IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No. 81782
Appellant,
vs.

VINNIE ADAMS,
Respondent.
_____/

BRIEF OF THE WASHOE COUNTY PUBLIC DEFENDER'S OFFICE AS AMICUS CURIAE

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Amicus Curiae

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STATEMENT OF INTEREST

The Washoe County Public Defender's Office is a duly constituted county public defender's office created pursuant to NRS 260.010, *et seq.* Since its inception on July 1, 1969, it has provided legal representation to indigent persons charged with crimes in Washoe County, Nevada. Issues of competency to stand trial or to be sentenced, restoration of competency, and other legal commitments under Chapter 178 of the Nevada Revised Statutes are routinely litigated by this office. The resolution of the four questions presented by this Court will have a direct impact on our practice.

QUESTIONS PRESENTED

In its order directing supplemental briefing and inviting amicus briefing, this Court identified four issues "concerning the determination of competence/incompetence and the possibility of restoration" to be resolved.[1] In this amicus brief we express no opinion as to the third

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[1] As stated: "(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 hearing? (3) what competency standard is alleged to have been applied by the district court in its decision? And (4) what competency standard should a district court apply in a competency determination if not the *Dusky*

question. As to the remaining questions we reframe them as: (1) what is the standard a district court must apply in a competency determination; and (2) what is the burden of proof and who carries the burden of proof in a competency proceeding.

DISCUSSION

A defendant's competency can only be determined under the Dusky *standard.*

In Nevada a person "may not be tried or adjudged to punishment for a public offense while incompetent." NRS 178.400(1). "Incompetent" means that the person "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 the person's counsel in the defense *at any time* during the proceedings with a reasonable degree of rational understanding." NRS 178.400(2) (italics added). This is the *Dusky* standard. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (test determinative of whether an individual is competent is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational

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standard?" Order Directing Supplemental Briefing and Inviting Amicus Briefing (filed on January 13, 2022).

understanding—and whether he has a rational as well as factual understanding of the proceedings against him"). Prior to legislative amendments that took effect on October 1, 2007, the statute addressed competency in terms of "sufficient mentality" rather than "present ability." Despite the variance in language, this Court interpreted the prior statute to be consistent with *Dusky*. See *Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1100 (2006) (holding that the then existing "statutory competency standard conforms to that of *Dusky* and thus satisfies constitutional requirements."). The 2007 legislative amendments "tighten[ed] up the [statute's] language to make the law consistent with the U.S. Supreme Court decision regarding *Dusky v. United States*, 362 U.S. 402 (1960), which sets the standard for everybody in the country." Nev. *Minutes, on the Senate Committee on Judiciary*, Seventy-fourth Session, April 27, 2007, p. 16 (Hon. Jackie Glass, District Judge, Eighth Judicial District Court).

Based on Nevada's statutory scheme and this Court's cases, in Nevada a defendant's competency can only be determined under the *Dusky* standard.

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Competency determinations can occur at one of two stages. The first stage does not establish, allocate, or assign a burden of proof, while at the second stage the State carries the burden of proof by a preponderance of the evidence.

In Nevada, a defendant's competency to proceed with a criminal case can be at issue any time after arrest, including, "without limitation," proceedings before trial, during trial and post-trial sentencing and probation revocation hearings "*if doubt* arises as to the competence of the defendant[.]" NRS 178.405(1) (italics added).[2] In *Pate v. Robinson*, 383 U.S. 375, 385 (1966), the United States Supreme Court identified that level of doubt doubt as a "*bona fide* doubt" about a defendant's adjudicative capacity. In Nevada, the level of doubt must be "reasonable". See *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (stating "[a] hearing to determine a defendant's competency is constitutionally and statutorily required where a

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[2] NRS 178.405(1) extends the competency concern *backwards* to judicial proceedings occurring after arrest but before trial, and *forward* through trial and into sentencing, probation revocation and suspended sentences, but not into incarceration which would be outside the judicial function. See *State ex rel. Dept. of Prisons v. Kimsey*, 109 Nev. 519, 853 P.2d 109 (1993) (once defendant begins serving sentence a district court lacks jurisdiction to control or direct Department of Prisons regarding sentence).

reasonable doubt exists on the issue."); *Morales v. State*, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000) (reiterating *Melchor-Gloria's* holding).

Competency proceedings; the first stage

Where a reasonable doubt arises as to a person's competency in a non-misdemeanor case, NRS 178.415(1) requires a court to "appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist to examine the defendant." Subsection (2) of NRS 178.415 mandates that the court that ordered "the examination must receive the report of the examination." An exception lies where a justice court orders the examination of a defendant who is charged with a gross misdemeanor or felony. In such a case, the "district court must receive the report of the examination." Under subsection (3) the court that "receives the report of the examination [must] permit counsel for both sides to examine the person or persons appointed to examine the defendant." Additionally, the prosecuting attorney and the defendant are given the opportunity to "[i]ntroduce other evidence including, without limitation, evidence related to treatment to competency and the

possibility of ordering the involuntary administration of medication[.]"[3] The statute also permits "[c]ross-examin[ation of] one another's witnesses."

Notably, nothing in the language of NRS 178.415 establishes, allocates, or assigns a burden of proof to either party. Instead, where doubt arises as to a defendant's competence, it simply mandates that *the court act* by appointing doctors, ordering an examination, receiving reports of the examination, and allowing the parties to supplement the record. Afterwards, the "court that receives the report of the examination [must] then make and enter its finding of competence or incompetence." At this stage, the district court's findings of competence or incompetence must be based on the totality of the information before it. This Court's past decisions have recognized as much. See *Olivares v.*

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[3] Any order for the involuntary administration of medications would have to follow a *Sell* hearing. See *Sell v. United States*, 539 U.S. 166 (2003). That is, if factors identified in *Sell* are not met, the statute does not provide an independent basis for an order authorizing the involuntary administration of medications. Under *Sell* the State carries the burden of showing by clear and convincing evidence that "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." 539 U.S. at 179.

State, 124 Nev. 1142, 1147-48, 195 P.3d. 864, 868 (2008) (noting that the Legislature has "codified a procedure for determining competency to stand trial); *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 122-23, 206 P.3d 975, 978 (2009) (discussing process); and *Sims v. Eighth Judicial Dist. Court*, 125 Nev. 126, 130, 206 P.3d 980, 983 (2009) (noting that statute's language denotes "expansive legislative intent" on the ability of parties to "introduce evidence during a competency hearing"). In none of these cases, however, did this Court establish, allocate, or assign a burden of proof to either party.[4]

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[4] This makes sense because it is neither in the State's nor the defendant's best interest to conduct a trial (or sentencing) while the defendant is incompetent. *Cf. Maxwell v. Roe*, 606 F.3d 561, 577 (9th Cir. 2010) (noting that "Maxwell's conviction is twelve years old" and because "[a] meaningful retrospective competency determination, given the twelve-year delay and sparse medical record, is not possible ... we remand with directions to grant Maxwell a writ of habeas corpus. The state remains free to retry Maxwell.") (citations omitted). Accord *Goad v. State*, 137 Nev. Adv. Op. 17, 488 P.3d 646 (Nev. Ct. App. 2021) (remanding for determination whether Goad was competent during his trial where doubt arose but no competency evaluation or hearing took place). In *Goad*, the court suggested that the burden of persuasion is on the prosecution to convince the trial court by a preponderance of the evidence that a retrospective competency hearing is even feasible. 488 P.3d at 661 (internal quotation, footnote, and citation omitted). Assuming feasibility, the burden to show incompetence at the time in question may lie with the defendant. See *Doggett v. State*, 91 Nev. 768, 772, 542 P.2d 1066, 1068 (1975) ("On remand the burden is on Doggett to prove by clear and convincing evidence, his allegations of

Competency proceedings; the second stage

The second stage follows a defendant's commitment for treatment to competency. If the district court finds a defendant incompetent "and dangerous to himself or herself or to society and that commitment is required for a determination of the defendant's ability to receive treatment to competency and to attain competence," it must order inpatient treatment to competency at "a division facility that is secure." NRS 178.425(1). Conversely, if the defendant is not "dangerous to himself or herself or to society" and "commitment is not required for a determination of the defendant's ability to receive treatment to competency and to attain competence," the court can order outpatient treatment." NRS 178.425(3).

Once committed for treatment to competency, reports on the defendant's status must be provided to the court, the prosecuting attorney, and the defense "within 6 months after the order and at 6-month intervals thereafter." NRS 178.450(2). In addition to expressing an opinion as to whether the defendant meets or does not meet the

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incompetency" seventeen years earlier in 1958). But see, *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (rejecting, on due process grounds, procedure requiring the defendant to proves his incompetence by clear and convincing evidence).

Dusky standard, the report must also contain an opinion as to whether "there is a substantial probability that the defendant can receive treatment to competency and will attain competency ... in the foreseeable future." NRS 178.450(2)(a). The report must also state whether the defendant is currently "a danger to himself or herself or to society." NRS 178.450(2)(b). Significantly, the language in NRS 178.450(2)(a)—coupled with language in NRS 178.425(5)[5]—codifies *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, the Supreme Court held,

> a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial *cannot be held more than the reasonable period of time necessary to determine if there is a substantial probability that he will attain that capacity in the foreseeable future*. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, *even if it is determined that the*

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[5] NRS 178.425(5) provides in relevant part: "Whenever the defendant has been found incompetent, with no substantial probability of attaining competency in the foreseeable future, and released from custody or from obligations as an outpatient pursuant to paragraph (d) of subsection 4 of NRS 178.460, the proceedings against the defendant which were suspended must be dismissed."

> *defendant probably soon will be able to stand trial, his continued commitment must be justified by progress towards that goal.*

Id. at 738 (italics added). Under *Jackson* and our statutory scheme, if the State cannot establish that an incompetent defendant is likely to attain competency in the foreseeable future, the State must dismiss the criminal action and possibly institute either civil commitment proceedings under NRS 433A.200 or, in the appropriate case, a commitment under NRS 178.461.[6] See NRS 178.460(4)(d).

Collectively, NRS 178.425(5), NRS 178.450(2), and NRS 178.460(4)(d) implicitly place the burden of establishing a defendant's competency—after he or she has been committed for treatment to competency—on the State. The statutes however do not establish what burden of proof should apply. We suggest—consistent with the Ninth Circuit, see *United States v. Frank*, 956 F.3d 872, 875 (9th Cir. 1991) (government has the burden of establishing, by a preponderance of the evidence, that the defendant is competent to stand trial)—that this Court should establish preponderance of the evidence as the burden of

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[6] Commitment under NRS 178.461 is available only for category A offenses and certain specifically enumerated category B felonies. See NRS 178.461(1), (6). Where applicable, commitment under this statute can only be instituted by motion of the prosecutor. NRS 178.461(1).

proof and allocate or assign that burden to the State where it seeks to have a defendant who has been committed for treatment to competency declared competent under Chapter 178 of the Nevada Revised Statutes. We are mindful that in *Medina v. California*, 505 U.S. 437, 449 (1992), the Supreme Court determined that a state can require a defendant to carry the burden of proving his incompetence by a preponderance of the evidence. But *Medina* did not hold that a state *must* require a defendant to establish his incompetence. And under our statutory scheme, once a defendant has been found incompetent and committed for treatment to competency, the promise is that the defendant has been restored to competency when the reporting person(s) avers as much. If a contested competency hearing results, it is fair to burden the State with fulfilling that promise by a preponderance of the evidence. Similarly, it is fair to require the State to show that restoration to competency is a reasonable possibility within the foreseeable future if the defendant remains incompetent after being treated to competency. NRS 178.450(2)(a) requires continued updates or reporting on that specific question and *Jackson v. Indiana* makes clear that treatment to competency cannot go on forever. 406 U.S. at 738 (a defendant being

treated to competency "cannot be held more than the reasonable period of time necessary to determine if there is a substantial probability that he will attain that capacity in the foreseeable future.) Here the court would have to consider the defendant's treatment to competency regimen, the efficacy of the anti-psychotic medications being administered, and any other information it or the parties deemed relevant to the restoration question.

CONCLUSION

The *Dusky* standard applies where a defendant's competency is at issue. Where a defendant has been found incompetent by a court and committed to the division (either inpatient or outpatient) for treatment to competency, the State, where competency is contested, must bear the burden of establishing by a preponderance of the evidence that the defendant is competent or if not competent, that restoration to competency is possible within the foreseeable future.

DATED this 18th day of April 2022.

JOHN L. ARRASCADA
WASHOE COUNTY PUBLIC DEFENDER

By: *John Reese Petty*
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 2,313 words. NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the

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

DATED this 18th day of April 2022.

/s/ John Reese Petty
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th 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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