 1998, Vanisi murdered and robbed University of Nevada Reno Police Sergeant George Sullivan on the UNR campus. At least two witnesses, including a police officer, observed Vanisi near the murder site shortly before the time of the killing. One officer testified that he observed Vanisi in the same area as Sullivan, who had recently made a

traffic stop. Vanisi had dreadlocks and was wearing a dark jacket. Subsequently, Sullivan was seen heading towards the area of a kiosk, a fairly well-lit area where officers wrote reports. *Id*.

Soon after, Sullivan's body was found lying under his police car near the kiosk. Sullivan's gun and gun belt were missing. The cause of death was multiple injuries to the skull and brain due to blunt impact trauma. *Id*.

Shortly after killing Sullivan, Vanisi proceeded to an apartment occupied by some of his relatives. He entered the apartment between 1:00 and 1:15 a.m. wearing a jacket and gloves and carrying a plastic grocery bag. Police found a hatchet in the apartment, as well as a pair of gloves, a jacket, and plastic bags containing items belonging to Sullivan. Vanisi's fingerprints were found on one of the bags. Stains on the hatchet and jacket contained Sullivan's DNA. The gloves contained DNA from both Sullivan and Vanisi. *Id*.

Vanisi told people he had killed a police officer after the officer completed a traffic stop. He bragged that he had worn a disguise to make himself look "Jamaican" when he knocked the officer unconscious and murdered him. A hat and wig were found discarded in a ditch not far

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from Sergeant Sullivan's body. *Id*. When Vanisi was finally apprehended in Utah, Sullivan's gun was found with him. *Id*.

B. Facts and Events After 2017 Remand

After the evidentiary hearing was set, the court filed a Request From Defendant that consisted of a handwritten letter from Vanisi that purported to be written on July 20, 2018. 36AA 07605-07606. The FPD had drafted and filed a 2018 waiver of the evidentiary hearing, and had their client sign it; but after Vanisi began contacting the prosecutor and the court to communicate his opposition the FPD's approach, their confidence in his competency to make decisions abruptly changed. 35 AA 07327-07335-5, 07356-07371. In his Request, Vanisi told the court that he was "writing you to see if I can waive my evidentiary hearing." 36AA 07606. Shortly after the State requested a hearing regarding the letter, the FPD began its quest to have Vanisi declared incompetent to make any decisions in his case. 36AA 07611-07614.

Vanisi also wrote a letter to the State's attorneys dated August 13, 2018. 36AA 07685-07690. In that letter, Vanisi indicated that he was "trying to waive my evidentiary hearing" and that he had "made repeated attempts to go through my attorney but they have rebuffed my request." 36AA 07690. At a status conference soon after, Vanisi directly requested

that the court "shoot down my lawyers' request for competency evaluation" because he believed they only wanted him evaluated "[b]ecause I said something contrary to what my lawyers were thinking." 37AA 07758-07759. Vanisi, having gone through the process many times before, predicted that "if I were to see a doctor again, I am quite sure they would find me competent. It would be a waste of resources, a waste of time on the Court's behalf if I were to see a doctor again." 37AA 07760. Vanisi wanted to make the "tactical decision" to waive because he did not want to pursue "any guilt phase penalty claim issues" but said that his attorneys "are doing it anyway against my wishes." 37AA 07763.

At the district court's direction, two mental health experts conducted competency evaluations. 36AA 07830 – 38AA 08080. After examining Vanisi, Drs. Steven Zuchowski and John Moulton both found Vanisi competent. 37AA 7791-7829. After hearing the testimony of both doctors, personally observing Vanisi, and hearing no evidence to establish incompetence, the court ruled that Vanisi was competent to make the decision as to whether or not he wanted to waive his evidentiary hearing. 38AA 08008-08010. After determining that Vanisi was competent, the court inquired with Vanisi to determine whether he fully understood the consequences of his decision to waive the evidentiary hearing. 38AA

08011-08056. The court concluded that Vanisi was competent, aware of his position, and able to make the rational choice to waive the evidentiary hearing. 38AA 08055-08056.

IV. SUMMARY OF ARGUMENT

This Court remanded this matter so that further evidence could be considered regarding Vanisi's claim of ineffective assistance of counsel as it pertained to mitigation strategy at sentencing. Counsel for both parties were ready to proceed. But prior to that hearing, Vanisi, who has been found repeatedly competent over the last two decades, explicitly advised both his attorneys, the State's attorneys, and the district court that he wished to cease litigation efforts aimed at commuting his sentence to a sentence other than death. Vanisi has written letters to the prosecution, the FPD, the district court, and this Court in an effort to have his voice heard. It may not be a choice that the FPD, the district court, or this Court agrees with, but it is his choice to make.

The 162 page Opening Brief is swollen with much academic and social debate regarding the righteousness of the death penalty, a question better postulated by the Nevada Legislature. It rehashes previously rejected arguments and procedurally barred claims. It illustrates the degree to

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which the FPD has ignored the limited purpose of the Court's remand, and their persistent intent to trample over the wishes of their competent client.

This Court should not consider the litany of procedurally barred arguments that have nothing to do with the purpose of the remand or the district court's acceptance of Vanisi's waiver. The experts have repeatedly opined that Vanisi is competent. This Court should find that Vanisi's waiver of the evidentiary hearing was valid and deny the other grounds for relief advanced by the FPD against their client's clearly articulated wishes.

V. STATEMENT OF ISSUES

A. This Court remanded this case for one clearly defined purpose: to conduct an evidentiary hearing with very limited scope. Following the remand, in 2018, Vanisi repeatedly expressed his desire to waive his remaining state court claim. Two mental health experts found Vanisi competent to make that decision. Did the district court err by accepting Vanisi's waiver, simply because the FPD disagreed with their competent client's litigation goal?

B. Where the FPD failed to establish facts supporting disqualification of the Washoe County District Attorney, did the district court err in denying their motion to disqualify without prejudice?

C. Where this Court found, in 2010, that Vanisi's claim regarding his right to self-representation was barred by the doctrine of the law of the case, should the claim be re-considered in this appeal?

D. Did the district court err in denying the FPD leave to file an untimely, successive, and abusive petition that fell outside the scope of this Court's limited remand order?

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VI. ARGUMENT

A. The District Court Properly Found Vanisi Competent to Waive the Evidentiary Hearing Contemplated By This Court's Order of Remand.

1. Standard of Review

"A district court's determination of competency after a competency evaluation is a question of fact that is entitled to deference on review. Such a determination will not be overturned if it is supported by substantial evidence." *Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006) (*internal footnotes omitted*).

2. Discussion

a. Vanisi retains the right to determine the goals of his litigation.

The FPD argues that the decision to waive the evidentiary hearing ordered by this Court in 2017 was not properly Vanisi's to make. Opening Brief ("OB") pp. 122-130; 38AA 08136-08156. Nevada Rule of Professional Conduct ("NRPC") 1.2 pertains to the "allocation of authority between client and lawyer." NRPC Rule 1.2(a) specifically provides that, subject to exceptions not in play here, "a lawyer shall abide by a client's decision concerning the objective of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." The Opening Brief asserts that because NRPC Rule 1.2(a) also

provides that "[a] lawyer shall abide by a client's decision whether to settle a matter," "as to a plea to be entered, whether to waive jury trial and whether the client will testify," the FPD is not obligated to abide the client's decision to waive an evidentiary hearing during postconviction litigation. OB 123. Such a narrow interpretation completely ignores that it is the client that gets to decide "the objectives of representation...." NRPC 1.2(a).

Here, Vanisi has made it abundantly clear that he does not wish to continue to pursue penalty-phase relief in the state courts. 38AA 08036-08040. His current objective in his post-conviction litigation is to pursue guilt-phase relief before the federal courts. "I think in federal courts is where I should be looking to. Besides, I don't want any penalty phase, your Honor." 38AA 8036. He understood that forgoing further penalty phase relief could result in his execution occurring sooner:

> THE COURT: Well, Mr. Vanisi, you understand—do you understand, I guess is my question, that you could end up losing all of your federal appeals?
>
> THE DEFENDANT: Yes, I understand that, Judge.
>
> THE COURT: And what do you see the end result being if you lose those appeals?
>
> THE DEFENDANT: I would be executed.
>
> THE COURT: And you understand that, if you give up this option to have this hearing and move forward with this, this issue, you're getting that much closer to execution?

THE DEFENDANT: Yes, I realize that, your Honor.

38AA 8037.

The FPD retains the ability to pursue particular arguments and make trial strategy-like decisions in furtherance of that goal, but the goal is set by their client. The United States Supreme Court recently reaffirmed this principle when it held that the client retains the right to make decisions such as whether or not to plead guilty, whether or not to reject the assistance of legal counsel, and whether or not to maintain innocence during the guilt phase of a criminal trial. *McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018). The *McCoy* court held that these types of choices "are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." *Id*. (*emphasis in original*) *citing Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017).

Vanisi's goal is to conclude his state level proceedings so that he may expeditiously proceed with his federal appeals where he can seek guilt-phase relief. His counsel can make the tactical decisions as to how best to achieve that goal, but they cannot substitute their own litigation objectives in place of Vanisi's. As a result, the district court properly found that Vanisi retained the ability to make the decision about whether to waive an evidentiary hearing.

b. Substantial evidence supports the finding that Vanisi was competent to waive the evidentiary hearing.

The relevant inquiry for determining whether a habeas petitioner is competent to waive or otherwise abandon their appeals comes from *Calambro v. District Court*, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998). In *Calambro*, this Court held that the test for determining "if a condemned habeas petitioner was competent to withdraw his petition for certiorari" requires "the trial court to determine whether the petitioner 'has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.'" *Id. quoting Rees v. Peyton*, 384 US 312, 314, 86 S.Ct. 1505 (1966).

Here, the district court heard from two witnesses who examined Vanisi and his medical records for the purposes of determining: "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." 37AA 07782-07784. Dr. Zuchowski and Dr. Moulton both concluded that Vanisi understood his position, could make a rational choice, and that while he

has a mental illness, it does not substantially affect his capacity to make a decision regarding waiving the hearing. 37AA 07881-07882, 38AA 07994. Before finding Vanisi competent to waive the scheduled evidentiary hearing, the district court conducted a hearing and heard from both doctors.

i. Dr. Zuchowski found Vanisi competent to waive the hearing.

Dr. Zuchowski is an adult psychiatrist who has worked at Lake's Crossing since 2004. 37AA 07837. Dr. Zuchowski undertook to evaluate Vanisi to determine "whether he understood and appreciated his position, and whether he was able to make a rational waiver of the evidentiary hearing. And, thirdly, whether his mental illness impacted that ability to make a rational waiver." 37AA 07838-07839. As part of his evaluation, Dr. Zuchowski met with and interviewed Vanisi in Carson City for approximately two hours on September 10, 2018. 37AA 07886, 07944. Dr. Zuchowski noted that Vanisi "was able to talk about his charge. His conviction. His sentence and so on." 37AA 07840. In other words, Vanisi demonstrated to Dr. Zuchowski that he not only had the capacity to understand his position, but that he in fact understood his position.

Dr. Zuchowski explained that this evaluation was different from many of the standard pre-trial competency evaluations that he is regularly called

upon to conduct. 37AA 07840. For instance, in most pre-trial competency evaluations, Dr. Zuchowski must ask a somewhat standard set of questions that simply did not apply to the circumstances here. 37AA 07839-07840. Dr. Zuchowski described the evaluation interview as "more of a conversation" rather than a rigid question and answer session. 37AA 07845-07846. Dr. Zuchowski described Vanisi as not appearing to have "an inflated self-esteem when I met with him" and said that Vanisi "actually seemed quite humble and quite easy to work with." 37AA 07849.

In discussing his federal claims, Vanisi described to Dr. Zuchowski that he thought his chances of prevailing in federal court were "excellent" but later downgraded that to "hopeful" while acknowledging the possibility that they could be denied. 37AA 07873. In response to a specific question from Vanisi's attorney regarding "overstating one's chance of success on appeal" as an example of a symptom of mania, Dr. Zuchowski replied that it could be a symptom, but that in this case he "looked at it more as an optimistic attitude as opposed to grandiosity." 37AA 07848. In regards to his optimism related to relief in the federal system, Vanisi explained to Dr. Zuchowski that his federal public defenders had told him that he had a "pretty good" chance at getting relief based upon reversible error that occurred during the trial. 37AA 07890-07891.

It appeared to Dr. Zuchowski that because Vanisi believed the federal courts to represent his best chance at relief that he wanted to move "his appeals into Federal court as quickly as possible and not be tied up in State court any longer." 37AA 07888, 07891. Dr. Zuchowski testified that Vanisi was able to understand that he might not prevail on any of his appeals and thus be executed some day. 37AA 07892. Dr. Zuchowski said that Vanisi appeared to understand all of the potential outcomes for his federal litigation and that he was not guaranteed to prevail on those claims. 37AA 07896. This recognition confirmed for Dr. Zuchowski that Vanisi's thought processes weren't delusional. 37AA 07892.

When asked specifically about his desire to waive the evidentiary hearing, Vanisi was able to explain his desire to waive the hearing in an "optimistic" or "hopeful" way, but one that Dr. Zuchowski ultimately concluded "did not flow from any delusion that I could detect." 37AA 07886. Dr. Zuchowski testified that Vanisi was able to explain that his decision was a tactical one and that it was Vanisi's desire to challenge the underlying conviction in addition to the death sentence, something that he can no longer do in state courts. 37AA 07887-07888. Throughout the course of the two-hour interview, Dr. Zuchowski challenged Vanisi's thinking and noted that Vanisi was able to maintain his composure and

"not appear particularly anxious or distressed in any way." 37AA 07900. Throughout their conversation, Vanisi was able to converse normally, expressed a variety of appropriate moods, and answered questions in a linear and logical manner. 37AA 07901-07904.

Vanisi perceptively explained to Dr. Zuchowski that he believed his current attorneys have a singular goal of overturning the death penalty and that they did not necessarily take into consideration other factors that were important to him, including seeking guilt-phase relief. 37AA 07914-07916. Vanisi expressed his opinion that life imprisonment without the possibility of parole in lieu of the death penalty was not necessarily any better for him, because he did not want to languish in prison. 37AA 07914-07916. Vanisi clearly demonstrated to Dr. Zuchowski that he understood his options and that he was able to make a rational choice in that he wished to proceed with guilt-phase claims instead of penalty-phase claims.

Dr. Zuchowski diagnosed Vanisi as being "schizoaffective bipolar type." 37AA 07850. Dr. Zuchowski also reviewed Vanisi's medication regimen and opined that his dose of Haldol Decanoate, a "long acting intramuscular antipsychotic," was "a relatively low dose." 37AA 07853. In his opinion, all of Vanisi's medications were "not an unusual combination"

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with Haldol being used to "treat the overall illness" and the other medications used to "augment" as needed. 37AA 07862.

Dr. Zuchowski noted that there was some question based upon the records whether Vanisi had received his monthly shot of Haldol in June, and Vanisi himself chimed in and stated that "I did take my shot in June." 37AA 07863-07865. Overall, Dr. Zuchowski did not testify to any concerns or apparent issues with Vanisi's medication regimen. In fact, Dr. Zuchowski believed that the totality of the medications Vanisi is taking "have him in a good place in remission." 37AA 07918-07919.

In concluding that Vanisi was competent to make the decision to waive his evidentiary hearing, Dr. Zuchowski considered a variety of sources of information: his interview with Vanisi, Vanisi's medical records from the prison, other competency evaluations that had been completed earlier during the course of the litigation, Mr. Fiedler's declaration, correspondence that Vanisi had written to the court, prison kites, and all of the mental health and medical records that were available to him. 37AA 07882-07884. Ultimately, Dr. Zuchowski expressed no doubt about Vanisi's competence, specifically as it related to his ability to make the decision to waive the evidentiary hearing.

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ii. Dr. Moulton found Vanisi competent to waive the hearing.

Dr. Moulton is a forensic psychologist who has worked for the past three years at Lake's Crossing. 37AA 07927-07929. In this case, Dr. Moulton set out to determine whether Vanisi could appreciate his position, understand where he is in the legal process, and whether his mental illness was impacting his ability to a rational decision. 38AA 07981-07982. Similar to Dr. Zuchowski, Dr. Moulton based his determination that Vanisi was competent on a variety of sources. Prior to interviewing Vanisi, Dr. Moulton reviewed Mr. Fiedler's declaration and also spoke with Vanisi's attorneys on a conference call during which they set out their concerns regarding Vanisi's competency. 38AA 07984-07985. Dr. Moulton also reviewed letters that Vanisi had written to the district court and to counsel which were short and to the point. 38AA 07986. In fact, based upon the allegations made by Vanisi's counsel, Dr. Moulton "went to NNCC fully expecting to see someone who is in a much worse condition based on the information that I had ahead of time." 38AA 07985.

Upon meeting Vanisi, Dr. Moulton testified that he presented in "a remarkably -- I don't know -- competent manner." 37AA 07950. Although Dr. Moulton testified that he does "not believe that Mr. Vanisi is malingering and I don't question that Mr. Vanisi has a serious mental

illness," he added that "I acknowledge that he has a mental illness but I don't see evidence that that mental illness is active to the degree that it would render him unfit." 37AA 07934, 07937. Thus, Dr. Moulton found that Vanisi's mental illness would not substantially affect his ability to rationally make a decision as to whether or not to waive the hearing.

Dr. Moulton testified that when asked specifically why Vanisi wanted to waive his evidentiary hearing, "he basically said he's not satisfied pursuing this penalty-phase relief. He wants guilt-phase relief." 38AA 07988. Vanisi explained that his goal is to obtain a new trial whereas his counsel's goal is to get him a new penalty hearing. *Id*. Dr. Moulton testified that Vanisi's desire to seek guilt-phase relief rather than penalty-phase relief did not flow from any delusion. 38AA 07989.

Dr. Moulton said Vanisi recognized that his chances at obtaining guilt-phase relief are "slim" but that it is a chance he wants to take, particularly in light of how long he has been incarcerated. 38AA 07990. When asked directly why he didn't want to have his evidentiary hearing before ultimately proceeding to federal court, Vanisi responded that he was "concerned about the delay and how long it would take." 38AA 07991. Vanisi acknowledged that he could lose his appeals in federal court and that "there's no guarantees." 38AA 07993. Dr. Moulton ultimately testified that

Vanisi "has the capacity to waive the hearing," that Vanisi's thinking was not inherently irrational, and that he did not "see evidence that that mental illness is active to the degree that it would impair his ability to make this decision." 38AA 07994.

The Opening Brief suggests that the interview with Drs. Zuchowski and Moulton was suspect, partly as a result of a correctional officer asking a question. OB p. 131. In support of this contention, the Opening Brief cites to a portion of the record wherein Vanisi's attorney argued to the district court that the guards "were participating either by interjecting or by asking questions." 38AA 08002. In fact, the record shows Dr. Moulton recalled a guard asked a question but could not recall who asked the question or what the question was. 37AA 07948. Dr. Zuchowski recalled that the guards were involved at two points during the interview: once to place leg shackles on Vanisi, apparently pursuant to a correctional policy, an event which Vanisi both appeared to expect and in fact prompted, and another time to provide information about educational and vocational programs available to inmates serving life terms that were not available to condemned inmates. 37AA 07843-07844, 07916, 07920. Dr. Zuchowski found the guards' input helpful as it provided information he was not aware of and that he was able to use in assessing Vanisi's thoughts about possibly being sent to general

population if his death penalty was overturned. Dr. Moulton did not even consider the guards' input. 37AA 07922-07922-23, 07948.

The Opening Brief also contends that "neither doctor appreciated the complexity of understanding the choice Vanisi was making..." OB, 132. This is simply untrue. Both doctors testified at length and in great detail that they pressed Vanisi to clarify what he understood his position to be, what he understood the choice he was making to be, and the consequences that would flow from that choice. Vanisi adequately demonstrated his understanding of these issues to both doctors and later demonstrated it to the court when it conducted a lengthy colloquy with Vanisi over the course of two days.

c. The court canvassed Vanisi and found that he had a rational understanding of his decision to waive the evidentiary hearing.

After concluding that Vanisi was competent based upon the testimony of the doctors, the court conducted a lengthy canvass of Vanisi regarding his decision. The court told Vanisi that it did not think he should waive the hearing. 38AA 08012. Vanisi told the court that nevertheless, he still wished to waive the hearing. 38AA 08014. Vanisi acknowledged that in so doing he would effectively be extinguishing his state court appeals. 38AA 08014-08015. The court asked Vanisi if it wouldn't be better just to have the hearing since it was already set and see if it made a difference. 38AA

08016-08017. Vanisi stated that he had already made up his mind to waive the hearing and the court told him that it was "trying to convince you that maybe it wasn't the right choice." 38AA 08017. Vanisi remained steadfast in his desire to waive the hearing. 38AA 08017.

The court instructed Vanisi to discuss the matter with his attorneys privately. 38AA 08018-08019. After conferring with his attorneys and the court, Vanisi still had not changed his mind about waiving the hearing. 38AA 08019. After a discussion between the attorneys about the legal effects of waiving the evidentiary hearing, Vanisi again reiterated that he wanted to waive the hearing. 38AA 08031. When asked if he could describe why he felt so strongly about wanting to waive the hearing, Vanisi indicated that it had been a long day and accepted the court's invitation to "sleep on it" and proceed again the following morning. 38AA 08031-08032.

On September 25, 2018, Vanisi again told the court that he wished to waive the hearing. 38AA 08036. Vanisi said that he wanted to waive the hearing to "maneuver myself to a better -- to a better advantage position" and that he did not "want any penalty-phase relief...." 38AA 08036-08037. Vanisi confirmed that he understood he could lose all of his federal appeals and that he could be executed as a result. 38AA 08037. Vanisi told the

court that he was not interested in penalty-phase relief because he could have the death penalty re-imposed or be sentenced to life without the possibility of parole, neither of which was something he was interested in as he did not want to spend the rest of his life in prison. 38AA 08038-08039.

Upon clarification by the State and the court, Vanisi recognized that he was potentially eligible for a sentence with the possibility of parole but stated his belief that he did not think any jury would grant him the opportunity of parole. 38AA 08045-08046. Vanisi told the court that he wanted to proceed with his federal appeals and was not interested in penalty-phase relief "[b]ecause the outcome of that is not so much better than what I've got now." 38AA 08039-08040.

The court took a recess so that Vanisi could review the Nevada Supreme Court's ruling with his attorneys and consider what it said about his likelihood to prevail on guilt-phase relief in habeas proceedings. 38AA 08042-08047. After the recess, Vanisi indicated that he believed he would be successful in federal court, "but if they're not successful, then I'm okay with that." 38AA 08047.

Vanisi also voiced his understanding that waiving the hearing was a permanent choice and would preclude additional appellate review. 38AA 08049-08050. The court again told Vanisi that it wanted to "convince you

to have the evidentiary hearing" but that ultimately it was his decision to make. 38AA 08054. The court concluded by saying that it believed Vanisi was making the wrong decision, but that it was his decision to make, he was competent to make it, he understood the consequences of the decision, and therefore would accept his waiver. 38AA 08055-08056.

After hearing additional argument and breaking for lunch, Vanisi again said that he wanted to waive the hearing. 38AA 08074. During the January 25, 2019, hearing on the motion for leave to supplement the petition, the court briefly addressed Vanisi. 38AA 08149-08150. Vanisi again reiterated his desire not to go forward with the evidentiary hearing. 38AA 08150.

Over the course of approximately six months and three hearings spread across four days, Vanisi remained steadfast in his desire to waive the evidentiary hearing. Vanisi never expressed anything other than a desire to waive the evidentiary hearing to the court, to his evaluators, or to his counsel. In the absence of any evidence to the contrary, the district court relied upon the substantial evidence of Vanisi's competency presented in the form of Drs. Zuchowski and Moulton's testimony. In addition, the court conducted an in-depth canvass with Vanisi and asked him repeatedly whether this was what he actually wanted to do. The court even went so far

as to try to convince Vanisi that it believed he was making the wrong decision. However, Vanisi never wavered in his desire to waive the evidentiary hearing in order to conclude his state appeals and proceed with attempting to obtain guilt-phase relief in the federal system. He expressed his rationale for wanting to make this tactical decision clearly and on multiple occasions to multiple people, including mental health experts.

Based upon the substantial evidence of Vanisi's competency and its own subsequent canvass of Vanisi, the district court properly concluded that Vanisi was competent and capable of deciding to waive his evidentiary hearing.

B. The District Court Properly Denied the Motion to Disqualify the Washoe County District Attorney's Office.

1. Standard of Review

The decision to disqualify a prosecutor's office based on an alleged conflict of interest arising from an attorney's possession of, or exposure to, privileged information lies within the sound discretion of the trial court. *Collier v. Legakes*, 98 Nev. 307, 309, 646 P.2d 1219 (1982)(*overruled on other grounds by State v. Eighth Judicial District Court (Zogheib)*, 130 Nev. 158321 P.3d 882 (2014).

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2. Discussion

During the proceedings after the 2017 remand, the FPD alleged that the Washoe County District Attorney's Office (hereafter "WCDA,") should be disqualified based on two arguments. First, the FPD alleged that in 2002, the Washoe County Public Defender's Office (hereafter "WCPD,") believed that the WCDA represented them in the context of post-conviction proceedings, and disclosed privileged information to a former prosecuting attorney for the WCDA. Second, the FPD alleged that in 2018, the WCDA acted unethically because it contacted Vanisi's former counsel and a former defense investigator to discuss their strategy as it related to the remaining ground of the Second Petition. The district court appropriately found that the FPD did not establish the existence of a basis for disqualification.

a. No disqualification was warranted due to the WCDA obtaining a memorandum at the behest of first post-conviction counsel.

The FPD claims there was "confusion" regarding whether or not the WCDA represented the WCPD for purposes of the first post-conviction proceeding that occurred in 2002. The FPD further claims that this purported confusion "allowed the district attorney's office to obtain privileged and confidential information" from the WCPD and that the district court erred in declining to disqualify the WCDA. OB, 138.

The gravamen of the FPD's first complaint is that in 2002, at the express, uncontested request of then post-conviction counsel Scott Edwards and Marc Picker, the WCDA obtained a copy of the SCR 250 Memorandum from the WCPD. Although the transcript had been available since 2002, the FPD waited at least eight years to seek to disqualify the WCDA for the professional courtesy extended by the WCDA to prior habeas counsel.

The transcript from the July 1, 2002, hearing reveals that prior post-conviction counsel Marc Picker and Scott Edwards had difficulty getting the SCR 250 Memorandum from the WCPD, and that Edwards asked former Chief Deputy District Attorney Terry McCarthy for assistance, because Picker and Edwards were concerned they did not have enough discovery to meet a looming deadline. McCarthy obliged the request of first post-conviction counsel.

During the 2002 hearing, Picker described what he perceived to be ongoing difficulties with the WCPD in obtaining the entire trial file on Vanisi: "...in looking through things and looking through the court file, we determined that we had not received a Rule 250 memo, that being a memo of counsel as to how the death penalty case had been run, decisions had been made." 36AA 7714. Picker indicated that he had written a letter to the

WCPD requesting the SCR 250 Memorandum, but received no response. *Id*., 7714. Picker explained:

> What we did end up with is on Friday Mr. McCarthy, through I'm not even sure how at this point, he ended up with a copy of the memo. Now, I'm not sure under the rule that's proper, but somehow we now all got it. Because, but Mr. McCarthy has a copy, and I know my client's never agreed to that, but he never waived it, but here we are, and we received a copy through Mr. McCarthy.
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> *Id*., 7716.

The FPD claims that the WCDA failed to correct some alleged misimpression by either post-conviction counsel or the WCPD regarding whether the WCPD represented Vanisi's trial counsel. OB, 143, fn. 54. This argument ignores the actual record of what occurred. At the 2002 hearing, Picker explained that McCarthy obtained the SCR 250 Memorandum at the behest of Picker's then co-counsel Scott Edwards:

> And I know that we have, Mr. Edwards and Mr. McCarthy talk frequently, Mr. McCarthy has attempted to help. I know he spent all last week getting us the Rule 250 memo, is my understanding. I believe Scott called him last Monday or maybe the Friday before that.
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> *Id*., 7716.

McCarthy then advised the district court that after obtaining the SCR 250 Memorandum at the behest of first post-conviction counsel, Picker and

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Edwards, he possessed it for an hour and delivered it to them without reading it:

> MR. McCARTHY: *Well, first off, the public defender is not my client. The public defender's office has witnesses that may appear in this action*. I represent the State and the warden, not the public defender's office, which usually is something I have to explain to a young public defender.
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> I got my Rule 250 memo by calling up and politely asking for it, and Steve Gregory took time out of his day and found it and copied it. I don't know why it wasn't done before. I didn't find it very difficult. It took me all of three minutes to arrange it.
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> THE COURT: How long have you had it?
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> MR. McCARTHY: About an hour before I gave it to Mr. Edwards. I haven't read it, by the way. To the suggestion that I shouldn't have it, I say those that want to keep secrets shouldn't file the lawsuit.
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> We also ran an explicit, express waiver waiving the attorney-client privilege, which would seem to cover any communications as to work product. That privilege is owned by the public defender. They can waive it or not waive it as they wish.
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> *Id*., 7719. (emphasis added).

The doctrine of waiver also applies to the FPD's claim. The FPD has represented Vanisi since 2011, but waited until 2019 to raise this issue. To the extent that Vanisi might arguably have been able to object to McCarthy obtaining SCR 250 Memorandum in 2002, Picker and Edwards did not object or seek any remedy, thereby waiving it on

behalf of Vanisi. If the FPD thought that the decision to waive the issue was wrong, it had many years to assert that via a claim of ineffective assistance of first post-conviction counsel, and did not do so in the Second Petition. The Nevada Supreme Court has recognized that the doctrines of waiver and laches apply in the context of a post-conviction petition, even in capital cases. *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001).

Even if the FPD had not waived its disqualification argument, its earlier decision to make the SCR 250 Memorandum a public document by filing it as an exhibit in support of the Second Petition makes the argument incredibly difficult to support. The FPD filed the SCR 250 Memorandum on May 5, 2011, thereby making it a matter of public record. 18AA 3841-3859, 19AA 3860-3905.

The district court expressly found that the FPD's assertion that the WCDA should be disqualified was "based upon supposition and guesswork." 37AA 7787-7789. It found that the FPD failed to allege "facts that would establish a specifically identifiable impropriety occurred, and the record and undisputed facts do not support a finding that the likelihood of public suspicion outweighs the interests that will be served by the WCDA's continued participation in Petitioner's post-conviction

proceedings" but allowed the FPD to raise the issue again if it developed additional factual basis to support its position. *Id.*, *citing Cronin v. Eighth Judicial Dist. Court, In and For County of Clark*, 105 Nev. 635, 641, 781 P.2d 1150 (1989).

b. No disqualification was warranted due to the WCDA contacting the Public Defender's former investigator in anticipation of the 2019 evidentiary hearing.

Next, the FPD alleges that disqualification was warranted because the WCDA called a former defense investigator in preparation for the 2019 evidentiary hearing that Vanisi ultimately waived. OB, 143, fn. 54. The FPD alleges in a footnote that the former defense investigator who had been assigned to gather mitigation information, Crystal Calderon-Bright, was told by the WCPD that the WCDA represented the public defender's office. OB, 143, fn. 54. However, to date, the FPD has provided absolutely no evidence to support this dubious claim. In a familiar pattern, the citation provided by the FPD to support this allegation on appeal is just to its own argument, not any affidavit, transcript, or statement provided by Calderon-Bright or anyone else that actually supports the allegation. *Id.*; 35AA 7451-52.

Consistent with its regular practice, in preparing for the hearing ordered by the 2017 remand, the WCDA requested to interview Vanisi's

former counsel, former Washoe County Public Defender Jeremy Bosler, as well as the defense investigators, regarding their mitigation strategy. This was not unethical because by filing the Second Petition, Vanisi waived his right to attorney-client privilege with respect to matters relevant to the ineffective assistance of counsel claims.

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

It is well-established in Nevada that where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to communications with his allegedly ineffective lawyer relating to the claims. NRS 34.735; *Molina v. State,* 120 Nev. 185, 87 P.3d 533 (2004). This Court has previously recognized that "Vanisi expressly waived his attorney-client privilege as it related to representation at trial." *Vanisi v. State*, 126 Nev. 76, 367 P.3d 830 (2010). The same rule has long existed in the federal courts. If habeas petitioner raises a claim of ineffective

assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer. *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003).

NRPC 1.6(b)(5) provides that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client. The plain language of NRPC 1.6(b)(5) also allows for an attorney to communicate regarding allegations of ineffective assistance of counsel.

In trying to establish some wrongdoing by the WCDA, the FPD cited to ABA Formal Opinion 10-456, which has never been adopted by the Nevada State Bar, or this Court. While their motion to withdraw was pending, on July 2, 2018, the Nevada State Bar's Standing Committee on Ethics and Professional Responsibility (hereafter "the Committee") issued Formal Opinion 55, expressly rejecting ABA Opinion 10-456. [3] Although Formal Opinion 55 was apparently withdrawn in order for the Committee to allow further commentary from interested parties, the fact remains that

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[3] Formal Opinion 55 was later withdrawn pursuant to an Order of the Nevada Supreme Court.

no authority in Nevada, binding or advisory, prohibited the WCDA from contacting Vanisi's former defense team.

c. The FPD's Claims of Confidentiality Are Disingenuous As the FPD Made Nearly Two Hundred Pages of Privileged, Confidential, and Sensitive Client Information Part of the Public Record.

The FPD's serious allegations of ethical violations ring particularly hollow in light of the approximately two hundred pages of confidential internal memoranda, emails, and declarations attached to the Second Petition as exhibits. 18AA 3841-3859; 19AA 3860-4080; 28AA 5816, 5856-5857; 5859-5861; 5869-5895; 5906-5940; 32AA 6712-6718. These exhibits included the declarations of former attorneys Jeremy Bosler and Stephen Gregory about mitigation strategy. *Id*. They also included Washoe County Public Defender Michael Specchio's memorandum completed pursuant to SCR 250. *Id*. The FPD also included additional internal file documents, emails, and memoranda from the WCPD's office. *Id*.

The FPD also filed Specchio's SCR 250 Memorandum. This highly sensitive, confidential document was over one hundred pages of privileged, and at times damning, information about Vanisi, including Vanisi's request that the defense team pursue a fraudulent and dishonest defense. 18AA 3841-3870. It included Specchio's analysis and observation regarding trial

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strategy, mitigation strategy, Vanisi's admissions of guilt, Vanisi's desire to blame the crime on a relative, and Vanisi's total lack of remorse. *Id.*

Additionally, former defense investigator Calderon-Bright's declaration regarded defense team communications about mitigation experts, potential travel to Tonga, conversations with Bosler, conversations with Specchio, Specchio's decisions regarding interviews of family members and mitigation witnesses, and her opinions about the performance of counsel. 28AA 5816. The FPD also filed an internal memorandum from Specchio, which indicated Dr. Lynn's findings that Vanisi was not insane and spoke of the murder nonchalantly. The memorandum also indicated that Vanisi admitted to lying in wait for Sergeant Sullivan because he hated cops and wanted to use the sergeant's gun to rob a convenience store. *Id.*, 5856-5857.

Another letter from Specchio to the federal public defender indicated that Vanisi had admitted to "pulling the chains" of the authorities while in jail. 28AA 5664. Additional internal documents filed by the FPD indicated that he admitted to having the hatchet in his right and left hand during the murder, summaries of interviews of potential mitigation witnesses, correspondence between Specchio and mitigation expert Scharlette Holdman, and indications by the Tongan community that they did not want

to support Vanisi, efforts by Specchio to contact cultural experts, Specchio's conversations with Vanisi, memos from Specchio to Calderon-Bright, and memos from Calderon-Bright to defense investigator Evo Novak. 28AA 3832-5893; 5894; 5899; 5904.

C. The Question of Vanisi's Right to Self-Representation Was Decided By the Nevada Supreme Court in 2001, and Falls Outside the Narrow Scope of the Remand Order.

1. Standard of Review

"When an appellate court remands a case, the district court 'must proceed in accordance with the mandate and the law of the case as established on appeal.'" *State Engineer v. Eureka County*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) *quoting E.E.O.C. v. Kronos Inc.*, 694 F.3d 351, 361 (3d Cir. 2012) (internal quotation marks omitted). "The district court commits error if its subsequent order contradicts the appellate court's directions." *Id., citing Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016).

2. Discussion

This Court remanded Vanisi's case for the limited purpose of conducting an evidentiary hearing "concerning whether Vanisi was prejudiced by postconviction counsel's failure to substantiate their claim of ineffective assistance of counsel for failure to introduce additional mitigation evidence." 34AA 07300. That was the only purpose for the

remand. In recognition of this fact, the district court denied the FPD's request to supplement the Second Petition. 38AA 08176-08180. The district court properly conducted limited proceedings in accordance with this Court's orders on remand. To allow the FPD to expand the scope of the hearings on remand, to supplement his petition, or to make additional arguments not heard by the district court, would effectively hold that the district court should have disregarded this Court's mandate in violation of *State Engineer v. Eureka County*, *supra*, and the express guidance in the order remanding.

The Opening Brief argues that "[t]he trial court denied Vanisi's request to represent himself pursuant to *Faretta v. California,* 422 US 806, 833-34 (1975)." OB p. 148. This Court, in deciding Vanisi's direct appeal in 2001, concluded that the district court had "acted within its discretion" in denying Vanisi's self-representation request on the grounds that Vanisi's request "was part of a pattern of dilatory activity," "Vanisi had shown himself unable or unwilling to abide by rules of procedure and courtroom protocol," and based upon the complexity of the case. 117 Nev. 330, 337-342, 22 P.3d 1164, 1169-1172 (2001).

In 2010, while ruling on Vanisi's appeal related to his first postconviction petition, the Court recognized that "Vanisi's claim[] that he

was denied the right to represent himself... [was] addressed on direct appeal" and was "therefore barred by the doctrine of the law of the case." *Vanisi v. State*, 126 Nev. 765, 367 P.3d 830 (table), 2010 WL 3270985 at *2 (2010) (unpublished) *citing Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006); *Vanisi v. State*, 177 Nev. 330, 337-41, 344 P.3d 1164, 1169-72, 1173-74 (2001). Vanisi's argument that he was denied the right to represent himself remains barred by the law of the case doctrine.

The Opening Brief also contends that Vanisi was constructively deprived of counsel during his trial as a result of the trial court's rejection of counsel's request to withdraw. OB pp. 153-157. This claim has also been raised previously. In the First Supplemental Petition, initial habeas counsel filed a claim alleging violation of Vanisi's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights based upon the district court's alleged error in refusing to allow trial counsel to withdraw. 19AA 03989-03993. The district court denied this claim. 21AA 04387-04389. This Court affirmed, holding that the district court did not err in finding that the claim was one of sixteen that was "procedurally barred, barred by the doctrine of the law of the case, or without merit." *Vanisi v. State*, 126 Nev. 765, 367 P.3d 830 (table), 2010 WL 3270985 at *2 (2010) (unpublished). This claim is also subject to the doctrine of the law of the case and barred.

D. The District Court Appropriately Denied the FPD's 2018 Motion to File An Untimely, Procedurally Barred Supplemental Petition.

1. Standard of Review

Where the issue is whether or not good cause exists to excuse procedural bars, this Court will not disturb the district court's decision absent an abuse of discretion. *Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989).

2. Discussion

a. The supplemental petition was pursued against the competent client's consent.

Only after the district court denied the FPD's motion to disqualify the WCDA, and after it allowed Vanisi to waive the evidentiary hearing against the FPD's advice, did the FPD seek to supplement the Second Petition it filed in 2011. 38AA 8088-8114. The district court properly denied the motion, for a number of reasons.

Vanisi waived his remaining postconviction ground after two competency evaluations, and a thorough canvass. The FPD made no showing that Vanisi desired to withdraw his waiver. Although the FPD continued to argue about Vanisi's "severe mental illness," this characterization was not offered by either Dr. Moulton or Dr. Zuchowski. More importantly, Vanisi clearly told the district court that he did not want

any form of penalty relief in state court. Dr. Moulton and Dr. Zuchowski found Vanisi competent. The district court found Vanisi competent. The FPD did not present any new information to challenge that finding. They were unauthorized by either Vanisi or the law to request that the district court allow them to amend the Second 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").

b. The proposed supplemental petition was procedurally barred without good cause for the delay, because the FPD knew for years that Vanisi had been diagnosed with mental health conditions, and had displayed bizarre behavior.

In addition to being contrary to their client's wishes, the new claim in the proposed supplemental petition was 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) (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.).

The FPD continues to claim that Vanisi is ineligible for the death penalty. But the FPD 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, the FPD continues to blatantly ignore their client's desire and pursue their own agenda, disregarding the district court's finding that Vanisi competently waived his hearing.

Citing *Barnhart v. State*, 122 Nev. 301, 130 P.3d 650 (2006), they assert that the district court erred in denying leave to supplement the petition, because the "severe mental illness" claim was "not available sooner." OB, 121. *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. The FPD never made that showing, and cannot make that showing.

Vanisi's mental illness has been well-known for years, and the FPD's assertion that it did not previously know Vanisi had been diagnosed with mental illness is disingenuous. In the Opening Brief, the FPD dedicates the bulk of its factual recitation to recounting manifestations of mental illness beginning in 1998. OB, 7-23, 31-47. In fact, in a letter dated October 6, 1998, Assistant Federal Public Defender Michael Pescetta indicated that he had "received some information that Mr. Vanisi may be suffering from a bipolar disorder..." 27 AA 05863. In support of its insistence that Vanisi is too mentally ill to be executed, it cites to Dr. Bittker and Dr. Amezaga's testimony in 2005. OB, 35-38. The FPD also uses the opinions of Dr. Mack and Dr. Foliaki, offered in 2011, to support the same argument. No explanation is offered for why the FPD waited at least eight years to raise the claim in the supplemental petition.

The petition was procedurally barred, without good cause. NRS 34.726(1); *Rippo v. State*, 368 P.3d 729, 132 Nev. Adv. Op. 11 (2016). The district court properly rejected it.

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c. Mental illness does not operate to stay or bar execution.

The "severe mental illness" alleged by the FPD is not a bar to Vanisi's execution. To bar or stay an 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 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.").

There is absolutely no evidence that Vanisi is insane or incompetent to make decisions about his litigation goals. To the extent that the FPD urges this Court to bar execution of all non-insane, competent persons who have been diagnosed with mental health conditions, the State respectfully asserts that such a position would depart sharply from United States

Supreme Court precedent. It is a question best posed to the Legislature, not this Court.

VII. CONCLUSION

Based on the foregoing, the State respectfully asserts that the FPD's appeal should be denied, and that this Court should affirm the district court's acceptance of Vanisi's waiver of the proceedings contemplated by the 2017 remand.

VIII. ROUTING STATEMENT

Because this appeal pertains to a post-conviction petition in a capital case, the Nevada Supreme Court should retain this appeal. NRAP 17 (a)(1).

DATED: December 12, 2019.

CHRISTOPHER J. HICKS
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 80 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: December 12, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 12, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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