IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. VINNIE ADAMS, Respondent.	)	Case No. 81782

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

(Appeal from Final Order)

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THE STATE OF NEVADA,	)	
	)	
Appellant,	)	
	)	Case No. 81782
vs.	)	
	)	
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	)	
Respondent.	)	
	)	

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STATEMENT OF THE ISSUES

1. What is the burden of proof that should apply to a district court's decision in a challenge hearing associated with a competency determination?

2. Which party has the burden of proof in a challenge hearing associated with a competency determination?

3. What competency standard is alleged to have been applied by the district court in its decision below?

4. What competency standard should a district court apply in a competency determination if not the *Dusky* standard?

SUMMARY OF THE ARGUMENT

The appropriate burden of proof in a competency challenge hearing is proof by a preponderance of the evidence because that was the common law standard in competency cases, and NRS 178.460 did not alter that standard.

Although Nevada's legislature *could have* placed this burden of proof on the defendant in NRS 178.460, it did not do so. Instead, based on a "whole-text" reading of Nevada's competency statutes, and in accordance with the majority of federal decisions, that burden fairly rests on the State, particularly where the State contends that trial accommodations would *make* the defendant competent. However, because substantial evidence supports a finding that Mr. Adams was more likely than not incompetent without possibility of restoration, an allocation of the burden of proof is not outcome-determinative in this appeal. As a result, just like the Second and Eighth Circuit Courts of Appeals, this Court can exercise judicial restraint and decline to allocate the burden of proof in this case.

In its briefing, the State claims that the district court applied a standard other than Dusky when it credited the testimony of Mr. Adams' defense expert over and above the testimony of the State's experts. While the State may disagree that the weight of the evidence supported a finding of incompetence without possibility of restoration, that does not mean that the district court applied the wrong legal standard in this case. As set forth herein, the district court applied Dusky and Dusky should continue to apply in competency cases going forward. The district court's Amended Decision and Order should be affirmed.

ARGUMENT

No one disputes that "the criminal trial of an incompetent defendant violates due process." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting Medina v. California, 505 U.S. 437, 453 (1992)). This rule has "deep roots in our common-law heritage" and can properly be classified as a "fundamental" right. Medina, 505 U.S. at 446. "The test for incompetence is also well settled." Cooper, 517 U.S. at 354. Courts must determine whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him." Id. (quoting Dusky v. United States, 362 U.S. 402, 402 (1960).

In NRS 178.400, Nevada's legislature codified these fundamental legal principles. NRS 178.400(1) currently provides that an "incompetent" defendant "may not be tried or adjudged to punishment of a public offense." Likewise, NRS 178.400(2) provides that a person is "incompetent" if he or she "does not have the present ability to: (a) Understand the nature of the criminal charges against the person; (b) Understand the nature and purpose of the court proceedings; or (c) Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding." Despite the slight variance in language between

Dusky and NRS 178.400, this Court has held that Nevada's competency standard "conforms to that of Dusky and thus satisfies constitutional requirements." Calvin v. State, 122 Nev. 1178, 1182, 147 P.3d 1097, 1100 (2006).

Although this Court has frequently addressed the issue of *when* a competency hearing is required,[1] it has not yet addressed the burden of proof or the burden of persuasion that are applicable at competency challenge hearings. This is likely because Nevada's competency challenge statute does not *expressly* address those burdens. NRS 178.460 governs the procedure at competency challenge hearings in the State of Nevada. However, our legislature did not include any language in *that* statute identifying the burden of proof that applies at a competency challenge hearing, nor did it include any language indicating which party should bear that burden. See, generally, NRS 178.460.

States normally have the power to "regulate procedures under which [their] laws are carried out, i*ncluding the burden of producing evidence and the burden of persuasion*," and such regulations will not violate the Due

[1] See, e.g., Goad v. State, 488 P.3d 646, 137 Nev., Adv. Op. 17 (Nev. App. 2021); Lipsitz v. State, 135 Nev. 131, 442 P.3d 138 (2019); Olivares v. State, 124 Nev. 1142, 195 P.3d 864, (2008); Fergusen v. State, 124 Nev. 795, 192 P.3d 712 (2008); Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 109 (1983).

Process Clause unless they are contrary to "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Medina, 505 U.S. at 445 (quoting Patterson v. New York, 432 U.S. 197 (1977)) (emphasis added). Because "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental," the Supreme Court looks to the common law to assess whether a particular rule violates Due Process.

When asked to evaluate a California statute that expressly placed the burden of proving incompetence on a criminal defendant, the Supreme Court found that at common law, there was "no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence." Medina, 505 U.S. at 446 (examining nineteenth century English decisions, American decisions from the turn of the century, and contemporary cases and finding "divergent views" on the allocation of burden of proof). Because there was no "fundamental" right involved in the allocation of this burden of proof, and because its application would only affect the "narrow class of cases" where the evidence of competence was "just as strong" as the evidence of incompetence, the Supreme Court held that it did not violate Due Process for the California legislature to place the burden of proving incompetence on the defendant. Id. at 449-453.

By contrast, when asked to evaluate an Oklahoma statute that expressly required a criminal defendant to prove incompetence by clear and convincing evidence, the Supreme Court found that there *was* a long-standing common law practice of applying a "preponderance of the evidence" standard of proof in competency determinations. Cooper, 517 U.S. at 356. The traditional practice in England required the jury to determine whether the defendant was "more likely than not" incompetent. Id. (citations omitted). And the "vast majority" of American jurisdictions agreed that the "preponderance of the evidence" standard was sufficient to "vindicate the State's interest in prompt and orderly disposition of criminal cases." Id. (citations omitted). Given the "deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel," and the "significant risk" of an erroneous competency determination, the Supreme Court struck down the Oklahoma law and held that states *may not* require defendants to prove their incompetence by clear and convincing evidence.

Medina and Cooper, thus, establish Constitutional limits on what States are permitted (and not permitted) to do when enacting procedural

rules governing competency challenge hearings: A State *may*, but is not required to, place the burden of proof on the defendant to establish incompetence. Medina, 505 U.S. at 452-53. But a State *may not* require a defendant to establish incompetence by clear and convincing evidence. Cooper, 517 U.S. at 369.

Turning now to the first two issues before this Court (e.g., which burden of proof should apply in a competency challenge hearing, and which party should bear that burden), the weight of authority indicates that the appropriate burden of proof in a competency challenge hearing is proof by a preponderance of the evidence. In addition, the State should bear the burden of proving the defendant competent, particularly when the State contends that "accommodations" will make the defendant competent at trial. However, the Court does not need to resolve the burden of proof question in this case, because substantial evidence indicates that Mr. Adams was more likely than not incompetent without possibility of restoration. As to the second two issues raised by this Court (e.g., what competency standard is alleged to have been applied by the district court in this case, and what competency standard *should apply*, if not Dusky), Mr. Adams contends that the Dusky standard *was* applied, and should continue to apply in competency cases going forward.

1. The burden of proof at a competency challenge hearing is proof by a preponderance of the evidence.

As set forth above, NRS 178.460 describes the *procedure* for a competency challenge hearing, but does not expressly identify the burden of proof or the party who bears that burden. NRS 1.030 provides that "[t]he common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State." Although the common law of England did not specify *who* should bear the burden of proving competency, Medina, 505 U.S. at 446, it *did* specify that the burden of proving competency was by a "preponderance of the evidence." Cooper, 517 U.S. at 358-362. Because the common law "preponderance of the evidence" standard does not conflict with any language in NRS 178.460, the applicable burden of proof in competency challenge hearings should be proof by a "preponderance of the evidence." See NRS 1.030.

2. The burden of proof at a competency challenge hearing should fall on the State, particularly when the State contends that "accommodations" are necessary to facilitate the defendant's participation at trial.

Although the Supreme Court has said that states *may* place the burden of proof on a defendant to establish competence by a preponderance of the

evidence, see Medina, 505 U.S. at 452, most federal courts that have considered this issue have determined that the *government* bears the burden of proving a defendant's competence. These courts include the Second, Third, Fifth, Seventh, and Ninth Circuit Courts of Appeals, and district courts in Maine[2] and North Dakota[3]. See, e.g., United States v. Teague, 956 F.2d 1427, 1431 n.10 (7th Cir. 1992) ("We note that once the issue of the defendant's mental competency is raised, the government bears the burden of proving that the defendant is competent to stand trial."); United States v. Frank, 956 F.2d 872, 875 (9th Cir. 1991) ("The Government has the burden of demonstrating by a preponderance of the evidence that the defendant is competent to stand trial."); United States v. Velasquez, 885 F.2d 1076, 1089 (3d Cir. 1989) ("At the competency hearing, the Government has the burden to prove the defendant's competency."); United States v. Hutson, 821 F.2d 1015, 1018 (5th Cir. 1987) ("the state must prove by a preponderance of the evidence that Hutson was competent to stand trial when she did."); Brown v. Warden, Great Meadow Correctional Facility, 682 F.2d 348, 349 (2d Cir. 1982) ("once a defendant's competency has been called into question . . .the burden is placed on the prosecution to prove that the defendant is mentally

[2] Maine is in the First Circuit.
[3] North Dakota is in the Eighth Circuit.

competent to stand trial.");[4] United States v. Ventura, 607 F.Supp.2d 229, 230 (D. Me. 2009) ("Once competency is raised, the Government bears the burden to establish that the Defendant is competent 'by a preponderance of the evidence.'"); United States v. Belgarde, 285 F.Supp.2d 1218, 1220 (D.N.D. 2003) ("The Government bears the burden of proving that the Defendant is competent to stand trial").

Only two circuits have placed the burden of proof on the defense: the Fourth and Tenth Circuits. See United States v. Robinson, 404 F.3d 850, 856 (4th Cir. 2005) ("Under federal law the defendant has the burden, 'by a preponderance of the evidence" to establish incompetence); United States v. Smith, 521 F.2d 374, 377 (10th Cir. 1975) (same).

The Eleventh Circuit Court of Appeals held, in the narrow circumstances where the defendant had moved to withdraw a guilty plea based on incompetence, that the defendant would bear the burden of proof. See United States v. Izquierdo, 448 F.2d 1269 (11th Cir. 2006). However, the court made this allocation because the defendant already bore the burden of proving entitlement to withdraw his guilty plea. Id. at 1276 ("A defendant-movant clearly has the burden on a motion to withdraw a guilty

[4] As set forth below, the Second Circuit subsequently reconsidered the question and declined to resolve it. United States v. Nichols, 56 F.3d 403 (2d Cir. 1995).

plea. That burden does not shift to the government when the basis of the withdrawal motion is incompetency at the time of the plea.").

And two circuits, the Second and Eighth Circuits, recognized the split in authority but declined to resolve the issue because the district courts' competency findings did not depend on how the burden of proof was allocated. United States v. Whittington, 586 F.3d 613, 618 (8th Cir. 2009); United States v. Nichols, 56 F.3d 403, 410 (2d Cir. 1995). These circuits aptly recognized that the burden of proof allocation would only matter if the evidence was in "equipoise," meaning that the evidence *for* competence was just as strong as the evidence *against* competence. Id.; see also Medina, 505 U.S. at 449. Because a resolution of the burden of proof issue was unnecessary to either appeal, the Second and Eighth Circuit Courts of Appeals practiced judicial restraint and declined to address the burden of proof.

Should this Court choose to resolve the burden of proof issue in this case, Mr. Adams would ask this Court to follow the majority rule and place a general burden of proof on the State to establish a defendant's competence. Doing so would enable this Court to rely on federal cases from a larger number of jurisdictions as persuasive authority when evaluating competency issues. More importantly, however, a review of the "whole-text" of

Nevada's statutory provisions[5] governing competency procedures indicates that the burden of proof should fairly rest on the State, especially when the State contends that "accommodations" will *make* the defendant competent to stand trial.

The "whole-text" canon requires that, in construing a statute, '[t]he text must be construed as a whole.'" Parsons v. Colts Mfg. Co. LLC, 137 Nev., Adv. Op. 72, 499 P.3d 602, 606 (2021) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012), and Orion Portfolio Servs. 2 LLC v. Cty. Of Clark ex rel. Univ. Med. Ctr. Of S. Nev., 126 Nev. 37, 403, 245 P.3d 527, 531 (2010)). Because "[c]ontext is a primary determinant of meaning," it is appropriate to examine related statutory provisions together to understand how the individual parts work together to accomplish a common goal. Scalia & Garner at 167-168. Here, when one looks at the life cycle of a competency case and all the related statutory provisions governing competency, it becomes clear that the State bears the burden of proof at a competency challenge proceeding.

To begin with, NRS 178.405 does not require the defendant to affirmatively request a competency evaluation to trigger the court's obligation to "suspend the proceedings, the trial or the pronouncing of the

[5] See, e.g., NRS 178.3981-4715 ("Inquiry into Competence of Defendant and Procedure Following Finding of Incompetence").

judgment, as the case may be, until the question of competence is determined." Rather, if "doubt arises as to the competence of the defendant," the court is statutorily required to suspend proceedings and determine the question of competence. Where the defendant has no statutory burden to *request* a competency evaluation, the defendant should not bear the burden of proving incompetence in the first instance.

While the question of competence is pending, the State may not seek an indictment of the defendant. NRS 178.415(4). The statute expressly places a burden on *the State* to "demonstrate that adequate cause exists for the court to grant leave to seek an indictment." NRS 178.415(4).

Once the court enters an order finding the defendant incompetent, the statutory scheme imposes additional burdens on the State. For instance, NRS 178.425 provides that the State may not bring new charges arising out of the same circumstances "except upon application by the prosecuting attorney to the chief judge." NRS 178.425(5). To bring new charges under this provision, the State must demonstrate "a good faith belief, based on articulable facts, that the defendant has attained competency," that "[t]he State has a compelling interest in bringing charges again," and that the "maximum time allowed by law for commencing a criminal action . . . has not lapsed since the date of the alleged offense." NRS 178.425(5).

Crucially, the only way the parties will *get* to a competency challenge hearing is if the court has already *found* the defendant incompetent pursuant to NRS 178.425, has ordered the defendant committed "for a determination of the defendant's ability to receive treatment to competency and to attain competence," and the defendant is subsequently released by the Administrator of the Division of Public and Behavior Health of the Department of Health and Human Services as provided in NRS 178.450, 178.455 and 178.460. At the time of the competency challenge hearing, the court's original order finding the defendant incompetent is still in effect. Thus, the purpose of the challenge hearing is to determine whether evidence exists to *overcome* the court's original finding of incompetence, such that the defendant may proceed to trial.

That purpose is reflected in the plain language of NRS 178.460. In describing the parties' ability to conduct an examination at a competency challenge hearing, NRS 178.460 contemplates that the district attorney will present his or her case first. See NRS 178.460(1) ("the judge shall hold a hearing within 10 days after the request at which the district attorney and the defense counsel may examine the members of the treatment team on their report.") By indicating that the district attorney will conduct his or her examination first at the competence challenge hearing, the statute further

demonstrates that the State bears the burden of proving competency. NRS 178.460(4)(d) further provides that if the judge finds the defendant *incompetent* with no substantial probability of attaining competency, the prosecuting attorney may file a motion under NRS 178.461 to determine whether the defendant will be involuntarily committed. Under NRS 178.461, the *State* must file the motion, and the court must find by "clear and convincing evidence" that the defendant has a "mental disorder," is "a danger" to themselves or others, and that "the person's dangerousness" requires placement at a forensic facility. NRS 178.461(2) and (3). Likewise, NRS 178.460(4)(a) provides that if the judge finds the defendant *competent*, the prosecuting attorney is responsible for facilitating the defendant's return to the county or city for trial.

It is only *after* a defendant has been involuntarily committed at the State's request (or pursuant to NRS Chapter 433A) that the statutory scheme places *any* express burdens on the defendant. NRS 178.463 allows either the Division or the defendant to petition the court for conditional release from commitment. NRS 178.467(2) makes a person eligible for discharge or conditional release if they can establish "by a preponderance of the evidence" that they "would not be a danger, as a result of any mental

disorder, to himself or herself or to the person or property of another" if discharged or conditionally released.

Thus, based on the statutory structure of NRS 178.3981-4715, which repeatedly imposes burdens on the State and places no evidentiary burdens on criminal defendants unless and until they are involuntarily committed, this Court should find that the State bears the burden of proof at a competency challenge hearing.

Finally, to the extent the State is asking a district court to find that "accommodations" at trial will ensure a defendant's competence under Dusky, the State should fairly bear the burden of persuasion on that issue. As the Washington Supreme Court recognized in State v. Ortiz-Abrigo, 187 Wash.2d 394, 402, 387 P.3d 638, 642 (2017), "accommodations, when appropriate, are permissible exercises of judicial discretion – *but are distinct from the legal analysis of competency to stand trial.*" In cases arising under the Americans with Disabilities Act, when a plaintiff contends that an accommodation would have enabled him or her to perform the essential functions of a job, the plaintiff/employee bears the burden of proving the "existence of a reasonable accommodation" by a preponderance of the evidence. See, e.g., Snapp v. United Transp. Union, 889 F.3d 1088, 1102 (9th Cir. 2018). Likewise, when the government contends that an

accommodation exists that would enable a criminal defendant to competently participate in his or her trial, the government should fairly bear the burden of persuasion on that issue. If the government is unable to demonstrate that specific accommodation(s) would, more likely than not, allow the defendant to aid and assist counsel during trial "with a reasonable degree of rational understanding," then the government has not carried its burden.

3. The district court's finding of incompetence without possibility of restoration under Dusky was supported by a preponderance of the evidence such that this Court need not determine whether the State or defense bears the burden of proof in this case.

a. The district court applied Dusky and NRS 178.400(2).

The Court has asked the parties to identify the competency standard that was applied by the district court in this case to the evidence before it. Mr. Adams contends that the district court applied the Dusky standard, as it cited both Dusky and NRS 178.400(2) before finding Mr. Adams "incompetent without the possibility of restoration." AA:193-197.

The Dusky decision is brief and to-the-point, containing a mere 234 words:

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. Upon consideration of the entire record[,] we agree with the Solicitor General that 'the record in this case does not sufficiently support the

> findings of competency to stand trial,' for to support those findings under 18 U.S.C. s 4244, 18 U.S.C.A. s 4244 the district judge 'would need more information than this record presents.' We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant (is) oriented to time and place and (has) some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'
>
> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent. It is so ordered.
>
> Reversed and remanded with directions.

Dusky, 362 U.S. at 402–03. Dusky does not identify the evidence that would be sufficient for a finding of competence; rather, it establishes the *test* that district courts must use when *examining* the evidence presented at a competency challenge hearing. While the Supreme Court pointed to "doubts and ambiguities regarding the legal significance of [the] psychiatric testimony" that was offered in Dusky, it did not make any pronouncements about the contents of that testimony, but sent the case back to the district court for *it* to evaluate the evidence under the proper legal standard.

Like Dusky, NRS 178.400(2) says nothing about the *type of evidence* that will suffice to support a finding of competence. Rather, NRS 178.400(2) states that a person is "incompetent" if he or she "does not have the present ability to: (a) Understand the nature of the criminal charges against the person; (b) Understand the nature and purpose of the court proceedings; or (c) Aid and assist the person's counsel in the defense at any time during the proceedings." Although subsequent cases have addressed the types of evidence[6] that may be relevant to the district court's competency findings, decisions as to the weight and admissibility of that evidence are properly left to the district courts' discretion, whose competency findings are entitled to deference upon review. See, e.g., Calvin, 122 Nev. at 1182, 147 P.3d at 1099.

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[6] See, e.g., Drope v. Missouri, 420 U.S. 162, 180 (1975) ("evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant"); Calvin, 122 Nev. at 1183, 147 P.3d at 1100 ("[a]ccuracy is best served when the district court and any appointed experts consider a wide scope of relevant evidence at every stage of the competency proceeding, including initial doubts as to the defendant's competency, the experts' evaluation, and the hearing after the evaluation."); 22A C.J.S. Criminal Procedure and Rights of Accused § 526 (Nov. 2021) ("Evidence of the defendant's mental state may be introduced at a competency hearing through lay testimony, expert medical testimony, the reports of examining medical experts, exhibits and other kinds of reports, the defendant's own affirmations of competency or incompetency, the observations of the defendant's attorney, and the judge's own observations.").

Here, the district court found that Mr. Adams "does not understand the nature and purpose of the court proceedings, nor is Mr. Adams able to assist counsel during the proceedings with a reasonable degree of rational understanding." AA:195. The district court's findings track the requirements of Dusky and NRS 178.400(2). Furthermore, because Dr. Jones-Forrester's neuropsychological examination showed that Mr. Adams had "lifelong intellectual and neurocognitive deficits" that would "significantly limit the range of any improvement," the district court found that restoration to competence was not possible and dismissed the charges, as permitted by NRS 178.425(5). (AA:197).

Throughout its briefing, the State conflates the *legal standard* under Dusky with the *evidence* that district courts may rely on to *meet* that legal standard. Although the State contends that the district court "adopted and applied a standard that sets the bar for competency higher than what is required by law," Appellant's Opening Brief (AOB) at 37, in reality, the State is asking this Court to second-guess the district court's findings and *require* the district court to assign greater weight to the State's experts than to the defense experts. While the district court was certainly *able* to assign

greater weight to the State's experts if it *chose to do so*,[7] the district court was not required to defer to the State's experts. See, Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980) (noting that the "trier of fact resolves the conflicting testimony of [expert] witnesses"). The district court's act of weighing the evidence presented to it did not alter the legal standard that applies in competency proceedings.

The State takes issue with the district court's reliance upon Dr. Jones-Forrester's neuropsychological evaluation to support its finding that Mr. Adams is unlikely to regain competency. See Reply Brief at 2. In its Reply Brief, the State claims that Dr. Jones-Forrester's neuropsychological evaluation "exceed[ed] the bounds of competency, as it was 'intended to examine [Mr. Adams'] intellectual, neurocognitive, and psychological functioning in depth." Id. But the State *never objected* to the admissibility of Dr. Jones-Forrester's evaluation at any point during the competency proceedings (AA:98-180), nor has the State cited *any* legal authority for the proposition that a neuropsychological evaluation is irrelevant or inadmissible in competency proceedings. The State's failure to do either is fatal to its claim that the district court erred by relying on the results of a

[7] See, e.g., Pigeon v. State, No. 67083, 408 P.3d 160 (Nev. Dec. 1, 2017) (unpublished disposition) (deferring to the district court's competency findings, and noting that the district court had *discretion* to assign greater weight to the State expert's opinion).

neuropsychological evaluation to conclude that Mr. Adams was unlikely to regain competence. See, e.g., Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (issues not argued below are "deemed to have been waived and will not be considered on appeal."); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("it is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

While the State's experts may have had a "professional disagreement" with Dr. Jones-Forrester about Mr. Adams' competency in this case (AA:133,139), this does not mean that the district court applied the wrong standard by crediting Dr. Jones-Forrester over the State's experts. As finder of fact, "the district court was in the best position to assess the credibility of the experts' findings in this case." Ybarra v. State, 127 Nev. 47, 70, 247 P.3d 269, 284 (2011) (addressing the district court's resolution of competing expert testimony in the context of an Atkins hearing). Ultimately, the State's claim that the district court applied the "wrong" competency standard is nothing more than a thinly-veiled attempt to avoid the deferential standard of review that otherwise applies to district court competency rulings.

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b. Because substantial evidence in the record indicates that Mr. Adams was more likely than not incompetent under Dusky and NRS 178.400(2), this Court does not need to resolve the burden of proof issue in this case.

Just like courts in the Second and Eighth Circuits, this Court practices "judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand." Mona v. Eighth Judicial Dist. Court, 132 Nev. 719, 380 P.3d 836 (2016). Therefore, unless this Court believes that the evidence of Mr. Adams' competence is just as strong as the evidence of his incompetence (or that the allocation of a burden of proof is outcome determinative), it will be unnecessary for the Court to decide which party bears the burden of proof in a competency challenge proceeding. See, e.g., Whittington, 586 F.3d at 618; Nichols, 56 F.3d at 410. Because substantial evidence[8] exists in the record that Mr. Adams was *more likely than not* incompetent to stand trial without possibility of restoration under Dusky and NRS 178.400(2), this Court need not allocate the burden of proof here.

i. The evidence before the court.

Mr. Adams hired Dr. Sharon Jones-Forrester, a clinical neuropsychologist, to perform his neuropsychological evaluation on February 7, 2019. (AA:10-11,101). During the evaluation, Dr. Jones-

[8] Substantial evidence is "evidence that a reasonable mind might consider adequate to support a conclusion." Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

Forrester completed a clinical interview with Mr. Adams and administered the Wechsler Adult Intelligence Scale (WAIS) 4th Edition, determining that his full-scale IQ was "extremely low" at 58. (AA:102). The evaluation revealed that "aside from his low IQ, [Mr. Adams] had very, very significantly low academic skills generally at the kindergarten level with the exception of applied problems which looks at his arithmetic problem solving skills, and that was at the 1.4 grade level." (AA:104). In terms of Mr. Adams' attention, mental tracking and process speed, the evaluation revealed that he had "significant difficulties in all of these areas" such that "he will be very vulnerable to missing and misunderstanding information" and that he would "process information very slowly and because of that he's even more likely to miss and misunderstand information." (AA:105). In terms of language skills, Dr. Jones-Forrester found that Mr. Adams had "a very low vocabulary" and was "very likely to struggle with abstract reasoning" and "understanding abstract concepts" which makes him vulnerable to "missing and misunderstanding information." (AA:105). In terms of memory, Dr. Jones-Forrester found that Mr. Adams had "significant memory difficulties . . . across the board." (AA:106). Dr. Jones-Forrester found that Mr. Adams also had "significant difficulties" in executive control skills, which suggests that "his ability to reason, to carefully think through

the consequences of his action, to engage in effective problem solving and to manage impulsive responding are all challenged." (AA:107).

As a result of her neuropsychological evaluation, Dr. Jones-Forrester diagnosed Mr. Adams with moderate intellectual disability, significant neurocognitive deficits, and significant learning disabilities. (AA:18). Because these conditions were "lifelong and not amenable to restoration," Dr. Jones-Forrester expressed concern that they would "compromise his competency, and may render him unable to meet the Dusky Standard or NRS 178.400." (AA:18). In addition, Dr. Jones-Forrester explained that those conditions "will negatively impact [Mr. Adams'] ability to have a clear factual and rational understanding of information related to his case and court proceedings, and his ability to participate in his defense with a reasonable and rational degree of understanding." (AA:18).

Following Dr. Jones-Forrester's initial neuropsychological evaluation, Mr. Adams was sent for a competency evaluation. (AA:92). Over the next five months, *three psychologists* found Mr. Adams incompetent, including Dr. C. Philip Colosimo on March 20, 2019, Dr. John Paglini[9] on August 19, 2019, and Dr. Sunshine Collins[10] on August 20, 2019. (AA:92). Dr. Paglini found that Mr. Adams exhibited "significant impairment pertaining to

[9] (AA:26-30).
[10] (AA:31-38).

understanding of the current charges, ability to aid and assist counsel in defense of his case, *and* in factual rational understanding of competency." (AA:30) (emphasis added). In addition, he agreed with Dr. Jones-Forrester's assessment that Mr. Adams exhibited a "lifelong neurocognitive disorder and his ability for restoration is highly doubtful." Id. Likewise, Dr. Collins found that Mr. Adams did not meet *any* of the three Dusky factors. (AA:37). As a result, the district court entered an order of commitment, finding Mr. Adams incompetent on August 23, 2019. (AA:39).

Mr. Adams was subsequently sent to Stein Forensic Hospital for competency restoration on September 5, 2019. (AA:45). To accommodate Mr. Adams' learning impairments and his inability to read or write, doctors had to use diagrams and the "Slater Method"[11] for competency restoration. (AA:47,136,154). After several months at Stein, Mr. Adams was able to

[11] The "Slater Method" is a "competency restoration tool that uses simplified language and visual aids to assist with competency restoration efforts for individuals with low cognitive functioning or intellectual disability." (AA:92). At the competency challenge hearing, Dr. Rami Abukamil explained how Mr. Adams was "taught" to be competent using this method: "[h]e would need things explained to him, so we just had pictures of the people in the courtroom and we said, you know, this is where you would sit, this is your lawyer, this is the prosecutor. . . . in order to build rapport I try to make things a little funny and, you know, draw a happy face for a lawyer and then, you know, draw a sad face, and, you know, he was able to say that's the DA." (AA:136). Dr. Abukamil stressed the importance of using "simple terms" with Mr. Adams, "For example, if you tell him, you know, please rise he'll be able to understand that but if you say, be careful not to incriminate yourself he may need that explained to him." (AA:136).

parrot back what he had "learned" on the Georgia Court Competency Test-1992, which "assesses a defendant's knowledge of basic courtroom layout and functions of courtroom participants" along with the defendant's "factual knowledge of his current charge and of his relationship to the defense attorney." (AA:48;92). Yet, the doctors at Stein never observed Mr. Adams interacting with his attorney, nor did they observe him in an actual courtroom setting to see if he could aid and assist counsel during the fast-paced atmosphere of a trial. See generally (AA:47-48;92).

In December of 2019, Mr. Adams was pronounced "competent" to stand trial by two of Stein's psychologists, Drs. Lia Roley[12] and Sarah Damas,[13] and the psychiatrist, Dr. Rami Abukamil.[14] (AA:45-66). On December 23, 2019, the court ordered that Mr. Adams be transported back to CCDC for "further proceedings," and that CCDC "continue the course of treatment of the Defendant as prescribed by the Administrator.'" (AA:68-69).

Because defense counsel had ongoing concerns about Mr. Adams' competency, on February 21, 2020, defense counsel requested a challenge hearing be set. (AA:75). Prior to the challenge hearing, on May 19, 2020,

[12] Dr. Roley's report was drafted on December 16, 2019. (AA:52-59).
[13] Dr. Damas' report was drafted on December 17, 2019. (AA:60-66).
[14] Dr. Abukamil's report was drafted on December 12, 2019. (AA:45-51).

Dr. Jones-Forrester evaluated Mr. Adams again, and *this time*, she specifically assessed his competency to stand trial. (AA:87;102). During her second evaluation, Dr. Jones-Forrester met with Mr. Adams, his attorney, and a social worker to directly observe his interactions with counsel "in order to assess his ability to consult with counsel and assist in his defense with a reasonable degree of factual and rational understanding." (AA:88). After watching Mr. Adams' interactions with counsel, Dr. Jones-Forrester concluded that Mr. Adams was *not competent* to proceed to trial because, although he *did* "demonstrate a rational and factual understanding of the charges against him," he *did not* "demonstrate a rational and factual understanding of court proceedings" or "demonstrate the ability to aid and assist counsel in his defense with a reasonable degree of rational understanding." (AA:87,89-92).

In May of 2020, all Mr. Adams could remember from his time at Stein was that they "asked me about court and stuff." (AA:92). He could not elaborate further. (AA:92). Dr. Jones-Forrester found Mr. Adams to be "confused" about the roles played by members of the legal community when Mr. Adams told her that the DA, the judge, *and* the jury were all responsible for finding him "guilty or not." (AA:90). Mr. Adams showed an inability to communicate collaboratively or express disagreement with defense counsel,

because he did not want to make his attorney "mad" or "mess up the friendship." (AA:90). When asked what he should do if someone said something "untrue" during the trial, Mr. Adams "responded, 'tell the judge it's not true' with no apparent notion that he should notify or discuss concerns with his defense attorney first." (AA:90). Mr. Adams had minimal understanding when counsel explained the range of sentences he could receive, and believed he would "probably" be offered probation because "everyone else is getting it". (AA:90). Mr. Adams had "clear and consistent difficulties" remembering and relating back his attorney's advice. (AA:91). Mr. Adams had "significantly poor insight and very limited understanding" as to the "relative strength and weakness of evidence and witnesses against him," and was "easily confused." (AA:91). And Mr. Adams expressed further confusion when the "adversarial nature of the legal process was discussed," repeatedly answering "I don't know' even when given "a high level of structure, support and prompting." (AA:91).

After reviewing Mr. Adams' records from Stein and considering her own observations of Mr. Adams with counsel, Dr. Jones-Forrester was concerned that his

> polite and cooperative manner, agreeableness, and the opportunities he had for high levels of structure and support, and frequent repetition of competency-related training at Stein may have made him able to engage in rote memorization of

> concepts sufficient to *appear* to be restored to competency without the necessary accompanying ability to functionally engage in legal decision-making and effectively assist counsel in his defense with a reasonable degree of factual and rational understanding.

(AA:92) (emphasis added). In addition, Dr. Jones-Forrester concluded that Mr. Adams' "lifelong intellectual disability and significant neurocognitive deficits" were such that he could not be restored to competency. (AA:87).

The challenge hearing was held on July 17, 2020. (AA:98-180). The State presented testimony from Drs. Abukamil, Roley, and Damas, who all reiterated their prior conclusions that Mr. Adams was "competent." However, at the time of the challenge hearing, it had been more than seven months since *any* of the State's experts had even *seen* Mr. Adams. (AA:178). And the State conceded during its argument that "things are going to fade over time" and that "I mean it's been seven months since he was in Stein. Things he learned there are going to fade for sure." (AA:178).

At the hearing, *all three* of Stein's doctors agreed that Mr. Adams had an intellectual disability. (AA:139,155,172). Dr. Abukamil agreed with Dr. Jones-Forrester that Mr. Adams was "going to have problems with memory" and "understanding information" at trial. (AA:134). In response to questioning by the court, Dr. Abukamil acknowledged that when he observed Mr. Adams at Stein, he "had to do a lot of prompting" and "used

some pictures as well." (AA:134). When the court pointed out to Dr. Abukamil that at trial, "people are not going to use small words and show pictures and be able to prompt and explain things to [Mr. Adams]," Dr. Abukamil responded that it "would be ultimately up to the Court to determine how much is enough for him to be found competent." (AA:134).

Dr. Abukamil conceded that Mr. Adams "will need things explained to him" at trial and suggested that the district court utilize "techniques" to enable him to aid and assist counsel, which could include "simple language, speaking slowly and clearly, using concrete terms and ideas, asking open-ended questions, repeating questions, proceeding slowly and repeating information and working with him in short sessions and taking frequent breaks." (AA:135). Dr. Abukamil agreed there was "no question" Mr. Adams "would have a lesser ability to help his lawyer than someone without an intellectual disability." (AA:135). Finally, Dr. Abukamil admitted that Mr. Adams' ability to assist his attorney at trial was contingent upon the district court's ability to provide workable accommodations:

> I find that he has an understanding of the basics of what's going on ***and with accommodations he would be able to assist***, *but ultimately it would be up to the Court to decide are these accommodations possible and how important it is to have the accommodations.*

(AA:135) (emphasis added). At the close of the hearing, the State conceded that "it's clear that for a defendant such as this" that the trial would have to be "adjusted" to accommodate Mr. Adams and that this would be "the responsibility of whatever trial Court he has to be in front of." (AA:177).

Although the State contends that the district court was required to "attempt to accommodate" Mr. Adams at trial, AOB at 45, the district court was in the best position to determine the availability and efficacy of any proposed accommodations. Dr. Abukamil could not identify any particular accommodations that would, more likely than not, have rendered Mr. Adams competent. The district court was not obligated to credit Dr. Abukamil's uncertain testimony, particularly where he conceded that it would be "up to the court to decide" if any accommodations were even possible. See, e.g., United States v. Cole, 339 F.Supp.2d 760 (E.D.La. 2004) (where "[n]one of the experts know how or could suggest how the Court would implement the recommended trial accommodations without which Cole would not be competent," defendant was incompetent to stand trial); United States v. Norrie, No. 5:11-cr-94, 2011 WL 4955211 (D. Vt. Oct. 17, 2012) (unpublished disposition) (where "examination of trial accommodations [was] relatively cursory," government did not establish that defendant "will be able to maintain this competence in a trial setting").

Furthermore, "substantial evidence" existed in the record that Mr. Adams was more likely than not incompetent without likelihood of regaining competence. Calvin, 122 Nev. at 1182, 147 P.3d at 1099. Although the State contends that the testimony offered by *its* three experts should have been afforded greater weight than that of Dr. Jones-Forrester,[15] it is well-settled that the trier of fact is responsible for determining the weight to assign to a given expert's testimony. See Leavitt v. Siems, 130 Nev. 503, 510, 330 P.3d 1, 6 (2014); Ford Motor Co. v. Trejo, 133 Nev. 520, 531, 402 P.3d 649, 657 (2017). The district court was entitled to give Dr. Jones-Forrester's testimony greater weight because she had *most recently* evaluated Mr. Adams, while the Stein doctors had not seen Mr. Adams for seven months. See Washington v. State, 162 So.3d 284, 289 (Fla. 4th D.C.A. 2015) (where trial court's findings were "based on evaluations completed six months to one year prior to the competency hearing" they were "stale" and did not constitute "competent, substantial evidence of appellant's competency").

It makes sense that the district court would credit Dr. Jones-Forrester's testimony in this case over that of the State's experts, because

[15] C.f. Respondent's Answering Brief (RAB) at 32, 36, 37, 40, 42, and 45 (repeatedly referencing the State's "three" experts as compared to Dr. Jones-Forrester).

competency requires a determination that the defendant has a "sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky, 362 U.S. at 402 (emphasis added). In this case, the State's experts could not speak to Mr. Adams' *present* ability to assist counsel—they could only speak to his abilities while he was being treated at Stein back in December 2019. Here, the district court properly relied on the most recent examination by Dr. Jones-Forrester, concluding that "[t]he May 2020 evaluation demonstrated that Mr. Adams did not have an understanding of the adversarial nature of the legal process." (AA:196).

Additionally, Dr. Abukamil admitted that Mr. Adams' ability to assist counsel at trial was contingent upon the availability of workable accommodations, and that it would be up to the *court* to decide if the accommodations were "possible" and how "important" they were. (AA:135). And the State conceded at argument that it had been "seven months since he was in Stein" and "things are going to fade over time." (AA:178).

In its Reply Brief, the State argues that the fact that Mr. Adams had "forgotten" some of the things that he learned at Stein "is by its very nature proof that he can make gains." Reply at 2-3. Yet, the State's argument ignores Dr. Jones-Forrester's expert opinion that Mr. Adams' "rote-

memorization of concepts" at Stein had only made him *appear* to be restored to competency, when in reality, he lacked the "accompanying ability to functionally engage in legal decision-making and effectively assist counsel in his defense with a reasonable degree of factual and rational understanding." (AA:92). Viewed in this light, evidence of "slippage" does not mean that Mr. Adams can be made competent with additional training and support.

In its Reply Brief, the State suggests that it was somehow improper for Dr. Jones-Forrester to evaluate Mr. Adams' ability to assist counsel by watching his interactions with his attorney. Reply at 3-4. But the State fails to cite any legal authority to suggest that an expert may not conduct a competency evaluation in this manner, so the argument need not be considered. See Maresca, 103 Nev. at 673, 748 P.2d at 6.

Again, at no point during the competency challenge hearing did the State *ever* object to the admissibility of Dr. Jones-Forrester's neuropsychological examination, nor did it argue that the results of that examination were irrelevant to the question of competency. (AA:98-180). As a result, the district court was entitled to rely on Dr. Jones-Forrester's findings that Mr. Adams had an IQ of 58, a learning disorder, and lifelong

neurocognitive disability that rendered him incompetent without likelihood of restoration.

While the State's experts may have "found Dr. Jones-Forrester's findings questionable,"[16] the district court was not bound to agree with their conclusions. Although psychiatrists and psychologists are experts on mental capabilities, "the judge is the expert on what mental capabilities the litigant needs in order to be able to assist in the conduct of the litigation" and a judge may properly disagree with the opinions of the experts. Holmes v. Buss, 506 F.3d 576, 581 (7th Cir. 2007). Indeed, the district court has a "duty . . . to make a specific judicial determination of competency to stand trial, rather than accept psychiatric evidence as determinative of this issue." United States v. Weston, 36 F.Supp.2d 7, 9 (D.D.C. 1999).

As factfinder, the district court was permitted to resolve the conflicting expert testimony against the State. Ogden, 96 Nev. at 698, 615 P.2d at 252. And any purported "weaknesses" in Dr. Jones-Forrester's testimony would go "to the weight, not the admissibility, of the evidence." Mathews v. State, 134 Nev. 512, 516, 424 P.3d 634, 639 (2018) (quoting Brown v. Capanna, 105 Nev. 665, 671, 782 P.2d 1299, 1303-04 (1989)). Because there was substantial evidence in the record that Mr. Adams was

[16] RAB at 42-43.

more likely than not incompetent without the possibility of regaining competence, this Court need not decide who generally bears the burden of proof in a competency challenge hearing. See, e.g., Whittington, 586 F.3d at 618; Nichols, 56 F.3d at 410; Mona, 132 Nev. at 724, 380 P.3d at 840.

4. The Dusky standard should continue to apply in competency proceedings.

In its briefing, the State has conflated two related issues: the legal standard that applies in competency proceedings, and the evidence that is sufficient to *meet* that legal standard. The State's arguments in this case can best be understood as an effort to avoid the deferential standard of review that this Court generally applies when evaluating competency findings. Cf. Calvin, 122 Nev. at 1182, 147 P.3d at 1099. By couching the issue before this Court as a question of law, and by suggesting that the Dusky *legal* standard somehow limits the types of expert testimony that can be considered by district courts, the State hopes to create a "de novo" issue for the Court to resolve. See AOB at 37. But at its core, the only real issue in this case is whether sufficient evidence exists in the record to support the district court's finding that Mr. Adams was incompetent without probability of restoration. See Calvin, 122 Nev. at 1182, 147 P.3d at 1099.

Without question, Dusky is the legal standard that applies to competency challenges in the State of Nevada. Id. at 1182, 147 P.3d at 1100

(recognizing Dusky as the "governing standard"); see also Minutes of the Senate Committee on Judiciary, Seventy-fourth Session, April 27, 2007 (Hon. Jackie Glass, District Judge, Eighth Judicial District Court) (explaining that Assembly Bill 77 amended NRS 178.400 to "tighten[] up the [statute's] language to make the law consistent with the U.S. Supreme Court['s] decision [in Dusky], which sets the standard for everybody in the country.").

Because the district court applied the Dusky standard in this case (AA:193-198), and because neither party has argued that any standard other than Dusky should apply,[17] the Court need not reconsider that standard here. See In re Amerco Derivative Litig., 127 Nev. 196, 220 n.8, 252 P.3d 681, 698 n.8 (2011) (explaining that the Court will generally decline to consider issues not raised by the parties). Furthermore, the doctrine of stare decisis counsels this Court not to overturn precedent "absent compelling reasons for doing so." Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008). Where "no party has pointed to 'weighty and conclusive' reasons" for adopting a standard other than Dusky, this Court should not disturb its prior rulings that have applied the Dusky standard in competency cases. Id.

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[17] See generally, AOB, RAB and Reply Brief.

CONCLUSION

The appropriate burden of proof in a competency challenge hearing is proof by a preponderance of the evidence. Although Mr. Adams contends that State bears the burden of proving a defendant is more likely than not competent to stand trial, particularly when trial accommodations are at issue, this Court need not decide that issue because substantial evidence supports the district court's finding that Mr. Adams was incompetent without possibility of restoration. The district court properly applied Dusky and Dusky should continue to apply in competency cases going forward. For all of the foregoing reasons, the district court's Amended Decision and Order should be affirmed.

Respectfully submitted,

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of April, 2022.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13th day of April, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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