

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,

Appellant,

v.

WILLIAM A. GITTERE,
WARDEN,

Respondent.

No. 78209

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Elizabeth A. Brown
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ANSWER TO PETITION FOR REHEARING

The State of Nevada, by and through CHRISTOPHER J. HICKS, Washoe County District Attorney, and Jennifer P. Noble, Chief Deputy District Attorney, hereby replies to the Court's Order Directing Answer to Petition for Rehearing filed March 25, 2022.

I. INTRODUCTION

In 1998, Siasosi 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 reasonable probability of a different outcome at the penalty hearing had this additional mitigation evidence been presented.

34AA 07299.

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 07988-07991; 08036-08037. 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 07782.-07784.

Both experts found Vanisi to be competent, despite his mental illness. Both experts also found that Vanisi appreciated that the possibility of the federal courts granting him a new trial was remote, but wanted to proceed because a mere reduction of his death sentence was not Vanisi's goal. After a thorough hearing on the evaluations, and an extensive canvass, the district court accepted Vanisi's waiver. 38AA 08157-08166. It found that as the client, Vanisi had the right to decide the goals of his litigation. *Id.*

Like the Opening Brief, the Petition for Rehearing was filed by the FPD against Vanisi's wishes, and without his consent. Once again, the FPD approaches the issue of Vanisi's desired waiver—which was central to the proceedings below—as a mere afterthought.

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 to further pursue state court litigation, including the Petition for Rehearing filed by the FPD against their client's wishes. The Petition should be denied, as discussed further below.

II. ARGUMENT

A. The District Court Properly Denied the Motion to Supplement the Habeas Petition Following its Acceptance of Vanisi's Waiver, and the Petition for Rehearing Should Be Denied.

Rehearing may be granted when this Court has overlooked, misapprehended, misapplied, or failed to consider any fact or rule that would allow the Court to consider the FPD's appeal. *See* NRAP 40(c)(2). In the Order of Affirmance entered January 27, 2022, all justices of this Court expressly rejected the FPD's position that the district court should not have accepted Vanisi's knowing, voluntary, and intelligent waiver of the state court evidentiary hearing. Order of Affirmance, 5.

This Court also found that the district court properly denied the FPD's request to supplement the latest petition for writ of habeas corpus. It reasoned that leave to supplement was requested only after the district court orally denied relief on the petition on the basis that Vanisi's waiver of further state post-conviction proceedings was valid. *Id.*, 5-6.

Importantly, the proposed supplement to the petition was filed after the district court's ruling regarding Vanisi's competency to waive the evidentiary hearing contemplated by the remand. Prior to the ruling, Vanisi told the district court that his lawyers were continuing to litigate sentencing phase claims against his wishes. 37AA 07763. At a subsequent

evidentiary hearing, Doctors 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.

Importantly, the district court expressly told the FPD that it was not ruling that the FPD could not file a new habeas petition arguing the points in the proposed supplement. *Id.*, 08151. In their Petition for Rehearing, the FPD argues that in affirming the district court's denial of leave to supplement the latest petition, this Court failed to base its affirmance on the district court's reasoning. Petition, 8. They insist that the district court's position regarding its ability to override Vanisi's clearly expressed

desire to waive further state court litigation is belied by record. *Id.*, 9. The gravamen of the FPD’s argument is that while Vanisi expressly waived the evidentiary hearing that was the subject of the remand, he did not wish to waive “anything else.” *Id.*, 9. That is repelled by the record. Prior to his competency evaluations, Vanisi made clear that he did not want to pursue relief with regard to his penalty, but that his attorneys would not listen to him: “I told them I don't want an evidentiary hearing, any guilt phase penalty claim issues, but they are doing it anyway against my wishes. I have been hijacked.” 37AA 07763. After he was found competent, Vanisi told the district court that his attorneys were continuing to disregard his wishes, despite the doctors’ findings:

THE COURT: Mr. Vanisi, how are you today?

THE DEFENDANT: Good. Good.

THE COURT: So did you understand what everybody is arguing today?

THE DEFENDANT: Yes, I do.

THE COURT: Do you have anything you want to say about it?

THE DEFENDANT: I just want to add you get a sense of what I am trying to deal with every time I get on the phone to talk about which direction I want my appeal to go in. I am glad the Court has the experience of what it is like to communicate with them. It goes on and on, Judge, and it goes on and on.

THE COURT: Circular.

THE DEFENDANT: It goes circular, right.

THE COURT: Do you still feel the way you felt when you talked to me in September about not going forward?

THE DEFENDANT: Still feel the same way.

38AA 08149-08150.

In making its ruling, the district court explained its position to the FPD:

Counsel, I do not want to chill your zealous representation of Mr. Vanisi. I appreciate that, and I know that you have some personal beliefs that help you to continue with this. However, you must follow the rules. You cannot allow that zealousness to go beyond what is permitted, and you have been really pushing the window, and you have filed things you probably shouldn't have. And as I noted today in one line in this brief, and I have not checked all your cites, it is clear you were not appropriately citing things. I don't know what else you might have cited in your brief that was inappropriate. So I am certainly making a record that anybody looking at this argument that you presented should carefully review the cites and the record that you tried to present here, because the conclusions that you reached in your brief are not supported by the evidence that I have seen in many instances.

So your request to supplement is denied. The other request for relief that you have in the proposed amendment will not be addressed at this stage in the proceedings.

38 AA 08152-08153.

Despite their client's clearly expressed wishes not to pursue further sentencing phase claims, the FPD sought leave to file a supplement challenging the sentence and sentencing phase. The proposed supplement

alleged that Vanisi suffered from mental illness so severe that he could not competently make decisions regarding his litigation goals. 38AA 08093-08094. Tellingly, the FPD failed to acknowledge the competency evaluations completed by Doctors Moulton and Zuchowski. In particular, Dr. Zuchowski had testified that Vanisi 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. 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. *Id.* Similarly, 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.

Despite their client’s clearly expressed wishes, both on the record and to two medical professionals, the FPD’s proposed supplement sought to continue litigating the issue of mitigation evidence, and its effect on the

penalty imposed in this case. The proposed supplement also sought to continue challenging Vanisi's sentence by arguing that his mental illness rendered him ineligible for the death penalty. *Id.*, 08094-08112. It was filed in violation of Nevada Rules of Professional Conduct Rule 1.2(a) ("a lawyer shall abide by a client's decision concerning the objectives of representation").

In reviewing the district court's denial of the motion for leave to supplement the petition, this Court reasoned:

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 that 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, 6.

In their Petition for Rehearing, the FPD maintains that this Court erred when it affirmed the district court's denial of leave to supplement the petition. The FPD claims that the reasoning in the Order of Affirmance departs from the reasoning in the district court's order. Even if this were true, this Court will affirm a district court's order when it reaches the right decision, even if for the wrong reason. *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008). The Petition for Rehearing is the latest in a series of filings

ignoring Vanisi's litigation goals, in violation of the Nevada Rules of Professional Conduct. That said, the district court made clear that it was not advising the FPD that it could not file a subsequent petition containing the grounds set forth in the proposed supplement. 38AA 08151

The district court did not abuse its discretion in denying the FPD's request to amend the petition following its finding that Vanisi had validly waived the evidentiary hearing, and it made clear that the FPD could file a subsequent petition. The Petition for Rehearing is yet another example of the FPD ignoring their competent client's litigation goals, and it should be denied.

DATED: April 22, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Jennifer P. Noble
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer 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 answer has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this answer complies with the word number limitations of NRAP 40(b)(3) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(c), it does not exceed 10 pages.

3. Finally, I hereby certify that I have read this appellate answer, 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 answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the answer 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 22, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on April 22, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Randolph M. Fiedler
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/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA