

DIPAK KANTILAL DESAI,

Petitioner,

VS

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
COUNTY OF CLARK, THE
HONORABLE KATHLEEN DELANEY,
DISTRICT COURT JUDGE,

Electronically Filed
Jan 12 2012 03:37 p.m.
No. Tracie K. Lindeman
Clerk of Supreme Court
(District Court No. C265107)

**DEFENDANT DESAI'S PETITION FOR WRIT OF MANDAMUS
DIRECTING THE DISTRICT COURT TO ALLOW THE DEFENSE TO
PRESENT EVIDENCE AT COMPETENCY HEARING**

DIPAK KANTILAL DESAI, by and through his attorney, Richard A. Wright, WRIGHT STANISH & WINCKLER, petitions this Honorable Supreme Court to order the district court to allow Petitioner to present relevant testimony and evidence at his scheduled competency hearing which will determine Petitioner's ability to assist counsel in the defense of a complex prosecution in spite of cognitive impairments caused by a stroke.

Petitioner seeks relief from the district court's oral ruling on December 13, 2011, which arbitrarily and capriciously restricted the defendant's due process right to present independent evidence of incompetency or otherwise contest the competency determination of Lake's Crossing. More specifically, the district court misinterpreted NRS 178.460 and this Court's precedent on procedural due process in competency hearings by limiting the defense to cross-examining the Lake's Crossing doctors and allowing only one expert witness, if any, whose

1 testimony about Desai's competency must be limited to an evaluation conducted
2 after his return from Lake's Crossing. The district court arbitrarily excluded any
3 other independent evidence to contest the competency determination of Lake's
4 Crossing or otherwise establish his incompetency.

5 Extraordinary relief is sought because the district court failed to provide
6 adequate procedural safe guards to determine Petitioner's current ability to assist
7 counsel in the preparation and trial of a complex prosecution. Without
8 extraordinary relief, Petitioner will lose the opportunity to have his current
9 mental capacity established in accordance with rudimentary principles of due
10 process. Moreover, this case presents an important legal question as to what
11 process is due in a competency hearing under NRS 178.460. Public policy
12 would best be served by clarifying this procedural due process issue so that the
13 fair trial rights of other defendants whose competency is in doubt may be
14 protected.

15 This petition is based upon the Due Process clauses of the Fifth and
16 Fourteenth Amendments and the Right to Counsel clause in the Sixth
17 Amendment to the United States Constitution and the similar clauses in Article 1,
18 Section 8, of the Nevada Constitution. Pursuant to NRS 34.160, Petitioner seeks
19 extraordinary relief to "compel the performance of an act which the law"
20 requires. The circumstances justifying extraordinary relief are described in the
21 attached Declaration of Richard Wright and the exhibits attached to this petition;
22 the law supporting relief is provided in the attached Memorandum of Points and
23 Authorities.

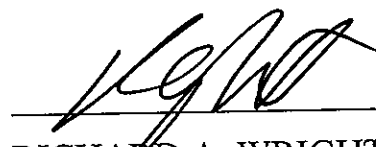
24 The competency hearing in this matter is scheduled for Friday, January 27,
25 2012. A motion to stay the hearing was filed in district court on December 30,
26 2012. On January 10, 2012, the undersigned was informed by Department 25
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1 personnel that the motion was denied by minute order, which is currently
2 unavailable at the time of this writing. Accordingly, Petitioner is filing
3 simultaneously with this petition an emergency motion to stay the competency
4 hearing.

5
6 DATED this 12th day of January 2012.

7 Respectfully Submitted,
8 WRIGHT STANISH & WINCKLER

9
10 By:


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22 **DECLARATION OF RICHARD A. WRIGHT**

23 1. I am an attorney licensed to practice law in the State of Nevada. I have
24 represented Dipak Desai, M.D., since February 2008, and I am retained to
25 represent him in the instant case. I am familiar with the procedural and
26 substantive history of the case.

27
28 **Indictment and Release Status**

2. On June 4, 2010, the Grand Jury sitting in Clark County returned an
indictment against Desai and two co-defendants stemming from the medical
procedures and billing practices at gastroenterology clinics operated by Desai
and others. The case focuses on seven patients who were treated at one of the

1 clinics in 2007, and subsequently tested positive for Hepatitis C. The case also
2 involves allegations pertaining to medical insurance fraud which cover a period
3 from June 2005 to May 2008. On June 11, 2010, the indictment was
4 subsequently amended to make non-substantive changes to the dates in certain
5 charges. The Amended Indictment charges the defendant with the following: a
6 single count of Unlawful Racketeering; 10 counts of insurance fraud; seven
7 counts of Performance of Act in Reckless Disregard of Person; seven counts of
8 Criminal Neglect of Patients; one count of Theft; and two counts of Obtaining
9 Money Under False Pretenses. [The bates-stamp numbers on Petitioner's
10 Appendix appear in parentheses following the reference to the exhibits.] Exhibit
11 1, Amended Indictment (#1-42).

12 3. Desai is released on a \$1 million bail. The trial court is Department
13 14, presided over by District Court Judge Donald Mosely.

14
15 **Preliminary Determination of Incompetency and Lake's Crossing**
16 **Determination of Competency**

17 4. On June 16, 2010, the State filed a "Motion to Compel Disclosure
18 of Medical Providers, For Transfer to Department Five for Competency
19 Evaluation and Order for the Release of Medical Records and Independent
20 Medical Evaluation." Exhibit 2 (#43-53). The defendant filed a response to the
21 State's motion in which he did not oppose the request for a competency hearing,
22 but opposed the remainder of the State's motion. Desai's medical history was
23 summarized in the response. It related that on July 8, 2008, Desai suffered a
24 stroke in the left medial - temporal area of the brain, which resulted in cognitive
25 impairment and rendered him unable to assist counsel. It further related that the
26 Nevada Medical Board of Examiners ("MBE") had previously directed that

Desai be evaluated for purposes of participating in an administrative disciplinary hearing. An independent neurological evaluation was performed by Thomas Kinsora, Ph.D., a neuropsychologist. The MBE reported that Dr. Kinsora determined that Desai was impaired in his ability to assist counsel. Exhibit 3 (#54-56). Neil Roitman, psychiatrist, provided follow-up psychological treatment pursuant to Dr. Kinsora's recommendation. Exhibit 6, Hrg. Tr., 10/11/11, pp. 8 (#87)

5. At a hearing on the motions held on July 23, 2010, Judge Mosley granted the State's unopposed motion to refer the case to Department 5 for a competency evaluation and deferred ruling on the State's other requests. Exhibit 4, Minutes, 7/21/10 (# 65-66).

6. On July 29, 2010, former District Court Judge Jackie Glass, Department 5, ordered the defense to gather all of Desai's medical records for submission to the court and State. Exhibit 4, Court Minutes, 7/29/10 (#68-69). Subsequently, Desai was evaluated by two court-appointed experts, Michael Krelstien, M.D., a forensic psychiatrist, and Shera Bradley, Ph.D., a forensic psychologist. On February 8, 2011, Judge Glass announced that the court-appointed evaluators found Desai to be incompetent. She ordered the defendant to surrender to custody so that he could be transported to Lake's Crossing for restoration under NRS 178.425. Exhibit 4, Minutes, 2/8/11(#71-72). Neither party objected to the order referring Desai to Lake's Crossing.

7. On March 17, 2011, Desai surrendered to custody and was subsequently transported to Lake's Crossing. Exhibit 4, Minutes (#74). Desai remained at Lake's Crossing for about six months. On September 20, 2011, Lake's Crossing released the competency evaluation to the parties, in which the defendant was deemed to be competent. The competency evaluation was

1 performed by two psychiatrists and one psychologist.

2 **October 11, 2011 Hearing**

3 8. On September 29, 2011, the defendant filed a "Motion for
4 Competency Hearing and Discovery of Competency Evaluation Records." The
5 request for a competency hearing was based on state and federal due process
6 requirements and the provisions of NRS 178.3981 to 178.482. The motion also
7 requested that the court order the discovery of all records connected to the
8 competency evaluations and treatment of Desai. The State did not oppose the
9 motion. Exhibit 5 (#76-79).

10 9. On October 11, 2011, a hearing was held before the Department 25,
11 presided over by District Court Judge Kathleen Delaney, who assumed
12 responsibility for the competency court upon the resignation of Judge Glass. The
13 court and parties discussed the procedures to acquire records from Lake's
14 Crossing and the other court-appointed evaluators, as well as the scope of the
15 competency hearing. Defense counsel explained that he intended to turn over the
16 medical records to defense experts who could review the records and evaluate
17 Desai. He further related that he envisioned a hearing in which the three Lake's
18 Crossing doctors would testify, the two court-appointed evaluators (Drs.
19 Krelstein and Bradley), and the experts who conducted the evaluation for the
20 MBE, Drs. Kinsora and Roitman. Defense counsel also stated that he needed to
21 present experts to present additional evidence of Desai's incompetency. He
22 explained that Desai lacked the cognitive ability to factually understand the
23 proceedings and the tens of thousands of pages of discovery. Exhibit 6, Hrg. Tr.,
24 10/11/11, pp. 8, 10-11 (#87, 89-90).

25 10. Judge Delaney observed that the competency statute was "thin" on
26 guidance for these type of hearings. She noted that the statute permitted counsel
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1 to examine the persons appointed to examine Petitioner, introduce other
2 evidence, including without limitation, evidence related to treatment to
3 competency and involuntarily administering evidence. It appears that the judge
4 was referring to the provisions of NRS 178.415 (which governs the district
5 court's initial inquiry into a defendant's competency) rather than NRS 178.460
6 (which governs the competency hearing following the defendant's return from
7 Lake's Crossing). Judge Delaney ordered the defense to subpoena the medical
8 records from Lake's Crossing and the prior evaluators and to provide copies of
9 the records to the State. She set a status check hearing for November 15, 2011.
10 Exhibit 6, Hrg. Tr., 10/11/11, pp. 9, 11-13 (#88, 90-92).

11 **November 15, 2011 Hearing**

12 11. At the status check hearing on November 15, 2011, defense counsel
13 related to the court that the defense received responses to the subpoenas which
14 consisted of approximately 1,200 pages. Judge Delaney stated that she wanted
15 to make it "very clear on the record it is not a competency hearing that is going
16 to take place" and "[w]e are not having a new bite at the apple on the
17 competency findings in that sense." She explained that the hearing would be
18 limited in scope according to the statute, finding that the parties could cross-
19 examine the Lake's Crossing doctors, have defense experts review the records to
20 assist counsel in preparing to conduct the cross-examination, and to put forward
21 evidence to challenge the doctor's findings. Exhibit 7, Hrg. Tr., 11/15/11, pp.
22 4-5 (#98-99).

23 12. Defense counsel respectfully disagreed with the judge, stating that a
24 competency hearing was still needed. He argued that Lake's Crossing provided
25 an opinion as to competency and that there still needed to be a competency
26 determination following a competency hearing. Judge Delaney agreed that she
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1 needed to make an ultimate finding based on the three reports provided and
2 defense counsel will have the opportunity to challenge the reporting doctors.
3 She acknowledged that the defense could hire experts to advise and assist. She
4 emphasized, however, that defense experts "are not going to be revisiting and
5 providing brand-new testimony as to competency." Exhibit 7, Hrg. Tr. ,
6 11/15/11, pp. 5-6 (#99-100).

7 13. Defense counsel responded that the Nevada statute does not
8 comport with due process. Under United States Supreme Court law, Desai is
9 entitled to a full and fair adversary hearing with witnesses by both sides.
10 Exhibit 7, Hrg. Tr., 11/15/11, pp. 6-7 (#100-01). The State agreed with the
11 judge, arguing that the issue at the competency hearing was to merely determine
12 if the evaluation that took place was a good evaluation. The purpose of the
13 hearing is not to permit the defense to present separate evaluators outside of the
14 court's prescribed methods. The State argued that the purpose of the hearing
15 was to examine and cross-examine the experts who evaluated Desai before and
16 during his stay at Lake's Crossing. The district court agreed with the State but
17 afforded the parties an opportunity to brief the parameters for the hearing.
18 Exhibit 7, Hrg. Tr., 11/15/11, pp. 7-9 (#101-03).

19 **December 13, 2011 Hearing**

20 14. On December 6, 2011, the defendant filed a "Memorandum of
21 Competency Standards and Hearing Procedures." Exhibit 8 (#107-22). In this
22 Memorandum, the defense counsel expressed a bona fide doubt as to Desai's
23 present ability to sufficiently function during both the preparation of his defense
24 and trial. More specifically, the defense memorandum related that Desai cannot
25 sufficiently (a) accept advice from counsel regarding legal strategy for the trial
26 or consider any possible pretrial resolution; (b) recall or communicate pertinent
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1 facts necessary to present a defense; (c) assist counsel in analyzing voluminous
2 discovery and grand jury evidence; (e) follow the anticipated testimony at trial in
3 order to assist counsel confront the witnesses against him; and (f) testify in his
4 defense. Exhibit 8, p. 5 (#111). To meet due process requirements, the defense
5 counsel requested that the district court afford Desai the opportunity to present
6 independent evidence of incompetency and evidence relevant to contest the
7 methodology of evaluation employed at Lake's Crossing. Exhibit 8, p. 2 (#108).
8 On December 6, 2011, the State filed a "Brief to Preclude the Defense from
9 Calling its Own Witnesses at an NRS 178.460 Hearing." Exhibit 9 (#123-31).
10 The State primarily relied upon rules of statutory construction to limit the
11 defendant's ability to present independent evidence.

12 15. On December 13, 2011, a hearing was held in Department 25 to
13 determine the parameters of the competency hearing. Defense counsel argued
14 that, under Nevada Supreme Court authority, the defendant was entitled to not
15 only cross-examine the Lake's Crossing evaluators, but to present independent
16 evidence relevant to competency. Judge Delaney asked defense counsel to
17 describe what type of independent evidence he anticipated presenting. Defense
18 counsel qualified his answer, stating that he had still not determined the entirety
19 of his presentation. However, he identified Dr. Kinsora and Dr. Krelstein as
20 potential defense witnesses. He also anticipated presenting evidence of
21 independent evaluations and testings. Additionally, he expected to call a
22 neurologist to explain the areas of the brain damaged by the stroke (who would
23 not make an ultimate determination of competency), as well as another
24 neuropsychologist who would have evaluated all the records and render an
25 opinion about the propriety of Lake Crossing's evaluation. Judge Delaney
26 acknowledged that she only expected a general answer to her inquiry on the
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1 proposed evidence because there was still time before the January 27th
2 competency hearing to pull together the evidence. Exhibit 10, Hrg. Tr.,
3 12/13/11, pp. 3-5 (#134-36).

4 16. The State argued that the district court had wide discretion on
5 controlling what evidence could be introduced at the competency hearing. It
6 contended that NRS 178.460 limited the defense to cross-examining the Lake's
7 Crossing doctors, and, perhaps, the doctors that provided prior evaluations. The
8 State concluded that the defendant could raise the competency issue anytime by
9 way of motion pursuant to other provisions. Exhibit 10, Hrg. Tr., 11/13/11, pp.
10 5-6 (#136-37).

11 17. In response to the State's argument, defense counsel clarified the
12 facts and ruling of Ferguson v. State, 124 Nev. 795, 192 P.3d 712, 718 (2008),
13 pointing out that, like the instant case, it involved a competency hearing under
14 NRS 178.460. And, the Ferguson Court held that the defendant had a right to
15 present independent evidence of incompetency. Exhibit 10, Hrg. Tr., 12/13/11,
16 pp. 6-7 (#137-38).

17 18. Judge Delaney ruled: (a) the defense could call only one witness, if
18 any, to testify about Desai's competency based on an evaluation conducted
19 subsequent to his return from Lake's Crossing; (b) the defense could introduce
20 the evaluation reports prepared by Drs. Krelstein and Kinsora, but could not call
21 them as witnesses; (c) the defense could cross-examine the Lake's Crossing
22 doctors, but could not call witnesses to contest the testimony of these doctors;
23 and (d) the defense could have an expert present to assist in the cross-
24 examination, but that expert could not testify. Exhibit 10, Hrg. Tr., 12/13/11, pp.
25 10, 14-18 (#141, 145-49). Thus, the defense would only be permitted to call a
26 single witness, if any, to testify about an evaluation of Petitioner after his return
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1 from Lake's Crossing.

2 19. In explaining her ruling, Judge Delaney first relied on the statutory
3 language which limited the scope of the hearing to the cross-examination of
4 Lake's Crossing doctors. *See*, NRS 178.460. Second, she found that Ferguson
5 was extremely limited in holding that the defense could call one psychologist to
6 opine that the defendant was incompetent following the return from Lake's
7 Crossing. She did not read the case law and statute to permit the defense to have
8 other experts. She observed that Calvin v. State, 122 Nev. 1178, 147 P.3 1097
9 (2006), gave the court broad authority to exclude even relevant evidence to avoid
10 a potential for undue delay, unnecessary presentation or cumulative evidence.
11 The judge found it unnecessary to "categorize" any of the additional pieces of
12 evidence proffered by the defense, finding that the court could make its
13 competency determination based on the cross-examination of the doctors and the
14 defendant's one testifying expert. The district court directed the defense to
15 provide the State with discovery of the defendant's one testifying witness.
16 Exhibit 10, Hrg. Tr., 12/13/11, pp. 6-12 (#137-43).

17 20. Defense counsel attempted to clarify the district court's ruling.
18 Judge Delaney said that the defense could not have qualified experts listen to the
19 cross-examination of the Lake's Crossing doctors and then call those experts as
20 witnesses to contradict the testimony of the Lake's Crossing doctors. She
21 emphasized that the statute provides for a hearing in which the Lake's Crossing
22 doctors may be examined. Beyond this examination, Ferguson permitted the
23 defense to call only an expert who had evaluated the defendant subsequent to his
24 return from Lake's Crossing. Judge Delaney concluded that the competency
25 procedures are set up to have the court appoint its evaluators, receive those
26 evaluations, and have the evaluations "flushed out" by cross-examination.

Exhibit 10, Hrg. Tr., 12/13/11, pp. 14-16 (#145-47).

Request for Extraordinary Relief

21. The competency hearing is currently scheduled for January 27, 2012. The district court's restraint on Petitioner's ability to contest the conclusions of the Lake's Crossing doctors and otherwise establish his cognitive inability to assist counsel violates Petitioner's due process right to a full and fair competency hearing and, ultimately, his right to a fair trial. The defense will not be able to fully explore the Petitioner's current mental status unless a full and fair hearing is held. Petitioner has no other legal remedy in this case. Therefore, Petitioner respectfully requests extraordinary relief and urges this Court to order the district court to afford him a full and fair opportunity to present evidence at the competency hearing and order the Court to consider the same.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED on the 12 day of January 2012.



RICHARD A. WRIGHT

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. JURISDICTION**

3 Mandamus is available to order a public official to do what the law requires.
4 It is appropriate for mandamus to issue when a judge refuses to follow the law and
5 Petitioner has no plain, speedy, and adequate remedy in the ordinary course of the
6 law. Sims v. Eighth Judicial District Court, 125 Nev. 126, 129, 206 P.3d 980, 982
7 (2009). A writ of mandamus is available to protect important issues of law
8 concerning the procedural due process rights at competency hearings. *See, Id.*
9 (granting writ of mandamus to compel district court to allow defendant to present
10 independent competency evaluation under NRS 178.415); Scarbo v. Eighth
11 Judicial District Court, 125 Nev. 118, 206 P.3d 980, (2009) (mandamus granted to
12 compel district court to furnish Lake's Crossing reports to defendant).
13 Consideration of a petition for extraordinary relief may be warranted in cases where
14 important legal issues need clarification. Sims, 125 Nev. at 129, 206 P.3d at 982.
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16 **II. ISSUE PRESENTED**

17 Did the district court arbitrarily and capriciously restrict Petitioner's due process
18 right to a fair hearing on competency to stand trial under NRS 178.460, by
19 excluding all defense witnesses except one expert, if any, who evaluated him
20 after his return from Lake's Crossing?

21 **III. FACTS**

22 The pertinent facts are described above in the Declaration of Richard A.
23 Wright, and incorporated by reference herein. On December 13, 2011, Judge
24 Delaney ruled that the defense could only cross-examine Lake's Crossing
25 doctors and call one expert witness, if any, to opine about Petitioner's
26 competency based on an evaluation subsequent to his return from Lake's
27 Crossing. This ruling is contained in Exhibit 10, Hrg. Tr., pp. 7-11 & 14-18
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1 (#138-42 & 145-49). From this ruling, Petitioner seeks extraordinary relief,
2 directing the district court to permit him to present other witnesses and evidence
3 to challenge the conclusions of the Lake's Crossing evaluators and otherwise
4 establish Petitioner's incompetency to assist counsel in the preparation and trial
5 in this complex prosecution.

6 IV. ARGUMENT

7 A. Introduction

8 The district court arbitrarily excluded relevant defense evidence based on
9 the erroneous interpretation of statutory law and case law pertinent to protecting
10 Petitioner's due process right to a fair competency hearing. It misconstrued the
11 law to mean that once Lake's Crossing doctors determine that a defendant is
12 competent, the defendant is entitled to only a partial or watered-down version of
13 due process under NRS 178.460.

14 The district court opined that the competency procedures are set up to
15 have the court appoint its evaluators, receive those evaluations, and have the
16 evaluations "flushed out" by cross-examination. Beyond this, the district court
17 further ruled that it had discretion to permit Petitioner to call one expert witness,
18 if any, who could testify that Petitioner was incompetent based on an
19 independent evaluation conducted after his return from Lake's Crossing. Exhibit
20 10, Hrg. Tr., 12/13/11, pp. 14-16 (#145-47).

21 It is significant to note that the district court's ruling was not based on the
22 rules of evidence pertaining to the exclusion of probative evidence as unduly
23 cumulative or wasteful pursuant to NRS 48.035(2). Rather, it was based on a
24 preference for streamlining competency determinations and an over-reliance on
25 Lake's Crossing doctors over the fundamental due process right to a meaningful
26 opportunity to be heard.

Petitioner seeks extraordinary relief from this Court to protect his procedural due process rights in the upcoming competency hearing. Without this relief, he will be unable to establish his current inability to assist counsel in the preparation and trial of this complex prosecution.

B. General Principles of Due Process Governing Competency Hearings

The district court's narrow reading of the law impinges on the most fundamental principles of due process. The substantive due process right to fair trial prohibits the trial and conviction of a defendant who is mentally incompetent. Calvin v. State, 122 Nev. at 1183-84, 147 P.3d 1097, 1100 (2007); *see*, NRS 178.400(1) (prohibiting trying or punishing incompetent person). Generally speaking, a "*formal competency* hearing is constitutionally compelled any time there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial." Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983)(emphasis added). Evidence is deemed to be substantial if it "raises a reasonable doubt" as to the defendant's competency to face trial. *Id.*, *citing*, Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972). The failure to order a formal competency hearing is an abuse of discretion and violates due process. *Id.*, *citing*, Pate v. Robinson, 383 U.S. 375, 385 (1966).

The touchstone of procedural due process in competency determinations is the right to notice and “a *meaningful* opportunity to be heard.” Scarbo, 125 Nev. at 124, 206 P.3d at 979. Basic due process in competency hearings mandates the presence of the defendant with counsel, “*the opportunity to be heard, offer evidence, and to test the evidence*” and a sufficiently explicit ruling to permit meaningful review. United States v. Day, 949 F.2d 973, 982 (8th Cir.

1 1991)(emphasis added).

2 To safeguard the substantive fair trial rights of the accused, the district
3 court must adhere to competency procedures that ensure the accuracy of the
4 competency evaluation. *See, Calvin*, 122 Nev at 1183, 147 P.3d at 1100; *Scarbo*,
5 125 Nev. at 131, 206 P.3d at 983. As explained in *Calvin*, procedural due
6 process in competency hearings obligates a district court to hear a wide scope of
7 relevant evidence:

8 “The conviction of an accused while he is legally incompetent violates
9 due process.” An accurate competency evaluation is therefore critical
10 to avoiding a violation of the defendant’s constitutional rights.
11 Accuracy is best served when the district court and any appointed
12 experts *consider a wide scope of relevant evidence at every stage of*
13 *the competency proceedings*, including initial doubts as to the
14 defendant’s competency, the experts’ evaluation, and the hearing after
15 the evaluation.

12 122 Nev. at 1183, 147 P.3d at 1100, *quoting, Krause v. Fogliani*, 82 Nev. 459,
13 462, 421 P.2d 949 , 950-51 (1966)(emphasis added).

14 This Court reiterated *Calvin*’s due process mandate in *Sims* when it granted a
15 writ of mandamus to compel the district court to afford the defense an
16 opportunity to present independent evidence of competency at a hearing under
17 NRS 178.415. *Sims*, 125 Nev. at 131-32, 206 P.3d at 983-84. For procedural
18 due process to be satisfied in a competency hearing, a district court must permit
19 the parties to introduce a “wide scope of relevant evidence” in order to test the
20 issue of competency. *See, Day*, 949 F.2d at 982. Pursuant to NRS 48.035(2),
21 however, the district court may appropriately exclude evidence relevant to the
22 competency issue “if the probative value is substantially outweighed by
23 considerations of undue delay, waste of time or needless presentation of
24 cumulative evidence.” *Sims*, 125 Nev. at 131-32, 206 P.3d at 983-84; *Calvin*,
25 122 Nev. at 1183, 147 P.3d at 1100.

26 Along the same lines as *Sims* and *Calvin*, the United States Supreme Court
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1 further underscored the need for a full and fair hearing when resolving contested
2 issues of mental state in the context of reviewing state procedures for
3 determining the sanity of a death row prisoner. Ford v. Wainwright, 477 U.S.
4 399, 414 (1986). The Ford Court observed:

5 [W]e recognize that, because “psychiatrists disagree widely and
6 frequently on what constitutes mental illness [and] on the appropriate
7 diagnosis to be attached to given behavior and symptoms,” *the*
factfinder must resolve differences in opinion within the psychiatric
profession “on the basis of the evidence offered by each party.”

8 Id., quoting, Ake v. Oklahoma, 470 U.S. 68, 81 (1985)(emphasis added).

9
10 This Court’s holding in Ferguson is especially relevant to the instant case
11 because it is the only Nevada authority that specifically addresses the due process
12 right for a meaningful opportunity to be heard in a competency hearing following
13 the defendant’s return from Lake’s Crossing under NRS 178.460. 124 Nev. 803-
14 04, 192 P.3d at 718-19. In Ferguson, the district court denied the defendant’s
15 untimely request for a competency hearing under NRS 178.460, despite counsel’s
16 expressed doubts as to the defendant’s competency to stand trial. Id. The
17 defense counsel in Ferguson filed a motion contending that the defendant was
18 incompetent to stand trial, as evidenced by psychological evaluations conducted
19 both before and after the defendant’s commitment to Lake’s Crossing in which he
20 was deemed incompetent. The defense counsel argued the right to not only cross-
21 examine the Lake’s Crossing doctors, but also to introduce the expert testimony
22 of a psychologist to establish incompetency in contradiction to the Lake’s
23 Crossing finding of competency. Id. at 803, 192 P.3d at 718.

24 The Ferguson Court ruled that the district court abused its discretion in
25 failing to hold a competency hearing and denying the defense counsel the
26 opportunity to present the evidence relevant to the ultimate issue of the
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1 defendant's competency to assist counsel and understand the nature of the
2 proceedings. Id. at 804-05, 192 P.3d at 719.

3 A determination of competence by Lake's Crossing evaluators does not
4 deprive an accused of the procedural due process right to continue to contest
5 competency when defense counsel reasonably doubts the sufficient present ability
6 of the accused to stand trial. *See, Id.*, at 805, 192 P.3d at 719. As noted by both
7 the United States Supreme Court and this Court, the accused's demeanor, any
8 prior competency evaluations and defense counsel's doubts about the defendant's
9 competency are relevant to trigger the procedural due process right to a
10 competency hearing. *See, Drope v. Missouri*, 420 U.S. 162, 180 (1995); Calvin,
11 122 Nev. at 1183, 147 P.3d at 1100. "Counsel's expressed doubt about her
12 client's competency is also relevant, given her "close contact" with the
13 defendant." Calvin, 122 Nev. at 1183, 147 P.3d at 1100.

14 In sum, the above authority recognizes that the substantive due process
15 right to fair trial must be jealously safeguarded by the judiciary. When sufficient
16 doubt as to an accused's competency arises, the defendant is entitled to
17 procedural due process in the form of a formal competency hearing in which the
18 defendant is afforded a meaningful opportunity to litigate the competency issue.
19 The accuracy of the competency determination is best served by holding a full
20 and fair competency hearing in which the defendant has a right to challenge the
21 Lake Crossing's conclusions and present witnesses subject to the ordinary
22 application of NRS 48.035(2).

23 **C. Analysis of the District Court's Restriction on Procedural Due Process**

24 **1. Sufficient doubt about Petitioner's competency exists**

25 Turning to the instant case, the opinions of the Lake's Crossing doctors do
26 not obliterate Petitioner's procedural due process right to a full and fair hearing to
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1 litigate the competency issue. There still remains a sufficient doubt about
2 Petitioner's competency that needs to be litigated in a full and fair competency
3 hearing. In light of the prior evaluations and defense counsel's expressed concern
4 about Petitioner's incompetency to stand trial, procedural due process mandates a
5 full and fair competency hearing in which Petitioner has a meaningful opportunity
6 to present independent evidence bearing on the issue of competency, as well as an
7 opportunity to cross-examine the Lake's Crossing personnel. *See, Fergenson*,
8 124 Nev. at 804-05, 192 P.3d at 719.

9 The evaluations performed before Petitioner's commitment to Lake's
10 Crossing, including the two evaluators appointed by Department 5, Drs. Krelstein
11 and Bradley, and the doctors examining him for purposes of the MBE
12 administrative hearing, Drs. Kinsora and Roitman, all raise a doubt about
13 competency. The court-appointed doctors determined that Petitioner was
14 incompetent and the doctors evaluating him for the MBE hearing also noted
15 significant mental impairments caused by the stroke. Additionally and
16 significantly, defense counsel has continued to express substantial doubts about
17 Petitioner's competency to stand trial. *See, Drope*, 420 U.S. at 180; *Calvin*, 122
18 Nev. at 1183, 147 P.3d at 1100.

19 Defense counsel expressed a bona fide doubt as to Desai's present ability to
20 sufficiently function during both the preparation of his defense and trial. Counsel
21 has represented Petitioner both before and after Petitioner's stroke in July 2008.
22 Defense counsel is familiar with the complex issues presented in the complex
23 prosecution which is essentially a criminal medical negligence case involving
24 seven patients and insurance fraud spanning three years. Defense counsel
25 informed the district court that Petitioner cannot sufficiently (a) accept advice
26 from counsel regarding legal strategy for the trial or consider any possible pretrial
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1 resolution; (b) recall or communicate pertinent facts necessary to present a
2 defense; (c) assist counsel in analyzing voluminous discovery and grand jury
3 evidence; (e) follow the anticipated testimony at trial in order to assist counsel
4 confront the witnesses against him; and (f) testify in his defense. Exhibit 8,
5 Memorandum of Competency Standards and Hearing Procedures, p.5 (#111).

6 To protect Petitioner's fair trial rights, the defense counsel requested that
7 the district court afford Petitioner the opportunity to present independent
8 evidence of incompetency and evidence relevant to contest the methodology of
9 evaluation employed at Lake's Crossing. Exhibit 8, p. 6 (#112). He preliminarily
10 identified Drs. Kinsora and Krelstein as potential defense witnesses. He also
11 anticipated presenting evidence of independent evaluations and testings.
12 Additionally, he expected to call a neurologist to explain the areas of the brain
13 damaged by the stroke who would not make an ultimate determination of
14 competency, as well as another neuropsychologist who would have evaluated all
15 the records to render an opinion about the propriety of Lake's Crossing
16 evaluation. Exhibit 10, Hrg. Tr., 12/13/11, pp. 3-5 (#134-36).

17 The proffered defense evidence is probative of Petitioner's incompetency.
18 Moreover, it will directly challenge the methodology and conclusions of the
19 Lake's Crossing doctors.

20 **2. The district court misconstrued the law and disregarded**
21 **substantive and procedural due process principles**

22 The district court's restriction upon the defense's ability to litigate the issue
23 of competency was primarily based on an erroneously narrow reading of the
24 Nevada competency statute and Ferguson without regard for the long established
25 principles of procedural due process discussed above.

26 Under the Nevada statute, a court must suspend the prosecution if doubt
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1 arises as to a defendant's competency to face trial. NRS 178.405(1), *see*
2 *generally, Ferguson*, 124 Nev. at 804, 192 P.3d at 718-19 (explaining statutory
3 provisions). The court shall appoint the appropriate mental health providers to
4 examine the defendant. NRS 178.415(1). Once these evaluators render an
5 opinion on the defendant's competency, the court must afford either party to
6 examine the evaluators, "introduce other evidence including, without limitation,"
7 evidence related to treatment to competency, and cross-examine each other's
8 witnesses. NRS 178.415(3)(a), (b). In the instant case neither party contested
9 Drs. Krelstein's and Bradley's conclusion that Desai was incompetent.
10 Accordingly, Department 5 remanded him to Lake's Crossing for further
11 evaluation and treatment.

12 Pursuant to NRS 178.460(1), "the judge *shall hold a hearing* within 10
13 days after the request *at which the district attorney and the defendant counsel*
14 *may examine the members of the treatment team on their report.*" NRS
15 178.460(1)(emphasis added). The district court compared this provision with
16 NRS 178.415(3), which provides for a hearing on the findings of the court-
17 appointed evaluators prior to commitment to Lake's Crossing. It reads in its
18 entirety:

19 3. The court that receives the report of the examination shall permit
20 counsel for both sides to examine the person or persons appointed to
21 examine the defendant. The prosecuting attorney and the defendant
22 may:

23 (a) *Introduce other evidence including, without limitation,*
24 *evidence related to treatment to competency and the*
25 *possibility of ordering the involuntary administration of*
26 *medication; and*

27 (b) *Cross-examine one another's witnesses.*

28 NRS 178.415(3)(emphasis added).

Applying rules of statutory construction, the district court compared the

1 two provisions and apparently concluded that the Legislature intended the hearing
2 following the return from Lake's Crossing to be limited in scope to the vetting of
3 the conclusions of the Lake's Crossing doctors. The district court stated that
4 NRS 178.460 only permitted the cross-examination of the Lake Crossing doctors.
5 It recognized that Ferguson authorized her to admit other evidence but strictly
6 narrowed that case to its facts, holding that the defense could only introduce one
7 expert witness, if any, who had evaluated the Petitioner after his return from
8 Lake's Crossing and reached a contrary finding. Exhibit 10, Hrg. Tr., 12/13/11,
9 pp. 6-12 (#137-43).

10 The arbitrariness and capriciousness of the district court's ruling was made
11 apparent in the following dialog at the December 13, 2010 hearing when defense
12 counsel attempted to clarify the court's ruling:

13 Mr. Wright: [I] don't want to be argumentative – I just want to be
14 clear –

15 The Court: Let's be clear.

16 Mr. Wright: So that if a Lake's Crossing witness says, Mr. Witness,
17 [says it] is dark outside, and I cross-examine him and I cross-
18 examine him and he sticks to his stupid answer when the sun
is shining, I cannot put on contradictory evidence to prove it.
I have to merely rely on my cross-examination skills at this
contested hearing, correct?

19 The Court: You may cross-examine the doctors and you may
20 present a doctor, if you have such doctor to opine as to
Dr. Desait's competency, and that is the extent of the
hearing, that is correct.

21 Exhibit 10, Hrg. Tr., 12/13/11, p. 16 (#147).

22 This district court's analysis wholly ignores the concept of procedural due
23 process and this Court's pronouncements that a district court must consider a
24 wide scope of relevant evidence to ensure that the competency determination is
25 accurate, subject only to the evidentiary limits of NRS 48.035(2). Sims, 125
26 Nev. at 131-32, 206 P.3d at 983-84; Calvin, 122 Nev. at 1183, 147 P.3d at 1100.
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1 As stated above, it is significant to note that the district court's ruling was
2 not based an evidentiary ruling that the probative value of Petitioner's proffered
3 evidence was substantially outweighed by considerations of undue delay, waste
4 of time or needless presentation of cumulative evidence. Although the district
5 court recognized that she had the discretion to exclude relevant evidence under
6 Calvin, it did not engage in an evidentiary analysis of the defense's proffered
7 evidence. To the contrary, the district court found it unnecessary to attempt to
8 "categorize" the defense's proposed evidence, finding that it could make a
9 competency determination based solely their on the cross-examination on the
10 opinions of the Lake's Crossing evaluators and the defendant's one testifying
11 expert, if any, who evaluated Petitioner after his return from Lake's Crossing.
12 Exhibit 10, Hrg. Tr., 12/13/11, pp. 9-11 (#140-42).

13 The district court opined that the competency procedures are set up to have
14 the court appoint its evaluators, receive those evaluations, and have the
15 evaluations "flushed out" by cross-examination. Exhibit 10, Hrg. Tr., 12/13/11,
16 pp. 14-16 (#145-47). This is a myopic view of the purpose of a competency
17 hearing and fundamental due process. It is contrary to both federal and state
18 jurisprudence requiring that courts protect the fair trial rights of an accused whose
19 competency to stand trial is called into doubt. Fundamental due process dictates
20 that Petitioner be afforded a meaningful opportunity to "to be heard, offer
21 evidence, and to test the evidence." Day, 949 F.2d at 982;

22 The mere fact that the state-employed doctors at Lake's Crossing deemed
23 Petitioner to be competent is not an ultimate conclusion of law or fact. Rather, it
24 is a piece of evidence that must be considered along with a wide scope of other
25 evidence presented at a formal competency hearing. The arbitrary limitation
26 imposed on defense counsel's ability to effectively contest this piece of evidence
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1 impedes the factfinding process by which an accurate competency determination
2 may be reached. "Accuracy is best served when the district court . . . consider[s]
3 a wide scope of relevant evidence at every stage of the competency proceedings,
4 including initial doubts as to the defendant's competency, the experts' evaluation,
5 and the hearing after the evaluation." Calvin, 122 Nev. at 1183; 147 P.3d at
6 1100.

7 **V. CONCLUSION**


8
9 Based on the foregoing, Petitioner urges this Court to grant this writ of
10 mandamus and permit him to introduce relevant evidence pertaining to
11 competency. Without this relief, Petitioner will be unable to obtain to contest the
12 Lake's Crossing evaluations and establish his present incapacity to assist counsel
13 in preparing or proceeding to trial.

14
15 Dated this 12 day of January 2012.

16 Respectfully Submitted,

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I declare under penalty of perjury that the foregoing is true and correct.

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