ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35249

FILED

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JANETTE M. BLOOM
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Appeal from A Judgment of Conviction
Second Judicial District Court of the State of Nevada
The Honorable Connie Steinheimer, District Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a jury trial. Appellant, Siaosi Vanisi (hereinafter "Mr. Vanisi"), was convicted of one (1) count of murder with the use of a deadly weapon a violation of NRS 200.010, NRS 200.030 and NRS 193.165, a felony; three (3) counts of robbery with the use of a deadly weapon, a violation of NRS 200.380 and NRS 193.165, each a felony; and one (1) count of grand larceny, a violation of NRS 205.220, a felony. The jury imposed a sentence of death by lethal injection on the murder count.[1] On November 22, 1999, Judge Steinheimer entered a judgment of conviction consistent with the jury's verdict specifically, a sentence of death on the murder count. ROA Vol. 6 at 1845-1846 (Judgment); ROA Vol. 6 at 1843-1844 (Order of Committal); ROA Vol. 6 at 1847-1848

(Order of Execution); and ROA Vol. 6 at 1849-1852 (Warrant of Execution).[2] At that time Mr. Vanisi was also sentenced, on each of the robbery counts, to a maximum term of 180 months with a minimum parole eligibility of 72 months plus a consecutive like sentence due to the weapon enhancement. On the grand larceny count Mr. Vanisi was sentenced to a term of 120 months with a minimum parole eligibility of 48 months and was further ordered to pay a fine in the amount of $10,000.00. These sentences were ordered to be served consecutive to each other and consecutive to the death penalty imposed herein on the murder count. Mr. Vanisi was given credit for 667 days time served. ROA Vol. 6 at 1845-1846 (Judgment). Mr. Vanisi was also ordered to pay a $25.00 administrative assessment, a DNA testing fee in the amount of $250.00 and attorney fees in the amount of $750.00. Id.[3]

On November 23, 1999, Judge Steinheimer entered an Order Staying Execution Pending Direct Appeal. ROA Vol. 6 at 1853. A notice of appeal was filed on November 30, 1999. ROA Vol. 6 at 1854-1854A (Notice of Appeal).

STATEMENT OF THE FACTS [4]

Guilt Phase

On January 13, 1998, Dr. Ellen Clark -- a board specialized forensic pathologist -- performed an autopsy upon the body of Sergeant George Sullivan. ROA Vol. 22 at 519, 521, and 523. She concluded that Sergeant Sullivan "died of multiple injuries of the skull and brain due to blunt impact trauma." Id at 527. She found a total of at least 20 "separate and discrete

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[1] Record on Appeal Vol. 6 at 1768-1769 (Verdict).
[2] "ROA" stands for the Record on Appeal which, pursuant to Supreme Court Rule 250, has been docketed with this Court by the clerk of the district court.
[3] And See ROA Vol. 33 (Transcript of Proceedings: Sentencing/ Imposition of Jury Sentence).
[4] The following statement of facts is taken from the trial transcripts. Citation will be to the reporters' original pagination.

impacts to the face and head." Id. She also found that each of the wounds were "all acute and of the same age." Id at 540. That is, they occurred at roughly the same time and were of such a nature that "the survival interval would have been relatively short." Id at 541.

On the night of January 12, 1999, Brenda Martinez drove to the University of Nevada to pick up her father -- a custodian at the University. Id at 545-547. She arrived just after midnight. Id. While waiting in the University parking lot for her father to arrive she saw a dog that caught her attention. She also saw a man. Id at 548. The man was walking "kind of funny" and was wearing a beanie cap. He had long hair, a full beard and he was wearing a long coat and had baggy pants. Id at 550.[5] She picked up her dad and left the campus. Id. While driving down Virginia Street, by the University, she saw the man again. He was in the student union parking lot and was walking towards the lake that is located on campus. Id at 551. At trial Ms. Martinez identified Mr. Vanisi as the man she saw walking on campus that night. Id at 553-554.

Carl Smith, a police officer for the University of Nevada, testified that on January 13, 1998, he was on duty. At about 17 minutes after midnight on the 13th he responded to Ninth and Center streets because Sergeant Sullivan had effected a traffic stop there. Id at 563-564, and 565-566, 568. Prior to arriving at the scene he saw a person near the area where Sergeant Sullivan was. This individual looked dark-skinned and had dreadlocks. According to the officer this individual "gave [him] a glaring stare like, Let's [sic] fight." Id. at 569. But he noted that that was something an officer occasionally sees. Id at 569-570. At trial Officer Smith identified Mr. Vanisi as the man he saw on campus that night. Id at 572. Officer Smith

then drove up and stopped behind Sergeant Sullivan's car. Id at 573. After completing the task at hand Sergeant Sullivan drove up to the University and up to a kiosk located there. Id at 578. According to Officer Smith the lighting in that area is good for writing reports and taking care of routine administrative details. Id at 579. At about 1:00 that morning Officer Smith was dispatched to the area of the kiosk. Id at 581-582. When he arrived he found Sergeant Sullivan laying several feet away from his vehicle. He was on the ground facing up. Id at 582. Sergeant Sullivan's gun belt, holster and gun were missing. Id at 586.

On January 13, 1998, Andrew Ciocca was walking through the campus grounds on his was home from visiting a friend. Id at 603-604. Upon cresting a hill he saw a UNR police car that was parked. Later he noticed someone who appeared to be under the police car. Id at 606. Moments later he realized that what he had thought to be leaking fluid from the police car was actually blood. Id at 607. Mr. Ciocca went to the body and felt for a pulse. He noticed that the body was warm. Mr. Ciocca ran to a nearby pay phone and called 911. He then returned to the police vehicle and called for assistance on the police radio. Id. Shortly thereafter Officer Smith arrived. Id at 610.

In January 1998, Mele Maveni was a student at Hug High School. Id at 647, 649. At about 9:00 on the Friday night prior to the death of Sergeant Sullivan, Ms. Maveni went to a local WalMart with Mr. Vanisi and her cousin Saia. Id at 650. Ms. Maveni had met Mr. Vanisi about two weeks earlier and considered him a friend. Id at 648-649. While inside WalMart Mr. Vanisi looked at some guns; however he did not purchase a gun. Id at 653. He

[5] On cross-examination Ms. Martinez explained that the man was walking "slanted kind of as if he was maybe drunk." ROA Vol. 22 at 557. She also said that he "was funny. He was kind of like when you get drunk, or you are sleepy and you're walking nowhere." Id at 558.

did purchase a hatchet[6] and some gloves.[7] According to Ms. Maveni, once the three of them were back in her van Mr. Vanisi made statements indicating that he hated police officers and wanted to kill them. Id at 655-656. He also said he did not like white people because they took a lot from the Polynesians. Id at 656. Apparently at one point as they drove passed the police station Mr. Vanisi asked to be dropped off because he wanted to kill a cop. Id at 657-658. But Ms. Maveni and Saia thought he was joking. Id at 658. Later, as they were driving, there was a police car in front of them and Mr. Vanisi again asked to be dropped off. He again expressed a desire to kill a police officer. Id at 659. The following Monday morning Ms. Maveni saw Mr. Vanisi. Id at 661. He was wearing some beige corduroy pants and a dreadlocks wig. Id at 662.[8]

Sateki Taukiuvea met Mr. Vanisi through his girlfriend, Renee Peaua. ROA Vol. 23 at 688-689. When he first met him Mr. Vanisi was wearing a long hair wig. Id at 690. In the evening of Monday January 12, 1998, Mr. Taukiuvea drove Mr. Vanisi over to Renee's house, which was located on Sterling way near the University. Id at 696-697. At that time Mr. Vanisi was wearing the wig, a maroon coat and brown corduroy pants. Id at 697. Mr. Tauliuvea then drove back to a house located on Rock Boulevard and went to sleep. Id at 697-698. At about 1:30 that morning he woke up when Mr. Vanisi walked into the house. Id at 698.[9] Mr. Vanisi

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[6] Later DNA testing of stains found on the hatchet showed them to belong to Sergeant Sullivan. ROA Vol. 22 at 641.

[7] Later DNA testing of stains found on the gloves showed some to belong to Sergeant Sullivan and to Mr. Vanisi. ROA Vol. 22 at 642.

[8] Several others testified for the State concerning Mr. Vanisi's expressions (made around the same time) of a desire to kill a police officer. See ROA Vol. 23 at 672-687 (Makaleta Kavapalu); Id at 688-696 (Sateki Taukiuvea); ROA Vol. 23 at 743, 747-748 (Maria Louis); ROA Vol. 23 at 766-778 (William Louis); ROA Vol. 23 at 779-783 (Priscilla Endemann).

[9] Manaoui Peaua, Renee's brother, gave him a ride to the house on Rock Boulevard. ROA Vol. 23 at 784-785, 787-788

was carrying a white plastic shopping bag. Id at 699.[10] Mr. Vanisi did not have his wig with him. Id at 700. Later, through some friends Mr. Taukiuvea learned of Sergeant Sullivan's death. Id at 701. At some point thereafter he asked Mr. Vanisi if he had any involvement in that death. According to Mr. Taukiuvea Mr. Vanisi said that he had "killed the cop." Id. Mr. Vanisi also showed him a gun. Id at 702.[11]

Renee Peaua is Mr. Vanisi's cousin. Id at 705, 707. On January 12, 1998 Ms. Peaua was living in a house on Sterling Way. Id at 709. At about 10:30 that night Mr. Vanisi was there, eating. Id at 710-711. When Ms. Peaua left the house Mr. Vanisi stayed. He was wearing his beanie and his wig. Id at 711. Ms. Peaua next saw Mr. Vanisi at a house on Rock Boulevard sometime after 12:30 a.m. Id at 715. He did not have his wig and he was carrying a white bag. Id at 716. When he walked in that morning Mr. Vanisi went in to the kitchen. Id at 718. Later that morning Ms. Peaua saw Mr. Vanisi sitting in the kitchen looking at his hatchet. Id at 723. That morning Ms. Peaua asked Mr. Vanisi if he had killed a policeman. Id at 740. He answered affirmatively. Id.

In January 1998, Maria Louis was living on North Rock Boulevard in Sparks. Id at 743-744. Mr. Vanisi is Ms. Louis's uncle. Id at 745. At approximately 1:15 a.m. on the morning of January 13, 1998, Mr. Vanisi walked into the apartment. Id at 748-749. He was carrying a little white plastic bag. Id at 761. Later, while watching the news, Ms. Louis learned that the

[10] Later fingerprint analysis identified prints belonging to Mr. Vanisi on this bag. ROA Vol. 22 at 623.
[11] The wig was recovered by a sheriff's search and rescue volunteer in the Orr Ditch. ROA Vol. 24 at 836, 838. While in Utah Mr. Vanisi told a relative that he had thrown his wig and hat in a ditch near the University. Id at 825.

police were looking items relating to the instant case. Id at 757. Ms. Louis found those items in a kitchen cabinet at her house. Id at 758. She then called the police. Id at 759.[12] [13]

On January 13, 1998, Louis Hill owned a black Toyota 1992 Camry. Id at 841-842. On that night he had his car outside warming up. He was in his house. When he came outside the car was gone. The car was later recovered in Utah. Id at 842.

On January 13, 1998, Patricia Misito was working as a clerk at a 7-11 store located on Baring Boulevard. At about 10:20 that night she notice an individual standing near the door of the store. Id at 846-848. A customer purchased some Copenhagen with a 20-dollar bill. Id at 849. When she had the change drawer open to give the customer his change the man that had been standing by the door came in and asked if Ms. Misito could help him out. The man showed her a gun and she put the drawer on the counter and said, "help yourself." Id at 850. At trial Ms. Misito identified Mr. Vanisi as the man with the gun. Id at 851. Mr. Vanisi took the money from the drawer -- approximately $99.00. Id at 854. The customer sought to give Mr. Vanisi his change but Mr. Vanisi told him "No thanks, man" and left after telling Ms. Misito not to call the cops. Id.[14]

At about 10:30 in the evening of January 13, 1998, Diana Shouse was working as a clerk at a Jackson's Market on MacCarran and Clear Acre. Id at 861. A man came in and laid his gun on the counter and told her to empty the cash drawer into a paper bag. Ms. Shouse did as

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[12] Reno Police Detective Jim Duncan was among those officers who responded to the call and as a result, collected items from the house including the hatchet. ROA Vol. 24 at 800-821. Detective Duncan also noted that the police had received a "secret witness" call that Mr. Vanisi had committed a "187" -- 187 being the California Penal Code for murder. Id at 809-810.

[13] Detective Duncan also testified that an arrest warrant for the arrest of Mr. Vanisi was sought and obtained. ROA Vol. 24 at 823. The information was placed on a national crime computer and subsequently the police were contacted by the Salt Lake County Sheriff's Office, Salt Lake, Utah. Id at 823.

she was told. Id at 862. The man then left the store. Id. At trial Ms. Shouse identified Mr. Vanisi as the man who took the money. Id at 864.

David Kinikini lives in Salt Lake City, Utah. Mr. Vanisi is his cousin. ROA Vol. 25 at 909-910. On January 14, 1998, Mr. Vanisi unexpectedly arrived at Mr. Kinikini's house. Id at 913. Mr. Kinikini described Mr. Vanisi as being "very excited" and anxious to visit with relatives. Id at 914.[15] Around 3:00 or 4:00 in the afternoon a relative informed Mr. Kinikini that the police were looking for Mr. Vanisi. Subsequently the police directly contacted him. Id at 915. At this time Mr. Vanisi was not at the house, having gone down to a youth rec center to play basketball. Id at 916. Eventually Mr. Vanisi returned to the house and the police arrived. Id at 918.[16]

Salt Lake County Sheriff Investigator Keith Stephens was one of the officers that responded to Mr. Kinikini's house on January 14, 1998. Id at 929, 933. He arrived around 5:30, 6:00 that evening. Id at 933. The police gave several commands to Mr. Vanisi to give up and come out of the house. Id at 935.[17] Mr. Vanisi did not respond. Id.

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[14] Caleb Bartelheim was the customer in the store that night. ROA Vol. 24 at 855-856. He too identified Mr. Vanisi. Id at 858. He also acknowledged that Mr. Vanisi did not take his money though he offered to give it to him. Id at 859.

[15] Vainga Kinikini ("Vainga") was staying at Mr. Kinikini's house when Mr. Vanisi arrived. ROA Vol. 25 at 954, 956. He too noticed that Mr. Vanisi was "excited or real hyper." Id at 959. According to Vainga Mr. Vanisi told him that he had committed a murder. Vainga did not believe him. Id at 960. But Mr. Vanisi showed him a gun and told him it was a cop's gun. Id at 963. Vainga testified that Mr. Vanisi told him that he waited around for a campus police officer to complete a traffic stop investigation. Id at 975. That he then crept up on the officer who appeared to be doing some paperwork. Id at 976. He knocked on the window and the officer asked if he could help. Then Mr. Vanisi started swinging with the hatchet. Id at 977-979. Mr. Vanisi told Vainga that he took a gun and a belt from the officer. Id at 981. Mr. Vanisi also told Vainga that at the time of this killing his disguise was a "beanie with dreadlocks, fake dreadlocks attached to it" [Id at 982], which he later threw in a nearby canal. Id at 984.

[16] Mr. Kinikini remembers seeing about 20 plus police officers stationed outside. ROA Vol. 25 at 921.

[17] Mr. Kinikini and others who had been in the house had left the residence before the police commands to Mr. Vanisi started. That is, Mr. Vanisi was alone in the house. ROA Vol. 25 at 934.

Salt Lake County deputy sheriff Craig Meyer also responded as part of the sheriff's SWAT team. Id at 941. He also arrived around 6:00 that evening. Id at 942. The area around the house was being contained by police officers when the garage was set on fire. Id at 944. At that point the members of the swat team were ordered to enter the residence. Id. Upon entering the building the deputy saw Mr. Vanisi down a hall way to his right. Id at 948. Mr. Vanisi was holding a gun. Deputy Meyer raised his weapon and shot Mr. Vanisi in the arm. Id at 949-950.[18] While firing at Mr. Vanisi the deputy proceeded to back out of the residence. Id at 950-951. About ten minutes later Mr. Vanisi stepped outside and, failing to respond to the officers' commands, was shot with a "bean-bag" round to subdue him. Then he was taken into custody. Id at 951-952.

The State rested its case-in-chief at this point. Id at 994. Mr. Vanisi elected not to testify. Id at 971. Without calling any defense witnesses, the defense also rested. Id at 995.

The jury found Mr. Vanisi guilty of one (1) count first degree murder with the use of a deadly weapon; three (3) counts of robbery with the use of a deadly weapon; and one (1) count of grand larceny. Id at 1043-1045; and see ROA Vol. 6 at 1722-1727 (Verdicts).

Penalty Phase

The State's first penalty witness was Michael Wiley, a correctional officer with the Nevada State Prison. ROA Vol. 28 at 1133-1134. He testified that on May 24, 1998, he was on watch in the Unit 12 yards of the Nevada State Prison. Id at 1135-1136. Mr. Vanisi was in the "walk-alone yard" and refused to respond to a command to come to the gate to be locked

[18] Mr. Vanisi did not fire any rounds at the deputy. ROA Vol. 25 at 953.

up. Id at 1135-1137.[19] According to the officer Mr. Vanisi had begun to dig a hole under one of the fences. Id at 1138. Mr. Vanisi would not stop and eventually the officer shot at him with real hard rubber pellets. Id at 1139-1141. Another correctional officer also took shots at Mr. Vanisi. Id at 1141. Ultimately Mr. Vanisi was removed from the yard. Id at 1142.

Next, Nevada State Prison correctional officer David Molnar testified concerning an incident that occurred three days later on May 27, 1998. Officer Molnar testified about Mr. Vanisi's barricading himself in his cell and the efforts taken to successfully remove him from that cell. Id at 1154-1160.

The State's next witness was Deborah Mann, a Correctional Case Work Specialist 3 at the Nevada State Prison. Id at 1168. As part of her duties she completed an assessment of Mr. Vanisi concerning levels of dangerousness or threat to staff and/or other inmates. Id at 1169-1172. She opined that Mr. Vanisi was "very volatile and very conniving" and was considered by her to be a significant risk to staff and inmates. Id at 1172.

The State also called a couple of Washoe County deputies to testify about discipline problems Mr. Vanisi had at the Washoe County Jail -- chiefly failure to timely return to his cell when ordered to. See Id at 1178-1195 (James Ellis); Id at 1214-1224 (Geoffrey Wise).

Vainga Kinikini, who had testified in the State's case-in-chief was called back to relate to the jury that on January 14, 1998, when he was talking to Mr. Vanisi in Utah, Mr. Vanisi told him that he [Mr. Vanisi] was insane and that he didn't care about anything anymore and that he was free and that he had to kill some more to keep his high. Id at 1209. On cross-examination Mr. Kinikini made clear that he thought Mr. Vanisi had gone crazy. Id at 1210.

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[19] For what it's worth Mr. Vanisi was not in the prison under any sentence. Rather he was being held as a courtesy to the Washoe County Jail. ROA Vol. 28 at 1150, 1172-1173.

He noted that the Vanisi he was talking to in Utah wasn't the Vanisi he had known previously. Id at 1211.

The State's final witnesses were Sergeant Sullivan's sister, a UNR police colleague, Sergeant Sullivan's wife and daughter who each gave emotionally moving victim impact statements in this case. Id at 1237-1248 (Sue Millard); Id at 1248-1267 (Stephen Sauter); Id at 1267-1308 (Carolyn Sullivan); and Id at 1308-1310 (Meghan Sullivan). With that the State rested. Id at 1310.

In mitigation the defense called twenty-one (21) friends and family members who recounted stories concerning Mr. Vanisi's birth, early family life in Tonga, his eventual move to the United States, his early schooling and church activities in the Mormon church. The testimony given by these witnesses painted a picture of a loving family and a loving child; a picture of Mr. Vanisi's kindness and support to his friends and family members (including his wife). But finally, a picture of a man who, for unknown reasons began to act oddly and in a fashion his family could not explain and which hurt them. ROA Vol. 28 at1311-1335; ROA Vol. 29; ROA Vol. 30. Deanne Vanacey, Mr. Vanisi's wife and the mother of his two children also testified concerning Mr. Vanisi's drug use and odd behavior. She said that about six months after they were married Mr. Vanisi would want to dress like a superhero. ROA Vol. 29 at 1490-1491. She noted that it didn't happen over night but rather happened over a period of time. Id at 1491. Mr. Vanisi would also pretend to be different people and would pose in front of a mirror pretending to be different people and giving himself different names. Id at 1492. She testified that Mr. Vanisi began to use Phen Fen. Id at 1493. And that he would act "very

strange, very weird. He would ramble." Id at 1495. Ms. Vanacey testified that Mr. Vanisi's behavior became progressively worse and bizarre. Id at 1495-1496.

The defense also presented the testimony of Dr. Ole Thienhaus, a psychiatrist presently employed at the Washoe County Jail. ROA Vol. 29 at 1439-1440. Dr. Thienhaus, in the course of his duties at the jail saw and treated Mr. Vanisi. Id at 1442. His impression of Mr. Vanisi was that he was possibly bipolar or cyclothymia and he recommended a drug -- Depakote -- for Mr. Vanisi. Id at 1443. Depakote is a mood stabilizer. Id at 1453. Later, Dr. Thienhaus put Mr. Vanisi on the antipsychotic drug Risperdal as well as a sleeping medication. Id at 1454. Mr. Vanisi was also on lithium. Id at 1455. Dr. Thienhaus opined that Mr. Vanisi suffered from a bipolar disorder. Id at 1457.

After the defenses rested [ROA Vol. 30 at 1691-192], the State called Reno Police Detective David Jenkins as its sole rebuttal witness. Id at 1697. Detective Jenkins testified that Mr. Vanisi's wife -- Deanne Vanacey -- "adamantly declined" to speak with him in any kind of official setting. Id at 1700. Concerning Mr. Vanisi, the detective testified that he was part of the detail that returned Mr. Vanisi back to Reno from Salt Lake City. Id at 1700-1701. According to the detective, while in the Salt Lake City airport Mr. Vanisi complained about his mother ever bringing him to the United States and that he would have been happier in Tonga. Id at 1702.

Mr. Vanisi elected not to testify but did make a statement in allocution:

> I want to say that I'm sorry the Sullivan family has gone through this. I'm sorry that my family has gone through this. If I had known that I was ill, I would have gone to the doctor. I used speed and marijuana before coming to Reno, and used it for the week that I was here. I didn't sleep much.

> This is not an excuse, but a reason. I fell away from my church and my values. If given the opportunity, I hope to try and help others avoid the nightmare of drugs and despair. Maybe this will help the Sullivan family and my family with their grief. Thank you.

Id at 1720.

The jury sentenced Mr. Vanisi to death for the first degree murder of George Sullivan. ROA Vol. 32 at 1854-1855; and see ROA Vol. 6 at 1768-1769 (Verdict). This automatic appeal followed.[20]

ARGUMENT

Guilt Phase

JUDGE STEINHEIMER COMMITTED REVERSIBLE ERRROR WHEN SHE DENIED APPELLANT'S PRETRIAL *FARETTA* MOTION FOR SELF-REPRESENTATION WHERE, AS HERE, THE RECORD DOES NOT SUPPORT, AND DOES NOT PROVIDE, A BASIS FOR THAT DENIAL.[21]

A criminal defendant is entitled to waive his Sixth Amendment right to counsel. See *Faretta v. California*, 422 U.S. 806, 807 (1975). A waiver of the right to counsel must be knowing, intelligent and unequivocal. Id at 835; *Harris v. State*, 113 Nev. 799, 801, 942 P.2d 151 (1997). The Supreme Court has for many years recognized the right to self-representation. Indeed, the Court has extended the *Faretta* right to all defendants, even those who are mentally impaired, so long as they are "competent to stand trial." *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993). "The test of a valid waiver is not whether specific warnings or advertisements were given but whether the record *as a whole* demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of a particular case."

[20] Other facts necessary to this appeal are set forth in the Argument portion of this Opening Brief.

Harris, *supra*, 113 Nev. at 801 (italics added, citations and internal quotation marks omitted). "The relevant assessment examines the accused's competence to choose self-representation, *not his ability to adequately defend himself*." Id at 802 (italics added, citation omitted). A defendant "has the constitutional right to refuse the service of counsel, so long as he does so knowingly and intelligently." Id at 803 (citing *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210 (1990). Denial of that right is per se harmful." Id.

In this case, prior to the second trial, Mr. Vanisi filed a motion with the district court seeking to exercise his Sixth Amendment right to conduct his own defense himself; that is, he sought his *Faretta* right for self-representation. On August 10, 1999, Judge Steinheimer held a hearing to conduct a canvass of Mr. Vanisi concerning his *Faretta* request. ROA Vol. 5 at 1333-1418.[22] At the conclusion of Judge Steinheimer's canvass defense counsel remarked that he thought Mr. Vanisi had "passed that canvass with flying colors. I think this Court has no alternative but to grant this man his penultimate constitutional right to represent himself, and any other decision by this Court creates reversible error." Id at 1412. The prosecution too thought that Mr. Vanisi had demonstrated that his request for self-representation was made knowingly and intelligently. "[MR. STANTON]: " I would agree with Mr. Gregory that Mr. Vanisi passed most, if not all of the Court's inquiry this morning." Id at 1412-1413. On the question whether Mr. Vanisi's request would delay the trial, the prosecutor acknowledged that it would not:

> ... Mr. Vanisi, I think, two times this morning, and confirmed by Mr. Gregory, indicated that indeed he would be prepared to go to

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[21] Although the following argument concerning the right to self-representation is being made in the "guilt phase" portion of this brief the error complained of obviously infects the entire proceedings including the "penalty phase." Thus by this reference this argument is made applicable to the "penalty phase" as well.

[22] This canvass was conducted in conformity with Supreme Court Rule 253.

> trial as his own counsel on September 7 this year. So to the extent now the State has what appears to be a confirmation of its concerns or lack of concerns that the timeliness of the motion and the delay *is not an issue*, that we are looking at a September 7 trial date with no delay.

Id at 1413 (italics added). The prosecution then addressed the question of whether Mr. Vanisi's intent by seeking self-representation was one of disrupting the judicial process. Again, the prosecution found no problem:

> ... I would indicate to the Court that at least the times in court that the State has been present -- we obviously were not present during another motion hearing. But certainly this morning Mr. Vanisi has been anything but disruptive. I think he responded very literally to the Court's inquiry, was cognizant of the questions and the proceedings surrounding them, oriented to time and place, *and satisfies that criteria across the board.*

Id at 1414 (italics added). Mr. Stanton noted that "[t]his would be my fourth pro per felony matter and Mr. Vanisi's distinctly and cognitively more adept at defending himself than any defendant I have ever been involved with." Id at 1414-1415. Mr. Stanton noted that Mr. Vanisi's "ability to read and process information [was] significant." Id at 1415. Mr. Stanton also acknowledged that "the law does not recognize as a significant consideration the extent of someone's legal knowledge." Id. Summing up, Mr. Stanton said:

> But the State is certainly aware of the unequivocal and fundamental constitutional right that has been endorsed time and again by the United States Supreme Court and the Nevada Supreme Court. This is the powerful right of one to represent themselves [sic]. *The State has seen nothing in the canvass this morning that would render Mr. Vanisi incapable pursuant to our guidelines of representing himself*, although we collectively do it, make that assessment with a severe degree of caution.

Id at 1415-1416 (italics added). Notwithstanding that "degree of caution" Mr. Stanton told the court: "I think that he's satisfied all the requirements" and "...if the record is looked at closely

and the rule of law is followed, I believe Mr. Vanisi's right prevails. And that is the State's position on this motion." Id at 1416.

Judge Steinheimer took the matter under submission but appeared to be prepared to grant Mr. Vanisi's motion: "THE COURT: Counsel, we have a ten a.m. hearing tomorrow morning. I am going to issue my decision right before that hearing. *However, I encourage Mr. Vanisi to be prepared for that hearing tomorrow.*" Id at 1417 (italics added).

The next morning Judge Steinheimer entered her order. ROA Vol. 5 at 1287-1296. In a stunning about face Judge Steinheimer denied Mr. Vanisi's motion for self-representation chiefly on the basis that it was untimely and made for the purpose of disputing the judicial process. This ruling finds no support in the record as a whole and constituted an unconstitutional infringement on Mr. Vanisi's rights under the Sixth Amendment. As such, it is reversible error *per se*. *Lyons v. State*, 106 Nev. at 443; *Harris v. State*, 113 Nev. at 803.

Judge Steinheimer first found that the motion was made for "the purpose of delay." Id at 1290. However, the record belies that finding. ROA Vol. 5 at 1375 ([MR. VANISI]: "So yeah, if you're not so, you are incorrect when you say I'm doing this to delay. I'll be ready on September 7. I will be ready September 7."); Id at 1375-1376 ("... but I wanted to put on the record that I'm not, I'm not -- I'm not delaying time. I will be ready on September 7.").

Judge Steinheimer's next basis for denying the motion was that she perceived it was made for the purpose of disrupting the judicial process. ROA Vol. 5 at 1290. Again the record does not support this finding:

> I don't intend to do anything that would violate the constitutional or the court law or any law. My pure intention of a tactical decision, it's just as I said first was, it was in my best interest. And that is why I want to represent myself, because it's

> in my best interest to pose as myself as a person who litigates for himself.

ROA Vol. 5 at 1376. In response to a follow up question concerning previously litigated motions -- Judge Steinheimer asked Mr. Vanisi if he was going to try and raise motions that had previously been raised [Id] -- Mr. Vanisi said he was not going to play games [Id] and that:

> [t]he point of representing myself is to behave and to comport with the justice system and to comport with your, with the court rules and comport with this rule, and just obey the commandments that are expected of me and to represent myself along those guidelines; not to meander off course or to wander aimlessly in a muddle. I don't, I don't plan on raising any of those arguments that I have already argued in this court. I am moving on.

Id at 1377.

Judge Steinheimer next suggested that perhaps Mr. Vanisi sought to represent himself so that he would be "released from the restraints that [he was] placed in." Id at 1378. Mr. Vanisi appropriately responded: "No, that's frivolous. . . . That's not my intention." Id. Later, Mr. Vanisi's counsel observed (with no disagreement voiced on the record by either Judge Steinheimer or the prosecution): "[t]his man's behavior has been impeccable over a year in this courtroom." Id at 1386; and see Id at 1388 ("This man's behavior, I reiterate, has been impeccable since this case first came into this courtroom. He had five days when he was in trial. He minded his manners. He's observed decorum. He's paid respect and courtesy to this Court."); and Id at 1389 ("He's answered all your questions. He's going to behave himself. He's not going to delay anything. He wants to go to trial September 7.").

A fair reading of Judge Steinheimer's order demonstrates that the expressed concern about the serious disruption of judicial proceedings was in actuality a concern about the inherent inconvenience of a *pro per* defendant:

> [d]uring the Rule 253 inquiry by the Court, the Defendant exhibited difficulty in processing information. He took an extremely lengthy period of time to respond to many of the Court's questions, the courtroom proceedings stopping for *two or three minutes* at times while he pondered his answer. The Court was asked to repeat the same question many times before answering. In addition, the Defendant refused to answer the Court's question because he believed it to be an "incomplete sentence." He frequently asked the Court questions rather than answering the Court's questions directly. Further, he spoke out loud to myself in such a manner that it was at times difficult to determine if he was speaking for his own benefit or to the courtroom audience or to the Court. Further, Mr. Vanisi has previously been observed making statements under his breath while others were speaking in court. Moreover, at past hearings, Mr. Vanisi has been observed standing up and engaging in unsettling rocking motions, as well as repeating himself over and over again. Based on this combination of words and gestures during prior proceedings, this Court has concern about *future* disruptions during trial.

ROA Vol. 5 at 1290-1291 (italics added). This Court's first question should be "what disruption?" Is it the fact that Mr. Vanisi "ponders" or thinks about the answer he is about to give? Is it the fact that Mr. Vanisi sought clarification concerning the questions asked of him before he was about to answer? Is it that fact that Mr. Vanisi chose not to answer a question he perceived to be incomplete? Is it that Mr. Vanisi would speak an answer to himself on occasion before answering the court on the record? Can Judge Steinheimer really say that a

rocking motion is disruptive -- and if so, where in any of the transcripts of any hearing and/or the first trial has this fact been brought to anyone's attention?

As Justice Rose noted in his dissenting opinion in *Tanksley v. State*, 113 Nev. 997, 946 P.2d 148 (1997):

> *Illinois v. Allen*, 397 U.S. 337, 346, 90 S.Ct. 1057, 1062, 25 L.Ed. 2d 353 (1970), clearly explains that behavior will be considered "disruptive" only if it is of an "extreme and aggravated nature." In *Allen*, the defendant, during trial, threatened to kill the judge, argued with the judge in an abusive and disrespectful manner, threatened to disrupt the proceedings by constantly talking, and answered the judge's questions with abusive and vile language. The judge repeatedly warned the defendant about his behavior and then expelled the defendant from the proceedings. *Id.* at 339-41, 90 S.Ct. at 1058-60. The United States Supreme Court concluded that Allen's actions were of such an "extreme and aggravated nature" as to justify the judge's remedial actions. *Id.* at 346, 90 S.Ct. at 1062.

113 Nev. at 1006. In his dissent, Justice Rose distinguished between actions of an "extreme and aggravated nature" -- "as to be considered 'serious and obstructionist conduct' pursuant to *Faretta* and *Allen*" -- and that of the mere "'inherent inconvenience' caused by a pro se defendant." 113 Nev. at 1006-1007 (citing *Lyons*, 106 Nev. at 444 n. 1). The lesson, of course, is that where serious and obstructionist behavior may form the basis for a denial of self-representation, the "inherent inconvenience" caused by a *pro se* defendant will not.

Judge Steinheimer had three fallback positions, neither of which supports her order. First, that this was a complex case. In *Godinez*, the United States Supreme Court observed (quoting *Faretta*), "... we made it clear that a defendant's 'technical legal knowledge' is 'not relevant' to the determination whether he competent to waive his right to counsel, and we emphasized that although the defendant "may conduct his own defense ultimately to his own

detriment, his choice must be honored. Thus, while '[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by there own unskilled efforts' a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self representation." 509 U.S. at 400. Judge Steinheimer's "complex case" rational is really the "inconvenience of a *pro se* litigant" rational turned on its head.

Second, Judge Steinheimer found that Mr. Vanisi did not understand the potential penalties that could be imposed in this case. ROA Vol. 5 at 1293. Wrong. Mr. Vanisi clearly articulated that first degree murder carried a possible death penalty and/or a sentence of life in the Nevada State Prison with or without the possibility of parole. ROA Vol. 5 at 1367.[23] Mr. Vanisi also correctly informed the court of the possible sentences for robbery and grand larceny as well as noting that each sentence could be doubled due to a weapon enhancement and that the district court could order consecutive or current sentences. Id at 1367-1368. Mr. Vanisi even knew what would occur in terms of an appeal, that is, the automatic nature of an appeal from a sentence of death, as well as, the thirty (30) day jurisdictional time frame to file a notice of appeal in all other criminal cases. Id at 1372.

Finally, Judge Steinheimer denied Mr. Vanisi's motion because of the medications he was taking. Id at 1294 (expressing concern about whether drowsiness "could" affect defendant's ability). However, the doctor treating Mr. Vanisi, under questioning by the prosecution, testified that the medications that Mr. Vanisi was taking would not affect his mental abilities to address issues as his own lawyer. ROA Vol. 5 at 1406; and see Id at 1407 ("[MR. STANTON]: So there's nothing about -- you use the term psychotropic medication.

There's nothing about either of these, either the dosage amounts or combination with one another, that would cause Mr. Vanisi to be mentally incapable of handling the issues that are confronting him in this context; is that correct? A. That is correct. If you again permit me to say, thinking of Mr. Vanisi as an average adult male of sound body frame and so forth, there is nothing, that's correct.").

It is respectfully submitted that Judge Steinheimer improperly denied Mr. Vanisi's *Faretta* motion for self-representation. This Court's full and complete review of the transcript of the canvass conducted by Judge Steinheimer will convince this Court -- as it convinced both defense counsel and the prosecution at its conclusion -- that Mr. Vanisi sought to represent himself and wished to waive court appointed counsel and that he was exercising his Sixth Amendment right in that regard in a knowing, intelligent and unequivocal manner. Further, the record demonstrates that Mr. Vanisi knew and understood the nature of the charges against him; the possible penalties; and the dangers and disadvantages of self-representation. That is to say Mr. Vanisi knew what he was doing and made his choice with eyes wide open. *United States v. Farhad*, 190 F.3d 1097, 1099 (9th Cir.1999). Accordingly, it was reversible error to denied Mr. Vanisi's motion particularly here, where the motion was denied merely to save the district court the inconvenience of a *pro se* defendant.

Because the State of Nevada "may not 'compel a defendant to accept a lawyer he does not want'" [*Arajakis v. State*, 108 Nev. 976, 980, 843 P.2d 800 (1992)(citation omitted)], this case must be reversed and remanded for a new trial in order for Mr. Vanisi to be able to defend himself in his own voice.

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[23] That Mr. Vanisi did not mention the possible term of years as a penalty should be of little relevance.

THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE IMPERMISSIBLY REDUCED THE STATE'S BURDEN OF PROVING FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT IN VIOLATION OF DUE PROCESS OF LAW.

The "standard of proof beyond a reasonable doubt," said the United States Supreme Court, "plays a vital role in the American scheme of criminal procedure because it operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979)(citation omitted). But, as Justice Blackman observed:

> [d]espite the inherent appeal of the reasonable doubt standard, it provides protection to the innocent only to the extent that the standard, in reality is an enforceable rule of law. To be a meaningful safeguard, the reasonable doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it.

Victor v. Nebraska, 511 U.S. 1, 29 (1994) (Blackman, J., concurring in part and dissenting in part). A "misstatement of the reasonable-doubt standard is prejudicial to [a] defendant, as it 'vitiates all the jury's findings,' and removes the only constitutionally appropriate predicate for the jury's verdict." Id (citation omitted).

In this case the district court instructed the jury on the concept of "reasonable doubt" based upon the provisions of NRS 175.211. ROA Vol. 6 at 1696 (Instruction No 18 [guilt phase]).[24] Contrary to Justice Blackman's admonition that to be meaningful a reasonable doubt instruction must "have a tangible meaning that is cable of being understood by those who are required to apply it," Nevada's instruction requires a jury to conceptualize reasonable doubt as

[24] And ROA Vol. 6 at 1748 (Instruction number 5 [penalty phase]). In each case the instruction was objected to by defense counsel and an alternative instruction offered. ROA Vol. 24 at 872 (guilt phase); ROA Vol. 29 at 1543 (penalty phase). Although this argument is advanced in the guilt phase portion of this brief it is equally applicable to the penalty phase and by this reference is incorporated therein.

that kind of doubt that would "govern or control a person in the more weighty affairs of life." As will be shown below, this standard is neither tangible nor meaningful.

The difficulty in this formulation of "reasonable doubt" is that it involves a risk-taking analysis that is wholly unlike the decisions a jury must make.[25] In 1989, the Supreme Court of the state of Utah directed trial courts in that state "to discontinue use of [the more weighty affairs of life language] in their instructions on the definition of reasonable doubt." *State v. Ireland*, 773 P.2d 1375, 1380 (Utah 1989). The dissent in *Ireland*, which later became the law in Utah,[26] collected cases critical of the "more weighty affairs of life" formulation of reasonable doubt. The dissent's eloquent analysis (which was later adopted by the court) is instructive to the issue at hand:

> ... it is not proper to instruct a jury that a reasonable doubt is one which "would govern or control a person in the more weighty affairs of life." Nothing that one ordinarily does in the course of a normal life span is comparable to the decision to deprive another of either his life or liberty by voting to convict for a crime. See *Scurry v. United States*, 347 F.2d 468 (D.C.Cir. 1965), cert. denied, 389 U.S. 883, 88 S.Ct. 139, 19 L.Ed.2d 179 (1967). Profound differences exist between decisions to enter into marriage, buy a home, invest money, have a child, or have a medical operation -- or whatever else might be deemed a weighty affair of life,

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[25] Justice Ginsburg made this point when analyzing similar "hesitate to act" language:

> [a] committee of distinguished federal judges ... has criticized this "hesitate to act" formulation "because the analogy it uses seems misplaced. In the decisions people make in the most important of their affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives -- choosing a spouse, a job, a place to live, and the like -- generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike decisions jurors ought to make in criminal cases."

Victor v. Nebraska, 511 U.S. at 24 (Ginsburg, J., concurring in part and concurring in judgment [citation omitted]). The same, noted in the text above, can be -- and has been in other states -- said about the "more weighty affairs of life" language offered to Nevada juries.

[26] See *State v. Johnson*, 774 P.2d 1141 (Utah 1989).

The mental process employed in deciding that someone has committed a crime beyond a reasonable doubt is different from the mental process employed in making decisions in the "more weighty affairs of life." In making the latter type of decisions, a person looks forward and makes a decision about future conduct. A degree of risk is always inherent in such a decision, and usually the degree of risk based on doubt about future events is significant. The process employed in making such decisions is only partly a matter of assessment of past facts; instead, the decision often rests on a degree of hope, determination, and frequently, personal resolve. In most cases, the decision is revocable, but whether or not revocable, it is at least salvageable.

A decision to convict always looks backward; it is concerned only about resolving conflicting versions of factual propositions about a past event. It is always irrevocable as to the jurors. The process does not involve the decision maker's hope, determination or willingness to undertake personal risk. Rather, such a decision demands reason, impartiality, and common sense. A jury must have a greater assurance of the correctness of its decision, if it is to comply with the constitutional mandate, than the jurors are likely to have in making the "weighty" decisions they confront in their own lives.

A number of courts have criticized the definition of reasonable doubt standard expressed in terms of making important or "weighty" decisions in juror's own lives. An instruction that does that *tends to diminish and trivialize the constitutionally required burden-of-proof standard.* See *Dunn v. Perrin*, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910, 98 S.Ct. 3102, 57 L.Ed2d 1141 (1978). In *Scurry*, Judge Skelly Wright stated:

> A person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such person would not necessarily be convinced beyond a reasonable doubt that he made the right judgment. Human experience, unfortunately, is to the contrary.

The Supreme Judicial Court of Massachusetts in *Commonwealth v. Ferreira*, 373 Mass. 116, 130, 364 N.E.2d 1264, 1273 (1977), stated:

> The degree of certainty required to convict is unique to criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable. (footnotes omitted).

773 P.2d at 1381-1382 (Stewart, J., dissenting [italics added, footnote omitted]).[27]

Recently in the case of *Quillen v. State*, 112 Nev. 1369, 929 P.2d 893 (1996), this Court recognized that the Ninth Circuit:

> no longer analogizes reasonable doubt to the most important decisions in one's life, because decisions like "choosing a spouse, buying a house, borrowing money, and the like ... may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in a criminal trial.

112 Nev. at 1382 (citation omitted). This Court in *Quillen* found the reasoning "persuasive" but found the prosecutor's remarks in that case -- analogizing reasonable doubt to "buying a house, changing jobs, major life decisions" -- to be harmless error since the jury was given a written instruction containing the statutory definition of reasonable doubt. 112 Nev. at 1382-1383. Yet, as this Court must recognize, it is this very "definition" that provides the basis for such an argument.[28] Even more recently, in the case of *Holmes v. State*, 114 Nev. ____, 972

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[27] As noted above, Justice Stewart's dissenting analysis in *Ireland* was later adopted by the Utah's Supreme Court. See e.g., *State v. Robertson*, 932 P.2d 1219, 1232 (Utah 1997)(the analysis "requires a three-part test. First, 'the instruction should specifically state that the State's proof must obviate all reasonable doubt.' Second, the instruction should not state that a reasonable doubt is one which 'would govern or control a person in the more weighty affairs of life,' as such an instruction tends to trivialize the decision of whether to convict. Third, 'it is inappropriate to instruct that a reasonable doubt is not merely a possibility,' although it is permissible to instruct that a 'fanciful or wholly speculative possibility ought not to defeat proof beyond a reasonable doubt." [citations omitted]).

[28] Consider, how does one -- whether the State's attorney or defense counsel -- address the more "weighty affairs of life" language of the instruction when making closing argument to the jury in light of *Quillen*? Is counsel to

P.2d 337 (1998), this Court reversed a conviction because the district court gave an improper written instruction on reasonable doubt (it contained the word "substantial") and because the prosecutor's argument improperly analogized reasonable doubt with major life decisions such as buying a house or purchasing a car. Query, if it is an improper argument to analogize reasonable doubt to major life decisions ("the more weighty affairs of life"), why is it not equally improper to instruct a jury that that is the standard it must use to determine reasonable doubt? The answer of course is that it is wrong to so instruct. In short, as the case law set forth above demonstrates, the instruction required by NRS 175.211 tends to trivialize the decision whether to convict and fails to provide "a tangible meaning that is cable of being understood by those who are required to apply it." *Victor v. Nebraska*, 511 U.S. at 29 (Blackman, J., concurring in part).

This Court, in principle, has already accepted the argument advanced above. See e.g., *Bollinger v. State*, 111 Nev. 1110, 1115, n. 2, 901 P.2d 671 (1995). But unfortunately, this Court has taken the position that "the task of discontinuing the use of this language in Nevada is best initiated by the legislature." Id.; and see *Middleton v. State*, 114 Nev. ____, 968 P.2d 296, 311 (998)(same).[29] But, because a constitutionally deficient reasonable doubt instruction

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ignore it and hope the jury does too? If so, what kind of guidance does the language provide a juror trying to come to terms with the tricky concept of proof "beyond a reasonable doubt"? See *Humphrey v. Cain*, 120 F.3d 526, 530 (5th Cir. 1997)(noting that "reasonable doubt is the quintessential black box decision."). Or, is counsel to draw the types of analogies rejected by a number of courts (as set forth in the text above) because of the imprecision of the analogy? If so, how does that help the jury?

[29] Mr. Vanisi is aware that this Court reads the case of *Ramirez v. Hatcher*, 136 F.3d 1209 (9th Cir.), *cert. denied*, ____ U.S. ____, 119 S.Ct. 415 (1998), as upholding the constitutionality of NRS 175.211. See e.g. *Noonan v. State*, 115 Nev. ____, 980 P.2d 637, 640 (1999). However, in that case the two-judge majority made clear that they did "not endorse the Nevada instruction's 'govern or control' language" but rather concluded that in considering the instructions in their entirety "... we hold that the 'govern or control' language did not render the charge unconstitutional." 136 F.3d at 1214. Moreover, Judge Reinhardt's dissenting opinion serves to under score the points made in the text above. In particular, the fact that the instruction as given impermissibly lessens the prosecution's burden of proof. See 136 F.3d at 1216-1219.

can never be harmless, [*Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993)], this Court should, in its capacity to oversee the lower district courts, instruct those courts to discontinue use of the "more weighty affairs of life" language in their instructions on the definition of reasonable doubt. Accord, *Ireland v. State*, 773 P.2d 1375 (Utah 1989).[30]

Penalty Phase

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE WAS EXCESSIVE AND MUST BE SET ASIDE AS IT WAS INFLUENCED BY CONSIDERATION OF ONE IMPROPER AGGRAVATOR; AND WAS THE PRODUCT OF PASSION AND PREJUDICED AS EVIDENCE BY THE FAILURE OF THE JURY TO FIND ANY MITIGATING CIRCUMSTANCES -- EVEN THOUGH THE RECORD CLEARLY CONTAINS MITIGATION EVIDENCE.

In this case the State sought the death penalty and alleged four (4) aggravating factors. The State first alleged that the murder in this case occurred during a robbery with the use of a deathly weapon. NRS 200.033(4)(a). Next, the State alleged that the murder occurred upon a police officer who was engaged in the performance of official duty. NRS 200.033(7). Next, the State alleged that the murder involved torture or the mutilation of the victim. NRS 200.033(8).[31] Finally, the State alleged that the murder was committed on the victim because of the actual or perceived race, color or national origin of that person. ROA Vol. 4 at 920-927 (Amended Notice of Intent to Seek Death Penalty).

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[30] It should be noted that in the last legislative session Senate Bill 400, if passed, would have changed the reasonable doubt instruction to one consistent with this Court's suggestion in *Bollinger*. Unfortunately, the Bill was never given the opportunity to be considered by the legislature. This Court then should not defer to that body any longer. A court's deference to a legislative body is appropriate where the question presented is political in nature and plausible arguments for or against the question can be marshaled. But how to define "reasonable doubt" is *not* a "political question." It is a concept intrinsic to due process; any "misstatement of the reasonable-doubt standard ... 'vitiates all the jury's findings' and removes the only constitutionally appropriate predicate for the jury's verdict." *Victor v. Nebraska*, 511 U.S. at 29 (Blackmun, J. concurring [citing *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

[31] In the course of the trial the State elected to remove the theory of torture as an aggravator and proceeded solely on mutilation as an aggravator. ROA Vol. 29 at 1547.

During closing arguments in the penalty phase of this trial defense counsel conceded the first two alleged aggravators; namely, that the murder was committed in the course of a robbery and that the murder had been committed against a police (or peace) officer. ROA, Vol. 32 at 1791. When the jury returned its verdict -- a sentence of death -- it based that sentence upon finding beyond a reasonable doubt each of the alleged aggravators except for the last one; namely, that the murder had been committed for racial reasons. ROA Vol. 32 at 1853-1855; and see ROA Vol. 6 at 1768-1769 (Verdict). The jury apparently did not find any mitigating circumstances in this case. Id.[32]

Improper Aggravator:

In this case the State alleged that the murder of George Sullivan involved mutilation of the victim. Recently, this Court held that mutilation, whether it occurs before or after a victim's death is an aggravating circumstance under NRS 200.033(8). See *Byford v. State*, 116 Nev. ___, ____ P.2d ____ (116 Nev.Adv.Op. # 23, filed on February 28, 2000). In *Byford* the victim's body was set on fire after the victim's death. Premortem mutilation can be illustrated by the case of *Calambro v. State*, 114 Nev. ____, 952 P.2d 946, 949 (1998)(victim hog-tied and gagged, hands behind his back, duct tape around his face, head smashed repeatedly by hammer, pry bar used to stab at victim's skull and used in an attempt to pry skull apart).

Each of these cases confirms that, concerning the imposition of the death penalty, the act of mutilation in murder is something "beyond the act killing itself."[33] That is, there must be an

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[32] The jury was instructed on four (4) mitigating circumstances: (1) no significant history of prior criminal behavior; (2) influence of extreme mental or emotional disturbance; (3) defendant's youth at the time of the crime; and (4) any other mitigating evidence. ROA Vol. 6 at 1754 (Instruction number 11).

[33] *Cf Robbins v. State*, 106 Nev. 611, 798 P.2d 558 (1990)(qualifying requirement to an aggravating circumstance based upon torture).

intent to mutilate on the part of the murder *in addition to* an intent to kill. Former Justice Springer made this point in his concurring opinion in *Calambro*:

> ... in many of the cases decided by this court, murder involving "mutilation of the victims" has incorrectly become "murder accompanied by great damage to the victim's body." Thus where two stab wounds may not be mutilation, ten wounds probably would be, because of the damage done to the body by so many wounds. A pistol shot to the head probably would not be seen as mutilation, whereas, a shotgun blast to the head probably would. [However] ... the essence of the mutilation aggravator is not disfigurement alone resulting from the killing act itself, but rather, the murder's *intent* to mutilate (maim) in addition to intending to kill his victim.

952 P.2d at 951 (citation omitted).

In the instant case Dr. Clark testified that Sergeant Sullivan died from "multiple injuries of the skull and brain due to blunt impact trauma." She found 20 "separate and discrete impacts to the face and head." She also found that each of the wounds were "all acute and of the same age." That is, they occurred at roughly the same time and were of such a nature that the "survival interval would have been relatively short." These findings are consistent with that statements attributed to Mr. Vanisi by Mr. Vainga Kinikini. The Court will recall that according to Mr. Kinikini Mr. Vanisi told him he knocked on the window of the police car and started swinging after Sergeant Sullivan rolled down the window and asked if he could help.

There is no question that Sergeant Sullivan suffered disfigurement in this attack. But that disfigurement was the inevitable result of the deadly weapon used in the murder and was not product of a specific intent to mutilate or maim. In this case mutilation was an improperly charged aggravator factor in this case because, in the former Justice's words: the "essence" of

the mutilation aggravator was not met here where, the disfigurement resulted from the killing act itself and not because of Mr. Vanisi's intent to mutilate.

Accordingly, this aggravator should be set aside as improperly charged by the State and considered by the jury.

No Mitigator:

Admittedly, the jury's finding of just the first two aggravators proven by the State and conceded by the defense makes Mr. Vanisi death eligible under Nevada's statutory death penalty scheme. But having said that, the question is: although Mr. Vanisi was death eligible, was the death penalty the most appropriate penalty to be imposed in this case? In *Haynes v. State* 103 Nev. 309, 739 P.2d 497 (1987), this Court said:

> [t]he United States Supreme Court has observed "that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first degree murders."

103 Nev. at 319-329 (citation omitted).

NRS 177.055(2) requires this Court to review the imposition of the death penalty in this case to determine if, given the facts concerning both the crime and the defendant, the penalty imposed was excessive and must be set aside. Indeed, the Court's mandatory review required by the statute is not limited to a mere perfunctory weighing of the aggravating circumstances and mitigating factors. Instead, this Court must examine the record in it entirety to determine whether the death penalty imposed herein was, in fact, *the* appropriate penalty given the facts of this case and the character of the defendant. Additionally this Court must determine if the penalty imposed was the product of passion and prejudice. *Parker v. State*, 109 Nev. 383, 392, 849 P.2d 1062 (1993).

In this case the jury's penalty verdict was improperly influence by an improperly charged aggravator; namely, mutilation. Further, the jury's apparent rejection of any mitigating factor demonstrates not only that the sentence is unreliable under the Eighth Amendment, but also indicates that the sentence was imposed -- in this high profile and emotionally charged case -- "under the influence of passion and prejudice" and must be reversed. NRS 177.055(2)(c); *Mills v. Maryland*, 486 U.S. 367 (1988).[34]

CONCLUSION

For the reasons and authorities set forth above it is restfully submitted that Mr. Vanisi's convictions and sentences must be reversed and this matter remanded to the district court so that Mr. Vanisi can conduct his own defense as mandated by the Sixth Amendment to the United States Constitution.

DATED this 17 day of April 2000.

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[34] This is so because the fact that the jury made no findings with respect to mitigating factors suggests that the jury violated *Mills*, by confining its consideration (if any) of mitigation to factors which the jury could only agree upon unanimously. Prejudice and passion is also suggested as factors in the jury's verdict by the jury's failure to find any mitigating factor after hearing the testimony of twenty-two defense witnesses who spoke approvingly of Mr. Vanisi's childhood and early young adult years, as well as, other testimony concerning his lack of a criminal history, and his suffering severe mental health problems in his later years. That is to say, in this "cop-killer" case the emotions ran high.

CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17 day of April, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date I forwarded a true copy of the foregoing document addressed to:

GARY HATLESTAD
Chief Appellate Deputy
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DATED this 17 day of April, 2000.

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