No. _____

In the
Supreme Court of the United States

Siaosi Vanisi,

Petitioner,

v.

William Reubart, Warden.
Aaron Ford, Attorney General, State of Nevada,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Nevada

Petition for Writ of Certiorari

CAPITAL CASE

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QUESTIONS PRESENTED

(Capital Case)

1. Does gross negligence on the part of the State satisfy the intent requirement as set forth in *Oregon v. Kennedy*, 456 U.S. 667 (1982) so that double jeopardy attaches following defendant's motion for mistrial?

2. Can a defendant who has been found to be competent to stand trial and presents only marginal mental health concerns be denied the right to self-representation as described by this Court in *Faretta v. California*, 422 U.S. 806 (1975)?

LIST OF PARTIES

Petitioner Siaosi Vanisi is an inmate at Ely State Prison. Respondent Aaron Ford is the Attorney General of the State of Nevada. Respondent William Reubart is the warden of Ely State Prison.

LIST OF RELATED PROCEEDINGS

Vanisi v. State, 7th Jud. Dist. Ct. Nev., No. CR98-0516 (Nov. 22, 1999, judgment of conviction); (Nov. 8, 2007, judgment dismissing post-conviction petition); (Mar. 31, 2014, judgment dismissing post-conviction petition); (Feb. 22, 2019, notice of entry of order dismissing petition).

Vanisi v. State, Nev. Sup. Ct. No. 34771 (Sept. 10, 1999) (order denying petition for writ of certiorari or mandamus).

Vanisi v. State, Nev. Sup. Ct. No. 35249 (May 17, 2001) (en banc) (affirming judgement of conviction).

Vanisi v. Second Judicial District Court, Nev. Sup. Ct. No. 45061 (Apr. 19. 2005) (denying writ of mandamus to stay postconviction proceedings pending competency restoration).

Vanisi v. Filson No. 3:10-cv-00448-CDS-CLB, U.S. District Court, Nevada.

Vanisi v. State, Nev. Sup. Ct. No. 50607 (Apr. 20, 2010) (affirming denial of state postconviction relief).

Vanisi v. Baker, Nev. Sup. Ct. No. 65774 (Sept. 28, 2017) (en banc) (affirming in part and reversing in part and remanding second postconviction petition).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Constitutional Amendments

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Nevada Supreme Court affirming Nevada's Second Judicial District court's denial of habeas corpus relief.

OPINIONS BELOW

On January 27, 2022, the Nevada Supreme Court issued the opinion below, *Vanisi v. Gittere*, Nev. Sup. Ct. No. 78209 (Jan. 27, 2022) reported at 502 P.3d 1088, 2022 WL 263342 (Nev. 2022). App. A. The Nevada Supreme Court denied Mr. Vanisi's petition for rehearing on May 18, 2022. App. B.

JURISDICTION

The Nevada Supreme Court's opinion of January 27, 2022, and subsequent denial of petition for rehearing constitute a final judgement of the highest state court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

STATEMENT OF THE CASE

I. Introduction

Mr. Vanisi was tried twice in the State of Nevada. His first trial commenced on January 11, 1999 and ended four days later in mistrial. 3AA00545–46.[1] Relying on transcripts provided by the State in pretrial discovery, Mr. Vanisi's trial counsel set forth the defense theory that one of Mr. Vanisi's associates actually committed the murder. 3AA00156–57. Following two days of testimony, the State, outside the presence of the jury, admitted that the transcripts provided to Mr. Vanisi's trial counsel were incorrectly transcribed. 3AA00529–530. Defense counsel moved for a mistrial because he had already put forth his theory of the case to the jury in reliance on the erroneous transcripts. 3AA0537. Prior to granting the motion, the trial judge canvassed Mr. Vanisi as to whether he waived any appeal as to the double jeopardy issue. 3AA0543–45. Although the issue was only brought to trial counsel's attention that morning, and Mr. Vanisi had not consulted with his trial attorney on the issue, he acquiesced to the waiver. *Id.*

Mr. Vanisi's second state trial commenced on September 20, 1999. In the time leading up to the second trial, Mr. Vanisi's relationship with his attorneys deteriorated. Mr. Vanisi moved first for the court to dismiss his trial counsel. Following the court's denial, he then requested to represent himself under *Faretta v. California* 422 U.S. 806, 836 (1975). 17AA3480; 17AA3491. During his hearing on the issue of self-representation, Mr. Vanisi demonstrated that he was highly

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[1] References are to the appellant's appendix in *Vanisi v. Gittere*, Nev. Sup. Ct. No. 78209, reported at 502 P.3d 1088, 2022 WL 263342 (Nev. 2022).

intelligent and fully aware of the risks of proceeding without counsel, and, even though not required under *Faretta*, thoughtfully answered many questions about legal procedure. 17AA03596. The trial court, despite acknowledging his acumen, denied his motion to represent himself on the grounds of mental illness, perceived delay, and disruption to the court. 17AA3501. All of these are belied by the record.

II. First State Trial

A. The mistrial was predicated on gross negligence by the State – for which there is no remedy under the current law.

During opening statements on January 13, 1995, Mr. Vanisi's defense attorney alluded to "another person" as the actual perpetrator, and that the Reno, Nevada, detectives investigating the case were aware of this other person. 1AA00156–57. The defense relied on transcripts received in pretrial discovery from the State in making this assertion to the jury. On the fifth day of Mr. Vanisi's first trial, after testimony from numerous prosecution witnesses, the State admitted that the transcripts provided to Mr. Vanisi's trial counsel as part of discovery were erroneously transcribed. 3AA00526–27.

The transcript was made from a police recording of a telephone conversation between Mr. Vanisi's associates Namoa Tupou and Chiatra Hanke. Tupou told Hanke about his conversation with a mutual friend, Sateki Taukiuvea. In that conversation Taukiuvea told Tupou: "*I* just did a 187. I have to go, bye, call you later."[2] 3AA00529. The State admitted that in the original audio recording from

[2] The terminology "187" was understood to refer to a murder. *See* 2AA00352, 3AA00529.

which the transcripts were transcribed, Tupou stated that Taukiuvea told him "*Beya* just did a 187". At the time, Mr. Vanisi was known by the nickname "Beya". This error was of critical importance because it undercut the defense theory that Taukiuvea had committed the murder.

The State had not reviewed the tapes prior to trial, and only reviewed them after opening statements. 3AA00533. Despite the fact that only the transcripts were conveyed to Mr. Vanisi's trial counsel, and not copies of the original audio recordings, the state did not verify their accuracy. 3AA529. Failure to flag the inaccuracy was more than a matter of mere error.

Following opening statements, the State consulted with Detective Duncan, who had investigated the case. Duncan said he did not remember Taukiuvea admitting to a murder. 3AA00529. The State also confirmed that a police report written by Detective Jenkins, Duncan's partner, confirmed the error in transcription:

> "She stated that earlier in the day. . . at approximately noon to 1300 hours, she had been speaking on the telephone with Namoa [Tupou] and that he told her that he had just been talking with [Taukiuvea] who reportedly told him. . .'Baya just did a 187, got to go, bye'".

3AA00531 (internal quotations in original). The assistant district attorney trying the case admitted that transcription errors had been a problem for many years, and that he had admonished the police department to invest in better equipment or use certified court reporters for their transcriptions. 3AA00533–534.

The State however, insisted the burden rested with the defense to ensure that all materials provided in discovery were accurate. 3AA00534–55. Because the

State had made the original audiotapes available for review in the evidence locker and had provided the police report that contradicted the transcript, the State argued that it was incumbent upon the defense to audit all of the materials. *Id*. The State further attempted to wash their hands of the error by stating that they had not intended to use the audiotapes or transcripts in question in their case-in-chief and had only reviewed them after the defense raised the issue in their opening statement. 3AA00531.

Defense counsel did not accuse the State of malfeasance, but vocally noted that the burden of another trial was to be borne by his client, and that the development left him with little choice but to abort the trial. Already having proceeded to the fifth day of trial, defense counsel moved for a mistrial. The trial court granted the defense motion on the theory that the destruction of the defense theory of the case as a result of the State's error made mistrial a "manifest necessity." 3AA00546.

B. Any waiver of double jeopardy was invalid.

Before granting trial counsel's motion for mistrial, Judge Steinheimer canvassed Mr. Vanisi, specifically asking if he supported his attorney's strategy and asking him to waive his right to an appeal as to double jeopardy. 3AA00544–46. Mr. Mr. Vanisi stated he supported his attorney's motion and agreed to the waiver. None of the State, trial counsel, or Judge Steinheimer ensured that Mr. Vanisi was fully aware of the law surrounding the attachment of double jeopardy in this situation.

The State had only discovered the error the morning of the hearing and immediately contacted defense counsel. The matter was brought before the trial court at 10:07 AM and the motion for mistrial made orally. 3AA00544. This abbreviated timeline left the defense without time for investigation. The apparent haste of the motion undercuts Mr. Vanisi's waiver as there was no possible way he was fully informed by counsel, who himself had just learned of the violation and had not heard the tapes.

III. Second State Trial

Mr. Vanisi's second state trial commenced on September 20, 1999. 3AA00622. Prior to the second trial, on June 16, 1999, Mr. Vanisi moved to dismiss his trial counsel and have replacement counsel appointed. 17AA3480. Mr. Vanisi cited a breakdown in communication as trial counsel had not answered his calls nor visited him in jail, inadequate preparation and investigation, and had failed to challenge the new charges following the mistrial. 17AA03483–84; 17AA3487–88. On June 23, 1999, Judge Steinheimer held a hearing on Mr. Vanisi's motion to dismiss counsel. Judge Steinheimer ultimately denied the motion citing a lack of support for Mr. Vanisi's allegations, and adding an unfounded finding that Mr. Vanisi only hoped to delay his trial through interlocutory appeals. 17AA03542. At a subsequent hearing, Mr. Vanisi indicated to the trial court that he wished to exercise his right to represent himself. 17AA03553. Judge Steinheimer ordered Mr. Vanisi to submit a written motion, which he did on August 4, 1999. 17AA03553; 17AA3491.

Mr. Vanisi's written motion to represent himself touched on key constitutional concerns: that he understood the risks of representing himself

against the State, his education level, his comfort with researching the law, and cited to his reading of *Faretta v. California* including this Court's holding that technical knowledge of the law is divorced from the right to represent oneself. 17AA3492–93. *See Faretta v. California* 422 U.S. 806, 836 (1975). Mr. Vanisi assured the court he would be prepared for his trial in September. 17AA3493.

Judge Steinheimer held a hearing on August 10, 1999, on Mr. Vanisi's motion to represent himself. 17AA03596. When canvassed by the trial court Mr. Vanisi indicated that he was aware that he may not raise an ineffective assistance claim on appeal should he lose at trial, that he was aware of the risks of litigating against the more experienced and well-resourced district attorney's office, and the standards he would be held to. 17AA03599–3602. Mr. Vanisi again reassured the court he would be ready for trial in September. 17AA03638–39. The trial court also canvassed Mr. Vanisi about his mental health, to which he responded that he was manic-depressive, but was receiving treatment and had never been institutionalized. 17AA03621–23.

Judge Steinheimer denied Mr. Vanisi's motion to represent himself in a written order filed on August 11, 1999. The trial court held that while Mr. Vanisi appeared to be highly intelligent and had satisfactorily answered the questions put to him about his case and the forthcoming trial, the chance of either delaying or disrupting the proceedings was too great. 17AA3501–02.

IV. Post-conviction Proceedings

Mr. Vanisi filed a state post-conviction petition, which was ultimately denied. 21AA04381. He filed a federal habeas petition, which was stayed so he could file a

petition in state court to exhaust his claims. This second state post-conviction petition was also denied, but the Nevada Supreme Court reversed and remanded for an evidentiary hearing. *See Vanisi v. Baker*, No. 65774, 2017 WL 4350947 (Nev. Sept. 28, 2017). As part of this appeal, Mr. Vanisi challenged the district court's ruling on his request to represent himself. The Nevada Supreme Court summarily denied relief. *Id.* at *8.

Following remand, the state district court denied relief, and Mr. Vanisi appealed. On this appeal, Mr. Vanisi raised the violation of double jeopardy and his right to self-representation. The Nevada Supreme Court did not address the double jeopardy argument; the court rejected the self-representation argument on the basis that it was not part of the remand and that, in any case, its prior rulings are law of the case.[3]

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition because the intent requirement under *Kennedy* deprives defendants of an important constitutional right in cases of gross prosecutorial negligence.

This Court should grant this petition to resolve the important question of whether gross prosecutorial mishandling of discoverable evidence fits within the narrow exception to reprosecution set forth in *Oregon v. Kennedy*, 456 U.S. 667, 675–76 (1982). In *Kennedy* this court held that a defendant who moves for mistrial

[3] The law of the case doctrine is not an independent and adequate ground to affirm the Nevada Supreme Court's ruling. *See Cone v. Bell*, 556 U.S. 449, 466 (2009).

may only bar subsequent reprosecution on double jeopardy grounds if he can demonstrate the *intent* of the prosecutor to induce a mistrial. *Id*.

In *Kennedy* this court retreated from what it deemed an overbroad exception to the rule that a mistrial granted on the defendant's motion does not bar reprosecution. *Id*. at 673. Prior to *Kennedy*, in *United States v. Dinitz*, 424 U.S. 600, 611 (1976) this court held that the double jeopardy clause bars reprosecution where *bad faith* conduct on the part of the prosecutor or judge is the basis for defendant's motion for mistrial. *Id*. *Kennedy* narrowed the scope of prosecutorial or judicial conduct significantly, disposing of the bad faith requirement in favor of an intent standard. *Kennedy* 456 U.S. at 674–75. In *Kennedy* this Court reasoned that the bad faith standard was difficult to define and engendered other, less wieldy standards such as "overreaching". *Id*. Under the intent standard the avenue available for relief is extremely narrow, difficult to prove, and almost certainly forecloses on many meritorious applications of the double jeopardy right. It is not overstatement that in attempting to better define the standard for relief, *Kennedy* went too far.

This narrow avenue for relief has allowed the State, in cases like Mr. Vanisi's, to operate with the thinnest veil of propriety knowing that regardless of their missteps defendants are unlikely to succeed in barring subsequent prosecution. This gives the State a strategic advantage in that at any point they may reboot a trial on a showing of mere error in discoverable material. The instant case is a prime example. The events leading to Mr. Vanisi's motion for mistrial tread a path close to, but not quite reaching, the intent recognized in *Kennedy*. However, there is no doubt that the state's negligence in auditing its own

investigation, and in the case of transcripts–work product–disadvantaged Mr. Vanisi. Yet Mr. Vanisi bore the burden, embarrassment, and delay of a second trial while the State was given another opportunity to convict him.

The question at hand is difficult. The record in Mr. Vanisi's case does not demonstrate intent. The state complied with its continued obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Vanisi's trial attorney, despite expressing outrage at the development, stated he did not believe there was malfeasance. However, the State was grossly negligent in mishandling important evidence. The State knew that the transcripts from its stenographers had been problematic for some time and had recommended the police use certified court reporters. The State had the reports of Detectives Duncan and Jenkins, which contradicted the transcripts disclosed to the defense counsel. Finally, the State had the original recordings, but never listened to them, and never made copies for the defense. Indeed, if the record reflected even an inkling of intent, a double jeopardy bar to reprosecution would properly attach under the rule in *Kennedy*. Instead, the burden of the State's failure to diligently conduct its investigation was borne by Mr. Vanisi. Mr. Vanisi was left with a Hobson's choice to move for mistrial, leading to reprosecution, or continue with an unfair trial and appeal, which would undoubtedly result in remand for a new trial. *See Kennedy* 456 U.S. at 670.

The contraction in available relief from *Dinitz* to *Kennedy* was significant. *See Kennedy* 456 U.S. at 689 (Stevens, J. concurring in judgement) ("It is almost inconceivable that a defendant could prove that the prosecutor's deliberate conduct was motivated by an intent to provoke a mistrial. . ."). Allowing relief for cases of

egregious and preventable negligence by the state–even absent intent–expands the rule set forth in *Kenned* only slightly. A new rule barring reprosecution in these circumstances is in line with this Court's reasoning in *Kennedy*: that a narrow, readily definable standard be used to demarcate the exception to reprosecution.

This small expansion serves the interests of justice without returning the exception to the breadth of *Dinitz*. *Contra Kennedy* 456 U.S. at 689 (Stevens J., concurring in judgement) (offering a much broader interpretation to encompass several types of prosecutorial error). This expansion would be in line with this Court's holdings in *California v. Trombetta*, 467 U.S. 478, 488 (1984). In *Trombetta* this court held that the destruction of evidence in good faith and in accordance with *normal practices* was not a due process violation. *Id.* Negligent handling of evidence, as in Mr. Vanisi's case, does not reach the level of bad faith, but falls far short of the *Trombetta* rule, because negligence can be neither a normal practice nor undertaken in good faith. Under the proposed rule the State is held to a standard of conduct that requires professionalism and honesty and ensures that an important constitutional right is protected.

II. This Court should grant the petition to correct the error of the Nevada Supreme Court because Mr. Vanisi did not knowingly and intelligently waive the double jeopardy issue.

This Court should grant this petition to resolve whether the waiver of an appeal of an important constitutional right is valid when the defense has not researched either the facts or the law surrounding the issue. During the colloquy between Judge Steinheimer and Mr. Vanisi following the motion for mistrial Mr. Vanisi stated that he understood and agreed with this trial attorney. This is

impossible, as his trial attorney had only been notified of the erroneous transcript that morning. The waiver of an important constitutional right must be "competent and intelligent". *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Dusky v. United States*, 362 U.S. 402 (1960) (defendant requires factual understanding of the proceedings).

In addition, because the court later held that Mr. Vanisi could not competently represent himself, he therefore could not waive the double jeopardy issue. *Godinez v. Moran*, 509 U.S. 389, 397–399 (1993).

III. This court should grant the petition to correct the error of the Nevada Supreme Court because summarily barring a defendant from self-representation for mental health reasons arbitrarily deprives a defendant of an important constitutional right.

The trial court violated the rule set forth in *Faretta* and the long standing common law tradition allowing self-representation. At the time of Mr. Vanisi's trial, *Faretta* was controlling law and this Court recognized the long-standing rule that a defendant has a near absolute right to self-representation when he knowingly, intelligently, and voluntarily waives counsel. At the time of Mr. Vanisi's trial, this Court recognized disruption and abuse in the courtroom as one of the few barriers to exercising that right. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970). At that time, there was no exception to the right to self-representation based on mental health. The trial court summarily imposed this new barrier on Mr. Vanisi based largely on speculation.

Under *Faretta*, barriers to self-representation may not be lightly erected when the basic elements of proper waiver of counsel are met. *See e.g.*, *Indiana v.*

Edwards, 554 U.S. 164, 183 (2008) (Scalia, J., dissenting) (noting the incongruity between the long-standing common law and constitutional rule, and the majority holding authorizing trial court judges to curtail that right using vague criteria).[4]

In the instant case, the trial court was faced with a defendant with a diagnosis of mental illness and serious breakdowns in communication with trial counsel. Mr. Vanisi made multiple attempts to have the trial court remedy the situation by first requesting replacement counsel, and then moving to represent himself. Mr. Vanisi demonstrated his understanding of the legal process through multiple motions and hearings in which he engage in lengthy and thoughtful colloquies with Judge Steinheimer. There can be no doubt that Mr. Vanisi made a knowing and intelligent waiver of his right to counsel, and yet the trial court curtailed his right to self-representation relying on vague findings about his mental health, possible delay, and the potential for disruption. The record supporting Mr. Vanisi's motion did not support any of these findings. Additionally, the trial court did not set forth standards or criteria by which to assess Mr. Vanisi's ability to represent himself, and instead treated his mental illness as a categorical exclusion.

The trial court's denial of a constitutional right for amorphous and indeterminate reasons is problematic because it incentivizes the denial of constitutional rights in favor of courtroom efficiency. *See e.g., Edwards* 554 U.S. at 189 (Scalia J., dissenting) ("Once the right of self-representation for the mentally ill

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[4] Because Mr. Vanisi's case predates *Edwards v. Indiana*, 554 U.S. 164 (2008), *Edwards* is not controlling. Nonetheless, Mr. Vanisi cites Justice Scalia's dissent as persuasive authority.

is a sometimes thing, trial judges will have every incentive to make their lives easier. . .by appointing. . .counsel.").

If, as this Court recognized in dicta in *Edwards*, trial courts are faced with a varying level of competency that shifts with time, the solution is to monitor the defendant closely and inquire as to his competency frequently, not deny the constitutional right categorically *a priori*. The waiver requirement set forth in *Faretta* provides ample framework to assess whether a defendant is so mentally ill that he cannot represent himself. This court should grant the petition and correctly apply *Faretta*, the controlling law at the time of Mr. Vanisi's trial.

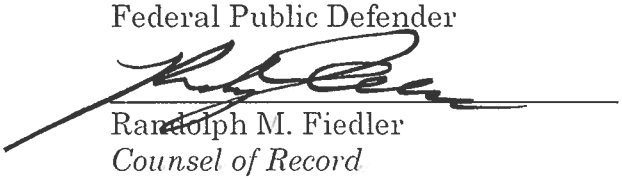
CONCLUSION

Based on the foregoing, Mr. Vanisi requests that this Court grant his request for a writ of certiorari.

Dated this 13th day of October, 2022.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender



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APPENDICES

Appendix A	Order of Affirmance, *Vanisi v. Gittiere, Warden*, Supreme Court of the State of Nevada, Case No. 78209 (January 27, 2022)	App. 001 – 009
Appendix B	Order Denying Rehearing, *Vanisi v. Gittiere, Warden*, Supreme Court of the State of Nevada, Case No. 78209 (May 18, 2022)	App.010 – 011

APPENDIX A

Order of Affirmance, *Vanisi v. William A. Gittere, Warden,* Nevada Supreme Court Case No. 78209 (January 27, 2022)

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 78209

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

A jury found appellant Siaosi Vanisi guilty of first-degree murder, three counts of robbery with the use of a deadly weapon, and grand larceny and sentenced him to death for the murder. This court affirmed the judgment of conviction on appeal, *Vanisi v. State* (*Vanisi I*), 117 Nev. 330, 22 P.3d 1164 (2001), and the denial of his first postconviction petition for a writ of habeas corpus, *Vanisi v. State* (*Vanisi II*), No. 50607, 2010 WL 3270985 (Nev. Apr. 20, 2010) (Order of Affirmance). Vanisi filed the instant petition on May 4, 2011—his second postconviction petition challenging his conviction and sentence. The district court denied the petition, but we reversed in part and remanded for the district court "to conduct an evidentiary hearing concerning whether Vanisi was prejudiced by postconviction counsel's failure to substantiate their claim of ineffective assistance of trial counsel for failure to introduce additional mitigation evidence." *Vanisi v. State* (*Vanisi III*), No. 65774, 2017 WL 4350947, at *3

(Nev. Sept. 28, 2017) (Order Affirming in Part, Reversing in Part and Remanding).

On remand, Vanisi moved to disqualify the district attorney's office, and the district court denied the motion. Vanisi also sought to waive the evidentiary hearing because he no longer wanted to pursue relief in state court but instead wanted to expeditiously move forward in federal court with challenges to the guilt phase. The district court accepted the waiver after cautioning Vanisi numerous times against waiver, having Vanisi evaluated for competency, and determining he was competent to waive the hearing. Because there was no evidentiary hearing, the district court determined that Vanisi had not demonstrated prejudice with respect to the remanded claim and denied relief as to that claim. Vanisi attempted to supplement the petition with a new claim, but the district court denied his motion. In this appeal, Vanisi argues that the district court erred by accepting his waiver of the evidentiary hearing, denying his motions to supplement the petition and to disqualify the district attorney's office, and violating his right to self-representation at trial.

Regarding Vanisi's waiver of the evidentiary hearing, his counsel argue that the district court erred for three reasons. First, they contend the decision to waive the hearing rested with them, not Vanisi. *See Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) ("[T]he well-established rule [is] that while the client may make decisions regarding the ultimate objectives of representation, the trial lawyer alone is entrusted with the decisions regarding legal tactics."); *see also* RPC 1.2(a) (addressing the allocation of authority between client and lawyer). Because the decision to waive the evidentiary hearing was indivisible from Vanisi's objective in

seeking postconviction relief—to obtain relief from the conviction (or guilt phase) rather than from just the death sentence—we conclude the decision to waive the evidentiary hearing was Vanisi's to make. *See Gov't of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1435 (3d Cir. 1996) (recognizing some fundamental decisions by a client may be viewed as strategic "because they relate to the means employed by the defense to obtain the primary object of the representation—ordinarily, a favorable end result" but concluding those decisions can be "so personal and crucial to the accused's fate that they take on an importance equivalent to that of deciding the objectives of the representation"). As pointed out by the district court, "[a]lthough Mr. Vanisi used the words that it was a strategic decision, in fact, it wasn't traditional legal strategy that he's talking about. It is talking about the goal or objective of his appeals." And our review of the record reveals Vanisi clearly identified his objective throughout the proceedings: to litigate his guilt-phase claims in federal court. While his counsel assert the decision to waive the hearing should have rested with them due to Vanisi's diminished capacity, the record belies the contention that Vanisi suffers from diminished capacity. As the district court noted, there had been no conclusion by the court or a doctor that Vanisi suffered from diminished capacity. And the district court found that Vanisi could clearly articulate his reasons for waiving the hearing, that he had consistently expressed he did not want to spend the rest of his life in prison, and that there was no evidence in the record of an inconsistent mental status affecting his ability to understand the consequences of his decision to waive the hearing. *See* Model Rules of Prof'l Conduct R. 1.14, cmt. 6 (stating factors a lawyer should consider when determining a client's diminished capacity, including "the

client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client"). Accordingly, the district court did not err in allowing Vanisi to make the decision to waive the evidentiary hearing.

Second, counsel argue Vanisi was not competent to waive the evidentiary hearing. We disagree. The district court used the test for determining whether a petitioner is competent to waive a petition, *see Calambro By and Through Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998), heard testimony from two doctors about their evaluations of Vanisi, and considered both doctors' independent and unequivocal conclusions that Vanisi understood and had the capacity to appreciate his position and to make a rational choice to waive the evidentiary hearing and that any mental illness did not substantially affect his capacity to make that decision. The district court determined Vanisi was competent to waive the evidentiary hearing, and substantial evidence in the record supports the district court's determination. *Id.* ("[T]his court will sustain the [district] court's findings when substantial evidence supports them."). Accordingly, the district court did not err in finding Vanisi competent to make the decision to waive the evidentiary hearing.

Third, counsel argue the district court violated the mandate rule in accepting the waiver because this court remanded for an evidentiary hearing. "The mandate rule is a specific application of the law-of-the-case doctrine that compels the district court on remand to comply with this court's dictates and prohibits it from relitigating issues this court decided."

United States v. Mims, 655 F. App'x 179, 182 (5th Cir. 2016) (quotation marks omitted); *see also United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). We do not agree with, nor has counsel offered any authority to support, their uncompromising view of the mandate rule. *Cf. Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (recognizing exceptions to the law-of-the-case doctrine that have been adopted by federal courts and adopting an exception); *Bejarano v. State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006) ("[T]he doctrine of the law of the case is not absolute . . . ."). Our decision in *Vanisi III* did not address whether Vanisi could waive the evidentiary hearing or how such a waiver would impact the district court's decision on remand. Rather, we remanded for an evidentiary hearing and a determination as to whether Vanisi had shown prejudice as to the remanded claim, and the district court considered Vanisi's waiver of the hearing when denying the claim. Nothing in our *Vanisi III* decision precluded Vanisi from waiving the evidentiary hearing or the district court from accepting that waiver. Accordingly, the district court did not violate the mandate rule in accepting Vanisi's waiver of the evidentiary hearing.

Next, Vanisi argues the district court abused its discretion by denying his motion to supplement the petition to add a new claim that severely mentally ill defendants should be categorically excluded from the death penalty. We disagree. Before Vanisi moved for leave to supplement the petition, the district court had considered Vanisi's request to waive the evidentiary hearing and his competency to do so for nearly two months and orally denied relief on the remanded claim. The district court determined that the 2011 petition had been litigated to completion, with the only remaining claim being the one that this court remanded for an evidentiary

hearing, and denied Vanisi's motion to supplement the petition. *See* NRS 34.750(5) (providing that it is within the district court's discretion to allow supplemental pleadings). 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.[1] *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (defining an abuse of discretion).

Vanisi also argues the district court abused its discretion by denying his motion to disqualify the entire Washoe County District Attorney's Office (WCDA). His motion was premised on alleged confusion during the first postconviction proceedings about whether the WCDA represented Vanisi's trial counsel in those proceedings and the disclosure of privileged and confidential information, namely trial counsel's SCR 250 memorandum. Vanisi has not shown that any purported conflict renders the postconviction proceedings unfair—any confusion about representation was immediately remedied when the prosecutor explained trial counsel was

[1]In light of the above, we do not consider the merits of the claim Vanisi wished to add as it is not properly before the court. And we express no opinion as to whether Vanisi could meet the procedural requirements of NRS chapter 34 should he raise the claim in a new postconviction habeas petition.

not a client of the WCDA, the prosecutor is no longer with the WCDA, the prosecutor represented he had the SCR 250 memo for about an hour before giving it to postconviction counsel and did not read it, and the memo is a part of the public record as it was filed as an exhibit to the 2011 petition. *See State v. Eighth Judicial Dist. Court (Zogheib)*, 130 Nev. 158, 164-65, 321 P.3d 882, 886 (2014) (determining the inquiry about "an individual prosecutor's conflict of interest [being] imputed to the prosecutor's entire office . . . is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case"). Accordingly, the district court did not abuse its discretion in denying the motion to disqualify. *Id.* at 161, 321 P.3d at 884.

Lastly, Vanisi argues that the trial court violated his right to self-representation and that he had to proceed with conflicted counsel at trial. This claim was not a part of this court's remand, and it is not a part of the district court's order that is the subject of this appeal.[2] Therefore, we do not consider it. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169,

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[2]Of note, we rejected this claim on direct appeal. *See Vanisi I*, 117 Nev. at 338, 22 P.3d at 1170. We also determined the claim was barred by the doctrine of the law of the case on appeal from the order denying Vanisi's first postconviction habeas petition. *See Vanisi II*, 2010 WL 3270985, at *2. It was raised a third time as part of a cumulative-error claim in the second postconviction petition, which we rejected on appeal. *See Vanisi III*, 2017 WL 4350947, at *8. Vanisi offers no excuse for raising this claim yet again nor any argument to overcome the law-of-the-case doctrine. *See Hsu*, 123 Nev. at 630, 173 P.3d at 728.

1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

Having concluded no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

_____, J.
Pickering

_____, J.
Herndon

cc: Hon. Connie J. Steinheimer, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Law Office of Lisa Rasmussen
The Law Office of Kristina Wildeveld & Associates
American Civil Liberties Union of Nevada/Reno
Chesnoff & Schonfeld
Clark County Public Defender
Washoe District Court Clerk

APPENDIX B

Order Denying Rehearing, *Vanisi v. William A. Gittere, Warden,* Nevada Supreme Court Case No. 78209
(May 18, 2022)

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIAOSI VANISI,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 78209

FILED

MAY 18 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Parraguirre, C.J.

Hardesty, J.

Stiglich, J.

Cadish, J.

Silver, J.

Pickering, J.

Herndon, J.

cc: Hon. Connie J. Steinheimer, District Judge
Joanne L. Diamond
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
The Law Office of Kristina Wildeveld & Associates
American Civil Liberties Union of Nevada/Reno
Chesnoff & Schonfeld
Clark County Public Defender
Washoe District Court Clerk