Case No. 78209

Supreme Court of Nevada

Electronically Filed
Mar 16 2022 03:35 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Siaosi Vanisi,

Appellant,

vs.

William A. Gittere, Warden,

Respondent.

Petition for Rehearing

DEATH PENALTY CASE

Appeal from the Second Judicial District Court

Rene L. Valladares
Federal Public Defender
Randolph M. Fiedler
Assistant Federal Public Defender
Nevada State Bar No. 12577
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

State Statutes

Other

I. Introduction

Petitioner Siaosi Vanisi seeks rehearing of this Court's January 27, 2022 Order affirming the district court's denial of his post-conviction petition because this Court overlooked or misapprehended a material fact in the record, namely the manner in which the district denied relief. *See* NRAP 40(c)(2),

Vanisi asked this Court to recognize that the Nevada Constitution prohibits the execution of those who suffer severe mental illness. Opening Br. at 62–121. Mr. Vanisi's mental illness—and its seriousness—are beyond dispute.[1] The American Bar Association, the American Civil Liberties Union of Nevada and the Capital Punishment Project and Disability Rights Project of the American Civil Liberties Union, the Clark County Public Defender, the Clark County Special Public Defender, the Nevada State Public Defender, the Washoe County Alternate Public Defender, the Washoe County Public Defender, Nevada Attorneys for Criminal Justice, and Nevada Law Professors all

[1] The Opening Brief documented a lifetime's worth of evidence of Mr. Vanisi's serious mental illness. *See* Opening Br. at 7–57.

filed amicus briefs supporting Mr. Vanisi's position. All of these parties assumed this legal issue would be before this Court.

This was an eminently reasonable assumption because this issue was before this Court. The district court's denial of Vanisi's claim was based on its reasoning that Vanisi's severe mental illness could not excuse any applicable procedural default. 38AA08177. Vanisi asserted it could: by rendering him ineligible for the death penalty, his severe mental illness established actual innocence and fell within this Court's miscarriage of justice jurisprudence. *See* 38AA8086–87, 38AA8127–29; *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

In briefing this argument for this Court, both Vanisi and the State understood the key issue to be whether Vanisi's severe mental illness establishes actual innocence of the death penalty that qualifies as a miscarriage of justice. Opening Br. at 115–21; Ans. Br. at 48–52. The district court's, the State's, and Vanisi's analyses shared a common assumption: a miscarriage of justice would warrant his supplement and excuse any other procedural default.

Rather than address this issue, this Court created a new basis for the district court to have denied relief, and then affirmed that creation. Order at 5–6. Specifically, this Court held:

> We do not think it outside the bounds of law or reason, nor arbitrary or capricious for the district court to conclude that the time to supplement a postconviction habeas petition is *before* the district court has entered a final judgment denying the petition, the appellate court has affirmed the decision as to all but one claim that is then remanded for an evidentiary hearing, and the district court has orally rejected the remanded claim.

Order of Affirmance, at 6 (Jan. 27, 2022) (hereinafter Order). This reasoning—for which none of the parties offered briefing—was not the district court's basis for its denial.

Because this Court's order overlooked and misapprehended the material facts in the record, Vanisi petitions this Court for rehearing.

II. Argument

This Court considers a petition for rehearing when the Court has "overlooked or misapprehended a material fact in the record or a material question of law in the case" or when the Court has "overlooked,

misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c).

A. This Court overlooked or misapprehended the basis for the district court's order in denying Vanisi's severe mental illness claim.

After allowing Vanisi to waive his evidentiary hearing, the district court verbally denied Vanisi's claim that trial counsel were ineffective for failing to learn and present mitigating evidence, specifically the evidence of Vanisi's mental health issues. 38AA08074. This order effectively meant that the evidence of Vanisi's mental health issues—the most important mitigating evidence in his case—no longer had a forum for consideration in Nevada. Vanisi then moved to supplement his petition to add a claim that he suffered from severe mental illness and that his severe mental illness rendered him categorically ineligible for the death penalty. 38AA08083.

After hearing argument on this motion, the district court denied relief, holding that the case had not been "remanded to this [c]ourt for purposes of augmenting the alleged new claims, addressing anything new. Therefore, an amendment to it at this stage in the proceedings is improper." 38AA08150–51. The court continued: "But in all of the

pleadings on the motion, I don't see any basis for this Court to extend jurisdiction that was provided to me by the Supreme Court on the 2011 Habeas." 38AA08151. The court ordered the State to draft the order. 38AA08152.

The State drafted an order substantially expanding on the district court's oral ruling. Vanisi objected to this expansion of the court's rulings, but the district court adopted the order as drafted. First the State drafted order held that counsel lacked the authority to file the supplement because it was contrary to Vanisi's wishes. *See* 38AA08177. Second, the State drafted order held that the claim was procedurally defaulted, and that Vanisi had not shown he could overcome the procedural default. 38AA08178. As to Vanisi's request to supplement, the order reasoned that "good cause requires, that, after the proceeding counsel must demonstrate that the new claim could not have been presented earlier." 38AA08178. Finally, the state drafted order concluded that "whether Vanisi is mentally ill to stay his execution is not within the purview of the Nevada Supreme Court's order" and added that "[t]here are other mechanisms by which a capital defendant

may challenge the execution of his sentence based on his current mental status." 38AA08179.

Absent from the district court's oral or written order is anything resembling this Court's reasoning. The district court did not deny leave to supplement as a matter of its discretion; the district court verbally denied leave to supplement as a matter or jurisdiction. 38AA08150–51. However, this was inaccurate as a matter of law. Both the mandate rule and the law of the case doctrine require "that 'the appellate court . . . actually address and decide the issue [raised] explicitly or by necessary implication.'" *Estate of Adams v. Fallini*, 132 Nev. 814, 819, 386 P.3d 621, 624 (2016) (modifications in original) (quoting *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010)). Nothing in this Court's previous order ruled on Vanisi's motion to supplement; thus the district court was not deprived of jurisdiction to allow the

supplement.[2] This misapplication of law would, itself, be an abuse of discretion.[3]

But the district court's written order sidestepped this problem altogether by inserting a wholly different analysis. Rather, it denied leave to supplement because (1) "Vanisi's counsel has no authority to override petitioner's desire to waive further litigation in this matter," 38AA08177; (2) "The new claim is also procedurally defaulted," that "Vanisi has not shown good cause to overcome the procedural bar" and that "good cause requires . . . demonstrat[ing] that the new claim could not have been presented earlier," 38AA08177–78; and (3) "whether Vanisi is mentally ill to stay his execution is not within the purview of the Nevada Supreme Court's order," 38AA08179. The district court's order did not deny Vanisi's leave to supplement by relying on the court's

---

[2] Indeed, this Court's discussion of the mandate rule in its order supports that the district court oral ruling was in error. As this Court explained, the mandate rule is not absolute, and this Court's previous decision did not address whether Vanisi could supplement his petition with new claims. *See* Order at 5.

[3] However, abuse of discretion is the wrong legal standard for this Court's review of the mandate or law of the case doctrine. Assuming this Court reviews the district court's oral ruling, the review would be de novo. *In re Adams*, 132 Nev. at 818, 386 P.3d at 621.

discretion under NRS 34.750(5). *Compare* Order at 5–6 *with* 38AA08176–79.

The abuse of discretion standard is deferential, but not absolute. And, it presumes review of the district court's actual decision, not alternate bases for that decision. *See, e.g.*, *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 ("we review a district court's *decision* . . . ." (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). Thus, this Court erred by affirming on a basis beyond the district court's decision.

B. This Court overlooked or misapprehended that the district court's decision denying leave to supplement was an abuse of discretion.

This Court overlooked that the district court's actual reasoning was an abuse of discretion. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender*, 122 Nev. at 1435, 148 P.3d at 714 (quoting *Jackson*, 117 Nev. at 120, 17 P.3d at 1000). Though the abuse of discretion standard is deferential, "deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010); *see also Koon v. United States*, 518 U.S. 81, 100

(1996) ("A district court by definition abuses its discretion when it makes an error of law.").

The ruling that Vanisi's counsel lacked authority to override Vanisi's "desire to waive further litigation in this matter" is belied by the record. As discussed in detail in the Opening Brief, Vanisi consistently stated his intent to waive his evidentiary hearing and not once stated he wished to waive anything else. *See* Opening Br. at 111–14.[4] Notably, the district court's actual order accepting Vanisi's waiver itself limits the scope of the waiver to the evidentiary hearing. 38AA08157; 38AA08163–65. And the district court's denial of relief on Vanisi's substantive claim of ineffective assistance of trial counsel itself was predicated on the limited scope of Vanisi's waiver:

> Petitioner has waived his right to the hearing ordered by the Nevada Supreme Court . . . . Because Petitioner has not presented any evidence that the outcome of the proceedings would have been different had additional evidence been presented, he has failed to demonstrate prejudice.

---

[4] *See* 38AA08036 ("Judge, I still want to move on—move ahead with waiving my evidentiary hearing."); 38AA08044 ("But I want to waive my evidentiary hearing."); 38AA08053 ("I've considered those other possibilities but I still want to waive my evidentiary hearing.").

> This Court therefore finds that Petitioner is not entitled to relief.

38AA08171–72. If Vanisi had waived his post-conviction proceedings generally, the district court would not have needed to engage with Vanisi's failure to present evidence, nor would it have needed to rule on Vanisi's habeas petition. *See id.* Thus, when the district court misconstrued Vanisi's waiver in denying leave to supplement, the district court acted arbitrarily and capriciously. *See Skender*, 122 Nev. at 1435.[5]

The district court's written reasoning as to staying Vanisi's execution was also an abuse of discretion. Vanisi did not ask the court to stay his execution; he asked the court to recognize a categorical exemption. Being ineligible for the death penalty would not stay Vanisi's execution, it would remove him from death row. Thus, the stay procedure was not implicated by the relief Vanisi sought. *See* NRS 176.425; NRS 176.455. Applying the wrong statute is also an arbitrary

---

[5] The State asserted this basis in its answering brief, but as Vanisi noted in his reply brief, the State failed to cite anything in the record suggesting that Vanisi's waiver was broader than a waiver of his evidentiary hearing. *See* Reply Br. at 40–41 n.31; *see also* Ans. Br. at 47–48 (providing no record citations of Vanisi's waiver).

and capricious basis to deny Vanisi relief. *See Byrd v. Byrd*, 137 Nev. Adv. Op. 60, 501 P.3d 458, 462 (2021). Notably the State did not assert this basis to affirm in its answering brief.

Finally, the district court's written reasoning as to procedural default was an abuse of discretion because it misapplied the law governing a miscarriage of justice. As Vanisi explained at length in his Opening and Reply Briefs, his severe mental illness establishes that he is actually innocent of the death penalty. *See* Opening Br. at 115–21; Reply Br. at 37–40. Indeed, the State understood this to be the key issue to Vanisi's claim, making it the focus of their response to it, devoting only a page to each of its waiver argument and its substantive argument, but five pages to its procedural default argument. Ans. Br. at 47–54. Vanisi argued that the district court erred in applying procedural default; such an error of law would be an abuse of discretion. *See AA Primo Builders, LLC*, 126 Nev. at 589, 245 P.3d at 1197; *see also Koon v. United States*, 518 U.S. at 100. This Court's analysis failed to address this abuse of discretion.

Nor can this Court's reasoning be justified by the district court's reasoning that "good cause requires, that, after the proceeding has

started, counsel must demonstrate that the new claim could not have been presented earlier." 38AA08178. This part of the district court's order is itself also a misapplication of law that is an abuse of discretion. The miscarriage of justice standard does not require a showing that the claim could not have been presented earlier. *See, e.g.*, *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (not requiring such a showing). Indeed, in situations where this Court applies the doctrine, the avowed purpose of the doctrine is to excuse the fact that the claim could have been or was raised earlier. *See, e.g.*, *Leslie v. Warden*, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002) (applying miscarriage of justice doctrine even though the claim "could have been raised before"); *Guy v. State*, No. 65052, 2017 WL 5484322, at *3 (Nev. Nov. 14, 2017) (not requiring showing that the claim was previously unavailable). Additionally, even if this Court applies this standard Vanisi meets it: before Vanisi waived his evidentiary hearing, there was another available state forum to consider his mental health issues, be it through his first state post-conviction petition or the petition under *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997). But after Vanisi's

mental illness successfully frustrated all these means, the record became clear that a categorical exemption is necessary.

This Court's failure to acknowledge the district court's procedural default ruling is particularly pernicious: Vanisi raised a novel constitutional claim—supported by amici—and this Court misread the state court record to avoid ruling on that claim. This is unfair not only to Vanisi, but to the amici who thoughtfully engaged with this legal issue and presented their views to the Court.

Because these three bases were the ones on which the district court actually decided, this Court overlooked and misapprehended the record in its order. The district court's order was not based on its inherent discretion under NRS 34.750(5), but Vanisi's waiver, application of procedural default, and the stay procedure. Because these bases were an abuse of discretion, this Court should reconsider its order and rule on whether Vanisi's severe mental illness establishes a miscarriage of justice.

III. Conclusion

Vanisi requests this Court rehear this case, and rule on whether his severe mental illness establishes his actual innocence of the death penalty.

Dated this 16th day of March, 2022

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing 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:

It has been prepared in a proportionally spaced typeface using Microsoft Word processing program in 14-point font size and Century Schoolbook font;

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 2,550 words.

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

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Jennifer P. Noble
jnoble@washoe.da.com

/s/ Sara Jelinek
An Employee of the
Federal Public Defender