

DIPAK KANTILAL DESAI,

Petitioner,

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Case No. 63046
District Court No. 10C265107

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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DIPAK KANTILAL DESAI,

Petitioner,

vs.

Case No. 63046

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE VALERIE ADAIR,
DISTRICT JUDGE

District Court No. 10C265107

Respondent,

and

THE STATE OF NEVADA,

Real Party in Interest.

14 **ANSWER TO PETITION
FOR WRIT OF MANDAMUS**

15 COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark
16 County District Attorney, through his Deputy, RYAN J. MACDONALD, on
17 behalf of the above-named respondents and submits this Answer to Petition for
18 Writ of Mandamus in obedience to this Court's order filed April 22, 2013 in the
19 above-captioned case. This Answer is based on the following memorandum and
20 all papers and pleadings on file herein.

21 Dated this 24th day of April, 2013.

22 Respectfully submitted,

23 STEVEN B. WOLFSON
24 Clark County District Attorney
25 Nevada Bar # 001565

26 BY /s/ Ryan J. MacDonald

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**MEMORANDUM OF
POINTS AND AUTHORITIES**
SUMMARY OF THE ARGUMENT

Petitioner Dipak Desai requests extraordinary relief from this Court because, he claims, the district court acted arbitrarily and capriciously when it denied his requests for (1) an evidentiary hearing to examine an independent medical expert and (2) a full competency hearing pursuant to NRS 178.415. The district court considered all of the conflicting reports of Desai's competence and concluded that some of them were not reliable because of Desai's malingering. The district court appointed an independent medical expert, who came to the same conclusion. Accordingly, the court's decision that no reasonable doubt as to Desai's competence arose because of this lengthy history of malingering was a correct exercise of its discretion, rendering extraordinary intervention in this matter unwarranted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Desai owned several gastroenterological practices and clinics that he operated as a criminal enterprise and which directly caused the death of one individual and the chronic illness of many more.¹ As a result, he stands charged, by way of amended indictment, of the following crimes: second-degree murder, theft, two counts of obtaining money under false pretenses, six counts of criminal neglect of patients resulting in substantial bodily harm, ten counts of insurance fraud, and eight counts of performance of an act in reckless disregard of person resulting in substantial bodily harm. PA 1-37.

Concerns about Desai's competence to stand trial—and concomitant suspicions that those concerns were based only on Desai's malingering behavior—arose soon after the initial indictment was filed against him in June 2010. RPIA 3.

¹A recitation of the facts of the criminal transactions is not necessary given the issues raised in this petition. For context, a thorough statement of facts can be found in the State's answer to Desai's petition challenging the sufficiency of the indictment in Docket No. 61230.

1 Desai was referred to competency court and evaluations raised questions about his
2 competence. He was sent to Lake's Crossing for in-patient evaluation in March
3 2011. RPIA 11. The conclusions of professional staff after six months of
4 observation at that facility were that Desai exaggerated his symptoms, attempted to
5 thwart evaluative testing, and was competent to stand trial despite his efforts to
6 feign otherwise. Specifically, the Lake's Crossing staff (physicians, psychologists,
7 and social workers) reported that Desai would present as cognitively incapacitated
8 during evaluations but, while in the general population, would act inconsistently
9 by, for example, performing mathematical calculations for the staff and discussing
10 politics with non-evaluators. PA at Ex. 3, Evaluation p.9-11.² The competency
11 court issued written findings affirming the conclusion that Desai was competent,
12 noting that while under observation at the facility, "[a]t no time, other than when
13 directly questioned by his evaluators, did Defendant actually exhibit any cognitive
14 defects." PA 74. Desai challenged that intermediate order by way of petition for a
15 writ of mandamus to this Court and the petition was denied on January 24, 2012.

16 Desai then retained the services of Dr. Bittker, who concluded—based upon
17 a Mini Mental Status Exam (a psychiatric screening tool not designed for forensic
18 use), an interview, and a review of the record—that Desai was incompetent. PA
19 82-91. Notably, in coming to this conclusion, Dr. Bittker entirely omitted the
20 findings of the professionals at Lake's Crossing who observed Desai for six
21 months in an inpatient setting. Based upon the Bittker report, Desai filed another
22 motion under NRS 178.400 et seq., asserting that he was not competent to stand
23 trial. On January 18, 2013, the district court—relying upon that report, the record
24 from Lake's Crossing, and everything that was previously before the competency
25 court—refused to re-open competency proceedings given that nothing had changed
26 since Desai's evaluation at Lake's Crossing. PA 94-107. Defense counsel again

27 ²Because Exhibit 3 of the petitioner's appendix was sealed by order of this Court, a
28 precise citation to pages of that exhibit is not possible.

1 raised their observations that Desai was completely unable to speak, comprehend,
2 or otherwise assist in his defense. The district court noted that these are the same
3 observations that counsel has been making since the incipience of this case. PA
4 100. Desai, according to the court, was making every effort to appear as
5 incompetent as possible when being formally evaluated. PA 96-98.

6 On March 7, 2013, the district court convened after being notified that Desai
7 had suffered another stroke. Defense counsel once again asserted that Desai was
8 completely unable to speak, comprehend, or otherwise assist in his defense and
9 renewed his request for a competency evaluation. Because of Desai's history of
10 "being a malingerer and an exaggerator," the district court declined to re-open
11 formal competency proceedings, but ordered that an independent medical expert
12 (IME) be appointed so that the court would be fully informed when making its
13 determination as to whether there was a reasonable doubt as to Desai's
14 competence. PA 107-39.

15 The district court appointed Dr. David Palastrant as IME. Dr. Palastrant is a
16 stroke specialist and is on the neurology and neurosurgery faculty at a prominent
17 teaching hospital in Los Angeles. PA at Ex. 3, CV. The IME reviewed the records
18 pertaining to all of Desai's past competency evaluations and his medical
19 interventions, including those related to his latest stroke. PA at Ex. 3, Evaluation.
20 Dr. Palastrant analyzed the MRI/CAT/PET imaging results of Desai's brain and
21 compared those with Desai's presentation of befuddlement when being
22 professionally evaluated. Dr. Palastrant concluded that "Desai's claimed degree of
23 neurologic dysfunction and neuropsychiatry testing performances between 2009-
24 2013, are far worse than would be expected and not corroborated by the extent and
25 anatomic distributions of his strokes." PA at Ex. 3, Evaluation p.21. "What the
26 exact actual underlying extent of his neurologic deficits were at this time is almost
27 impossible to tell, given the extent of the embellishment [of his symptoms]." Id.
28

1 As evidence of the extreme extent of Desai's "embellishment," Dr.
2 Palastrant cited: (1) the discrepancy between his low test results on the one hand,
3 which would indicate almost complete mental impairment, and Desai's brain
4 imaging results ("Strokes affect defined vascular territories in the brain and are
5 expected to have associated discrete deficits and not impair all cognitive spheres
6 unless the strokes are far more widespread than was the case with Desai."); (2)
7 Desai's test results worsen over time, even though all stroke victims evince some
8 improvement no matter how severe the neurological event; (3) the discord between
9 his cognitive-functioning test results indicating complete impairment and his
10 observed daily functioning habits while the closed environment of Lake's
11 Crossing; (4) the impossibility of Desai's claimed degree of amnesia: while some
12 degree of memory loss may result from the type of stroke-related injury observable
13 in his scan, Desai claimed almost complete amnesia as it relates to his professional
14 career—this is not possible given the injuries observed and not likely given Desai's
15 lapses in keeping his story straight ("His professional career would be a major
16 aspect of his life story and would be deeply embedded in his memory. At times he
17 did appear to slip up . . . and reported that he was reading gastroenterology
18 journals."). PA at Ex. 3, Evaluation p.22-24.

19 Dr. Palastrant then evaluated the evidence pertaining to Desai's latest
20 February 2013 stroke event, noting that the strokes were small in size and scope.
21 "Memory and executive function should not be affected by these new strokes." PA
22 at Ex. 3, Evaluation p.25. Dr. Palastrant also included the observations of a
23 physical therapist treating Desai after these latest small strokes. The therapist
24 reported that Desai was utterly incapable of completing simple physical commands
25 (touch your nose with one finger, etc.) during the evaluation. PA at Ex. 3,
26 Evaluation p.14. Outside of the formal evaluation process, however, Desai could
27 remove his sunglasses, wipe his arm in exact area where IV was leaking, and brush
28 his teeth without complication. The therapist noted that these results are

1 inconsistent, id., and Dr. Palastrant concluded that they were further evidence of
2 malingering. See PA at Ex. 3, Evaluation p.26-27.

3 The district court received Dr. Palastrant's report on April 16, 2013. In light
4 of all the evidence in the report and the court's observations of Desai, the district
5 court declined to reopen competency proceedings, concluding that the evidence
6 supporting the defense's allegations of Desai's incompetence to stand trial is not
7 substantial. PA 143. Defense counsel yet again proffered his observations that
8 Desai was completely unable to speak, comprehend, or otherwise assist in his
9 defense. The district court noted that the goal of the defense is to delay this trial as
10 long as possible, but stated its intention to afford Desai every reasonable
11 accommodation to facilitate communication with counsel.³ Desai filed this latest
12 mandamus petition and emergency stay motion on April 22, 2013. That day, this
13 Court ordered the State to respond to both by April 24, 2013. This answer follows.

14 **ARGUMENT**

15 **I**

16 **STANDARD OF REVIEW IN THIS ORIGINAL PROCEEDING**

17 A writ of mandamus may issue to compel the performance of an act that the
18 law requires as a duty resulting from an office, trust, or station, or to control an
19 arbitrary or capricious exercise of discretion. See NRS 34.160; Round Hill Gen.
20 Imp. Dist. v. Newman, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981). The writ will
21 not issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary
22 course of law. See NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d
23 at 1338. Further, mandamus is an extraordinary remedy, and the decision to
24 consider a petition for such relief rests within the discretion of this court. State v.
25 Dist. Ct. (Riker), 121 Nev. 112, P.3d 1070, 1074 (2005). However, even when a
26 remedy at law arguably exists, this Court may exercise discretion to entertain

27 ³As this Court is aware, jury selection is proceeding as of the date of this
28 document's submission. The district court is permitting Desai and his counsel to
retire to the courtroom's antechamber for 5 minutes after each venireperson is
questioned and passed for cause so that Desai may consult with counsel.

1 petitions for extraordinary relief under circumstances revealing “urgency and
2 strong necessity,” Babayan, 106 Nev. at 176, 787 P.2d at 819, or when an
3 important issue of law requires clarification and sound judicial economy and
4 administration favor the granting of the petition. Riker, 121 Nev. at 112, P.3d at
5 1074. The district court did not abuse its discretion in this matter and the petition
6 should accordingly be denied.

7 **II**
8 **THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT**
9 **DETERMINED THAT ANY DOUBT AS TO DESAI’S COMPETENCY**
10 **WAS NOT SUBSTANTIAL GIVEN THE OVERWHELMING EVIDENCE**
11 **OF HIS MALINGERING BEHAVIOR**

12 Desai has a history of strokes, and a history of exaggerating the effects of
13 those strokes. PA at Ex. 3. While all stroke victims evince some improvement no
14 matter how severe the neurological event, Desai seems to get worse without an
15 underlying physiological cause to explain the deterioration. PA at Ex. 3,
16 Evaluation p.22. When Desai is interviewed by an expert using a screening tool
17 like the Mini Mental Status Exam (MMSE), Desai scores as low as someone who
18 requires 24-hour care and can do nothing for himself. See e.g., PA 82-91 (report of
19 Dr. Bittker employing MMSE); see also PA at Ex. 3, Evaluation p.23 (Dr.
20 Palastrant interpreting test results and explaining that Desai’s dementia score
21 would place him the percentile of someone so mentally disabled so as to require
22 round-the-clock care to assist his with his activities of daily living (feeding
23 himself, toileting, dressing himself, etc.)). When Desai was observed for a length
24 of time outside of the professional interview context, he was capable of
25 perambulating, performing mathematical calculations, discerning whether a meal
26 conforms to his vegetarian diet, doing his laundry, brushing his teeth, and engaging
27 in political discourse. Id. at 10-11. This is the context in which the district court,
28 after assessing all the evidence, declined to send Desai to psychiatrists for further
evaluation pursuant to NRS 178.415.

1 “An incompetent defendant is defined under NRS 178.400(2)(a) as one who
2 does not have the present ability to understand either the nature of the criminal
3 charges against him or the nature and purpose of the court proceedings, or is not
4 able to aid and assist his counsel in the defense at any time during the proceedings
5 with a reasonable degree of rational understanding.” Olivares v. State, 124 Nev.
6 1142, 1147, 195 P.3d 864, 868 (2008). NRS 178.405 requires that “if doubt arises
7 as to the competence of the defendant, the court shall suspend the proceedings, the
8 trial or the pronouncing of the judgment, as the case may be, until the question of
9 competence is determined.” The “doubt” at issue in the statute is defined as
10 “‘substantial evidence’ that the defendant may not be competent to stand trial.”
11 Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008) (quoting
12 Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983)). “Whether
13 such a doubt is raised is within the discretion of the trial court.” Melchor-Gloria,
14 99 Nev. at 180, 660 P.2d at 113. The district court’s determination that any no
15 reasonable doubt as to Desai’s competence existed was not an arbitrary and
16 capricious exercise of its discretion given his proven history of malingering.

17 Desai offers several contentions to support his argument to the contrary.
18 First, he asserts that Dr. Palastrant’s report confirmed that Desai may experience
19 some expressive and receptive aphasia. However, the next lines in that report state
20 that “[m]emory and executive function should not be affected by these new
21 strokes.” PA at Ex. 3, Evaluation p.25. Difficulty speaking does not even approach
22 the standard for incompetence enunciated in NRS 178.400(2)(a). Further, as
23 repeatedly raised in Desai’s multiple evaluations, we may unfortunately never
24 know the true extent of Desai’s difficulties due to his insistent malingering. The
25 report of the stroke expert notes that there should be significant improvement in the
26 first three months, yet in the two months since his stroke he is presenting as if he
27 has worsened.
28

1 Second, Desai asserts that denial of full competency process was an arbitrary
2 and capricious exercise of discretion because Dr. Palastrant opined that Desai
3 could suffer retrograde amnesia from his 2008 stroke. Desai claims that this
4 statement means that Desai would be unable to recall the events related to the
5 criminal transactions at issue. Again, this is not germane to the statutory
6 competency standard. In fact, Desai has not only claimed that he cannot remember
7 the events related to spreading hepatitis-C infection, he claimed to be unable to
8 recall his entire professional career. Moreover, he purportedly cannot report what
9 his medical specialty was, despite the fact that he is apparently a reader of
10 gastroenterology journals. PA at Ex. 3, Evaluation p.23.

11 Third, Desai asserts that defense counsel has provided substantial evidence
12 of possible incompetence by relating its observations that Desai was completely
13 unable to speak, comprehend, or otherwise assist in his defense. As the district
14 court recognized, this is an assertion that counsel has made from the start of this
15 matter and continues to make now. See Petition. The district court did not doubt
16 defense counsel's veracity, but asserted that Desai would likely not spare counsel
17 from his acting routine and credited those observations on par with the other Desai-
18 controlled evaluations, such as Dr. Bittker's.

19 Fourth, Desai contends that denial of full competency process was an
20 arbitrary and capricious exercise of discretion because Bittker's report raised a
21 reasonable doubt as to Desai's competency. Dr. Palastrant did not accord much
22 weight to the Bittker interview because Bittker curiously did not employ the six
23 months of Lake's Crossing data in his conclusions. The district court came to a
24 similar conclusion. PA 94-100. This is a reasonable conclusion, not an arbitrary
25 one. Whatever Bittker's reasons for failing to include the Lake's Crossing data,
26 neuropsychiatric screening testing—like the MMSE that Bittker performed—
27 “requires active patient participation, without which their results become dubious.”
28 Many of the experts who conducted this type of testing on Desai noted this

1 possible fatal flaw to their findings. See PA at Ex. 3, Evaluation pp. 8 (Bradley
2 evaluation), 8-9 (Krelstein evaluation); 10 (Farmer evaluation). Some conducted
3 concurrent tests that demonstrate malingering, each of which indicated
4 affirmatively. See PA at Ex. 3, Evaluation p. 10-11 (Farmer evaluation). Bittker
5 did neither of these. The district court's decision to accord this evaluation no
6 weight given these flaws and the other evidence at hand is not a failure of the
7 court's discretion; it is its proper exercise. This is particularly true given Dr.
8 Palastrant's conclusion that Desai's "ability to embellish his symptoms . . . speaks
9 to very high level executive function and planning. The observed embellishment
10 demonstrated an ability to realize secondary gain and conceive and maintain a plan
11 over time. All things a person with severe memory and cognitive impairment
12 could not do." PA at Ex. 3, Evaluation p.25.

13 In an effort to rescue his feeble arguments, Desai entirely relies the
14 following quotation for support: "Once there is [substantial] evidence from any
15 source, there is a doubt [as to competence] that cannot be dispelled by resort to
16 conflicting evidence." Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109,
17 113 (1983) (quoting Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972).
18 Although this Court has never elaborated upon this curious statement, this
19 quotation cannot possibly mean what Desai construes it to mean: that any time any
20 person claims that a defendant is not competent, no conflicting evidence may be
21 considered by the district court. If that were so, the previous lines in Melchor-
22 Gloria recognizing that the district court has discretion in such matters would have
23 no meaning. In Desai's construction, there is no discretion to consider if the
24 claimant is lying or misinformed, no discretion to consider the defendant's
25 extensive history of malingering, and no discretion to consider the totality of the
26 circumstances when ruling on the threshold issue of competence. In Desai's
27 construction, all that is required is that the defense hire one expert to state that
28 defendant is incompetent and the district court is deprived of further discretion to

1 act and must, as a matter of law, automatically appoint experts and begin the
2 statutory competency process. Such a result would permit a malingering defendant
3 to hijack the trial process at will. This Court should not condone such an outcome;
4 the petition should be denied.

5 **III**
A STAY OF TRIAL IS NOT WARRANTED

6 Initially, the State asserts that a stay of trial is not warranted because the writ
7 petition may be, and should be, summarily denied. Further, a stay is unnecessary
8 even if this Court accepts Desai's contention that it was egregious error to deny his
9 request for an evidentiary hearing so that Dr. Palastrant could be sworn and his
10 conclusions could be tested through examination. Such an examination could be
11 conducted concurrently with trial, *in media res*. In either case, a stay would serve
12 no purpose.

13 **CONCLUSION**

14 This petition is simply an adjunct to Desai's malingering behavior and
15 constitutes yet another attempt to delay his day in court. The district court acted
16 well within its discretion and therefore extraordinary relief is unwarranted. For the
17 same reasons, a stay of Desai's long-delayed trial is unnecessary. Accordingly, the
18 State requests that this Court order both the motion for stay of district court
19 proceedings and petition for a writ of mandamus be DENIED.

20 Dated this 24th day of April, 2013.

21 Respectfully submitted,

22 STEVEN B. WOLFSON
23 Clark County District Attorney
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