

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
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4 DIPAK KANTILAL DESAI,)

5 Petitioner,)

6 vs.)

7)

8 THE EIGHTH JUDICIAL DISTRICT)

9 COURT OF THE STATE OF NEVADA,)

10 COUNTY OF CLARK, DEPARTMENT 21)

11 Respondent.)

12 and)

13)

14 THE STATE OF NEVADA,)

15 Real Party In Interest.)

16 _____)

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Tracie K. Lindeman
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No. 63046

District Court No. 10C265107

17 **PETITIONER'S REPLY TO STATE'S ANSWER**

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19 Pursuant to this Court's Order, dated April 22, 2013, Petitioner, DIPAK
20 KANTILAL DESAI, by and through his attorney, Richard A. Wright and Margaret
21 M. Stanish, WRIGHT STANISH & WINCKLER, replay to the State's Answer. The
22 State concedes that the independent medical evaluator ("IME") confirmed that
23 Petitioner suffered strokes in July 2008, which likely resulted in retrograde amnesia,
24 and he suffered multiple focal strokes on February 24, 2013, resulting in aphasia.
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1 The State, however, incorrectly assumes that aphasia and memory problems do not
2 raise a reasonable doubt as to competency under NRS 178.405. The State's answer
3 misstates and distorts certain facts which merit correction herein.
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5 DATED this 26th day of April 2013.
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7 Respectfully Submitted,
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9 WRIGHT STANISH & WINCKLER
10

11 BY 
12

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1. Undisputed Facts on Petitioner's Present Neurologic Functioning

The State's Answer does not contest the fact that the IME confirmed that Petitioner suffered a stroke on February 24, 2013, resulting in receptive and expressive aphasia. Nor does the State contest the IME's finding that the 2008 acute stroke caused some degree of retrograde and anterograde amnesia, as well as aphasia. The State does not deny that the IME concluded that it will take up to nine months for Petitioner to regain close to his pre-morbid condition, with full recovery expected in up to 18 months. These uncontested facts raise substantial doubt as to Petitioner's present competency to assist in his defense, especially when coupled with counsel's bona fide expression of doubt and Dr. Thomas Bittker's recent finding of incompetency.

The February 2013 stroke was a serious medical episode that in and of itself raises doubt as to competency. Petitioner was hospitalized for six days, including four days in the intensive care unit. Exhibit 8 (134). In studying the MRI, the IME observed new lesions in the part of the brain involved in processing speech, which support the finding that he has expressive and receptive aphasia. Exhibit 3 (64-66) The IME report, standing alone, raises reasonable doubt as to Petitioner's ability to assist in his defense by virtue of the finding that the stroke caused Petitioner to suffer expressive and receptive aphasia.

1 Rather than address the above undisputed evidence of doubt as to
2 competency, the bulk of the State's Answer primarily focuses on the findings of
3 Petitioner's past condition, especially the Lake's Crossing findings that he
4 exaggerated his symptoms when participating in formal testing.¹ State's Answer,
5 pp. 4-6.
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8 In reviewing the medical records prior to the February 24, 2013 stroke, the
9 IME found that Petitioner previously embellished his symptoms, due in part to
10 malingering and depression, when participating in past formal testing. Exhibit 3
11 (60-64, 66). His review of the 2009 UCLA records, however, established the
12 Petitioner's "baseline deficits" stemming from the 2008 acute stroke, which
13 included trouble in expressing himself, processing speech inputs, following
14 complex commands, and problems forming new long-term memories (anterograde
15 amnesia) and recalling events up to two years prior to the 2008 stroke (retrograde
16 amnesia). Exhibit 3 (60-61).
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21 ¹ The State also argues that the IME's summary of a physical therapist's
22 notes showed evidence of malingering because Petitioner performed basic motor
23 tasks on his own volition (brush his teeth, remove his sunglasses, wipe his arm in
24 the area where the IV was leaking) versus his inability to follow instructions to
25 perform motor tasks (finger to nose, etc.). State's Answer, pp. 5-6. Although the
26 IME noted these inconsistencies by the physical therapist, it did not dissuade him
27 from finding that Petitioner suffered expressive and receptive aphasia that required
28 up to nine months to regain close to his pre-morbid condition and up to 18 months
for full recovery. Exhibit 3 (64 & 66).

1 The State cannot and does not dispute these findings. Instead, its argument
2 is essentially, “once a malingerer, always a malingerer.” These undisputed
3 findings, however, merit the “broader inquiry” that this Court recognized would be
4 necessary if sufficient evidence of doubt as to competency to stand trial was
5 raised. Order in No. 60038, *2, n. 1, *citing*, State v. Ferguson, 124 Nev. 795, 805,
6 192 P.3d 712, 719 (2008), Morales v. State, 116 Nev. 19, 22, 922 P.2d 252, 254
7 (2000); NRS 178.405; NRS 178.415. Exhibit 2 (38).

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11 **2. Sufficient Doubt as to Competency – The Inability to Assist**
12 **Counsel**

13 Astonishingly, the State argues that retrograde amnesia covering the time
14 relevant to the indictment is “not germane to the statutory competency standard;”
15 and Petitioner’s present, undisputed “[d]ifficulty speaking does not even approach
16 the standard for incompetence.” State’s Answer, pp. 5, 8-9. An accused must
17 have “*sufficient present ability to consult with his lawyer with a reasonable*
18 *degree of rational understanding ...and a rational as well as factual understanding*
19 *of the proceedings against him.*” Dusky v. United States, 362 U.S. 402
20 (1960)(emphasis added); NRS 178.400.

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24 The Sate treats Petitioner’s current stroke-induced aphasic condition as if it
25 were a mere speech impediment in which he just needs a bit more time to
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1 pronounce words. This is incorrect. Aphasia distorts the ability to comprehend
2 and process language and accurately express ones thoughts. For discussion of
3 aphasia, see original petition, pp. 1, n. 1, 22-23. In other words, aphasia effects
4 the ability to “*consult with his lawyer with a reasonable degree of rational*
5 *understanding.*” Id.
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8 The State’s argument that Petitioner’s undisputed memory problems caused
9 by the 2008 acute stroke is irrelevant to competency is equally troublesome. This
10 is not a case where A sold drugs to B and everything was tape-recorded. This case
11 will involve at least six more weeks of testimony, scientific and medical testimony
12 and voluminous records pertaining to historical events and conversations
13 regarding numerous patients during the period from 2004 through early 2008, over
14 five to nine years ago. It defies common sense to believe that doubt as to
15 competency is not implicated when a brain-damaged defendant suffers from
16 receptive and expressive aphasia and anterograde and retrograde amnesia.
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21 Without the ability to process language and accurately express desired
22 thoughts, Petitioner cannot effectively communicate with his counsel and
23 rationally assist in his defense. Without such abilities, Petitioner cannot effectively
24 exercise his right to testify or assist counsel in exercising the right of
25 confrontation.
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1 The IME report, Dr. Bittker's finding of incompetency, and counsel's firm
2 conviction that Petitioner cannot rationally assist in his defense raise sufficient
3 doubt as to Petitioner's ability to process and understand speech (receptive
4 aphasia); accurately express his thoughts with the desired words (expressive
5 aphasia); retain new information (anterograde amnesia); and retrieve information
6 from the relevant 2007 time frame (retrograde amnesia).
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9 As a point of emphasis, Petitioner is not arguing that the undisputed facts
10 constitute a legal finding of present incompetency. Likewise, the State cannot
11 argue that the findings of Petitioner's past embellishment of symptoms constitute a
12 legal finding of present competency. Instead, Petitioner is arguing that the
13 undisputed facts set forth in the IME report, counsel's bona fide doubts, and Dr.
14 Bittker's findings raise sufficient doubt to merit an accurate evaluation of his
15 present ability to stand trial based significant evidence of current stroke-induced
16 neurological deficits. *See, State v. Calvin*, 122 Nev. 1178, 1183, 147 P.3d 1097,
17 1100 (2006)("An accurate competency evaluation is therefore critical to avoiding
18 a violation of the defendant's constitutional rights").
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23 In light of the undisputed evidence of doubt as to Petitioner's present
24 competency, the district court abused its discretion when refusing to stay the trial
25 and obtain a fair and accurate competency evaluation of Petitioner's present
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1 ability, long after his release from Lake's Crossing in September 2011.

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3 **3. Misstatements in State's Answer**

4 The State's Answer contains several mischaracterizations of facts that
5 warrant correction. First, the State misstates the record when informing this Court
6 that undersigned counsel represented to this Court in the instant Petition and to the
7 district court on January 8, 2013, and April 16, 2013 that "Desai was completely
8 unable to speak, comprehend, or otherwise assist in his defense." Answer, pp. 4,
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10 ln. 1-2; 6, ln. 7-9; and 9, ln. 12-13. This is untrue and offensive.

12 Counsel has consistently and accurately related to this Court and the district
13 court that Petitioner cannot effectively communicate due to the effects of the
14 strokes, which include expressive and receptive aphasia and memory loss.

16 Counsel accurately related that when he first visited Petitioner in the intensive care
17 unit of Summerlin Hospital following the February 24, 2013 stroke, Petitioner
18 could only make indiscernible sounds. Thereafter, his speech improved with
19 therapy but nowhere near to the degree to permit him to effectively communicate
20 in the defense of a complex criminal medical negligence and insurance fraud case.

23 See, Petition, pp. 17-18; Competency Motion, Exhibit 6 (80, 88-90); Hearing on
24 Competency Motion, 1/13/13, Exhibit 7 (100 & 103); Calender Call, 4/16/13
25 (147-48, 157-58, 161, 170-71, 178, 182). In fact, counsel's accurate recitation of
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1 Petitioner's post-stroke progress is corroborated by the IME's prognosis of
2 Petitioner's expected recovery time from the February 2013 stroke.
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4 Second, the State erroneously assumes that Dr. Bitter's finding of
5 incompetency "entirely omits" the Lake's Crossing findings. Dr. Bittker discuss
6 the findings of Lake's Crossing and noted that those findings were made 13
7 months before his evaluation. Exhibit 6 (87-88). Unlike the IME who provided a
8 neurological review of the medical records, Dr. Bittker conducted a competency
9 evaluation 13 months after Petitioner's return from Lake's Crossing. He was
10 aware of the complex nature of the criminal medical neglect and fraud charges; he
11 reviewed pertinent medical records, including the Lake's Crossing records; and
12 personally examined Petitioner. Exhibit 6 (84-88).
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16 Consistent with the IME's findings of aphasia and retrograde and
17 anterograde amnesia resulting from the 2008 stroke, Dr. Bittker found that
18 Petitioner had aphasia and memory impairments, including the ability to learn new
19 information and retrieve past information. Given these deficits and the
20 complexity of the instant case, Dr. Bittker concluded that Petitioner could not
21 assist counsel within the meaning of Dusky. Exhibit 6 (88-89). Dr. Bittker's
22 December 2012 conclusion of the Petitioner's inability to assist counsel would
23 undoubtedly be bolstered by the medical records showing the impairment caused
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1 by the new strokes suffered in February 2013.

2 Third, the State incorrectly claims that “in the two months since his stroke
3 he it presenting as if he has worsened.” State’s Answer, p. 8, ln. 25-27. This is
4 untrue. As stated above, counsel reported to both this Court and the district court
5 that Petitioner has improved with therapy but doubt still remains as to his ability to
6 assist counsel.
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8 Fourth, the State erroneously describes the earlier petition for writ of
9 mandamus in Case No. 60038. Petitioner did not seek extraordinary relief to
10 challenge the competency court’s written finding of competency. State’s Answer,
11 p. 3. That earlier petition was filed prior to the post-Lake’s Crossing hearing and
12 sought to compel the competency court to permit Petitioner to introduce evidence
13 of incompetency. Order Denying Petition, Case 60038, Exhibit 2 (37-38).
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15 Fifth, the State goes outside of the record in an apparent attempt to leave
16 this Court with the impression that the district court remedied Petitioner’s
17 “difficulty speaking” by permitting Petitioner and counsel confer for five minutes
18 in the anteroom after a juror is passed for cause. State’s Answer, p. 6, n. 3.
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20 Petitioner is compelled to also venture outside the record to disclose to the Court
21 significant information omitted by the State.
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23 On April 23, 2013, the undersigned counsel was permitted to make a record
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1 of his interactions with Petitioner on the morning of that date. With respect to the
2 voir dire of two jurors passed for cause on the morning of April 23, 2013, counsel
3 related that Petitioner understood some of the information but was mistaken and
4 confused about some of the information. Petitioner was mixing up facts,
5 scrambling one juror's characteristics with another. Petitioner had difficulty
6 communicating his thoughts and counsel opined that he was not obtaining
7 accurate information from his client. When counsel attempted to ask Petitioner
8 about the jurors that had been passed for cause on the previous day, Petitioner had
9 no recollection of those jurors. In response to counsel's observations, the district
10 court commented that everyone has trouble remembering jurors, or words to that
11 effect.
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13 While the undersigned counsel acknowledges that he is not a medical
14 expert, Petitioner's difficulties in assisting counsel during the jury selection
15 process appear to be confirmed by the IME's finding that Petitioner has expressive
16 and receptive aphasia, as well "anterograde amnesia," i.e., the "[i]mpaired
17 registration of new information." Exhibit 3 (60, 66). Based on counsel's
18 experience as a long-time practitioner of criminal law, Petitioner's
19 communications and memory problems exhibited during voir dire (one of the more
20 simpler trial procedures) adds to the existing substantial doubt about Petitioner's
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1 ability to assist counsel during a lengthy trial involving complex facts.

2 Based on the foregoing, the State's Answer fails to establish that the district
3 court reasonably exercised its discretion when disregarding the substantial
4 evidence of doubt as to Petitioner's present competency to assist in his defense.
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6 Although Petitioner has been the subject of much public attention and
7 disparagement, he cannot be fairly tried without an accurate competency
8 evaluation of his current ability to assist counsel in light of the uncontradicted
9 substantial doubt as to competency to assist in his defense.
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12 DATED this 26d day of April 2013.
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14 Respectfully Submitted,
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EXECUTED on the 26th day of April 2013.

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