

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

TARIQ MANSON,

Respondent.

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CASE NO: 82038

APPELLANT'S OPENING BRIEF

**Appeal From Amended Decision and Order
 Eighth Judicial District Court, Clark County**

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JURISDICTIONAL STATEMENT

NRS 117.015(1)(b) provides that the State or the defendant may file an appeal “to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution from an order of the district court granting a motion to dismiss, a motion for acquittal or a motion in arrest of judgment, or granting or refusing a new trial.”

On October 6, 2020, the district court entered and filed its Amended Decision and Order finding Tariq Manson (“Manson”) incompetent without the possibility of restoration and dismissing his charges without prejudice. The State filed its Notice of Appeal on October 28, 2020.

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(14) because it raises a principal issue of a question of first impression and statewide public importance.

STATEMENT OF THE ISSUE

1. Whether the district court abused its discretion when it applied a heightened standard to determine competency that resulted in a finding that Manson was incompetent without the possibility of restoration and thereby dismissed his criminal case.

STATEMENT OF THE CASE

On April 2, 2018, TARIQ MANSON (hereinafter “Manson”) was charged by way of Criminal Complaint with one (1) count of Sexual Assault with a Minor. IAA1. On April 16, 2018, the State filed an Amended Criminal Complaint charging Manson with one (1) count of Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366) and three (3) counts of Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230). IAA5-6.

On October 24, 2018, Manson’s counsel filed a Request for Evaluation(s) for Competency and the district court filed an Order for Competency Evaluation(s). IAA10. On October 29, 2018, the district court filed a Commitment and Order and bound the case over to district court to determine Manson’s competency. IAA13. On

or about December 14, 2018, Manson was released from custody and placed on Mid-Level Electronic Monitoring. IAA15. After considering the reports from Dr. C. Phillip Colosimo and Dr. Sunshine Collins, who found Manson incompetent, but not a danger to himself or society, the district court ordered Manson, pursuant to NRS 178.425, to receive out-patient treatment for purposes of competency restoration. IAA17.

In September 2019, Manson was sent to Stein Forensic Facility Outpatient Restoration Services (hereinafter “Stein”) for purposes of competency restoration. IAA166. While undergoing such competency restoration at Stein, two (2) licensed psychiatrists, Dr. Mohammad Asim Khan and Dr. Patrick Bennet, as well as one (1) licensed psychologist, Dr. Shera D. Bradley, evaluated Manson. IAA26. All three (3) evaluators found that Manson was not competent to stand trial at that time. IAA26. However, Dr. Khan and Dr. Bennet found that there was a substantial probability of competency restoration and Dr. Bradley found that Manson would need further competency restoration and treatment. IAA30,38,43.

On September 27, 2019, the district court filed a Findings of Incompetency and Order Recommitting Defendant (Out Patient). IAA44-46. In such Order, the district court explained that it reviewed the reports completed by Dr. Khan, Dr. Bennet, and Dr. Bradley and found that pursuant to NRS 178.460(4)(b) Manson:

(1) is incompetent to stand trial at this time; (2) that there is substantial probability that [Manson] will attain competency to stand trial in the foreseeable future; and (3) the Court further finds that [Manson] may constitute a possible danger to the safety of himself and/or society if released from custody/monitoring at this time, and that the recommitment of [Manson] is required for a further determination of his ability to attain competence.

IAA44-46. Accordingly, Manson was ordered to participate in further outpatient treatment. IAA55.

While undergoing further competency out-patient treatment at Stein, Manson was once again evaluated. IAA50-68. Two (2) licensed psychiatrists, Dr. Eric Bossi and Dr. Daniel Sussman, as well as one (1) licensed psychologist, Dr. Sarah Damas, conducted such evaluations. IAA50-68. All three (3) evaluators found that Manson's competency had been restored. IAA50-68. Based on these findings, the district court, on April 3, 2020, filed an Order to Transport Manson back to the Clark County Detention Center for further proceedings. IAA70.

On September 26, 2019 and April 23, 2020, Dr. Sharon Jones-Forrester, a psychologist hired by Manson, conducted a Neuropsychological and Competency Evaluation of Manson. IAA72-88. Dr. Jones-Forrester documented her findings in a report dated May 29, 2020. IAA72.

On June 5, 2020, Manson's counsel advised the district court that he provided Dr. Jones-Forrester's report, explained that he would like to raise a challenge to Dr.

Bossi, Dr. Sussman, and Dr. Damas' findings, and requested that the matter be set for a Challenge Hearing. IAA90-92. The State advised the district court that the additional report would need to be reviewed by the Stein evaluators and should their conclusions not change, then a Challenge Hearing would need to be set. IAA90-92. On June 26, 2020, the district court set a date for the Challenge Hearing. IAA94.

On July 24, 2020, the district court held a Challenge Hearing where Dr. Eric Bossi, Dr. Sussman, and Dr. Jones-Forrester testified. IAA96-195. The hearing continued on August 28, 2020 where Dr. Damas also testified. IIAA197-261. At the conclusion of the hearing, the district court took the matter under advisement and explained it would issue a written order. IIAA261.

On September 11, 2020, the district court found that Manson was incompetent without the probability of restoration. IIAA263-65. On September 22, 2020, the district court filed a Findings of Incompetency and Order for Civil Commitment or Release. IIAA270-72. On October 6, 2020, the district court filed its Amended Decision and Order finding Manson not competent without the possibility of restoration pursuant to Dusky v. U.S., 362 U.S. 402 (1960). IIAA278-283. Thereafter, Manson's charges were dismissed without prejudice. IIAA282. The matter was then set for status checks regarding Manson's treatment and discharge

plan. IIAA284-290,293-94. On October 28, 2020, the State filed a Notice of Appeal. IIAA291-92.

STATEMENT OF THE FACTS

On April 16, 2018, the State filed an Amended Criminal Complaint charging Manson with one (1) count of Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366) and three (3) counts of Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230). IAA5-6. While the underlying facts of this case are indeed important to keep in mind, the State has elected to include a synopsis of each of the relevant medical reports, including Manson’s first set and second set of Stein evaluations, and Challenge Hearing testimony which are imperative to this Court’s review of the district court’s decision. IAA26-43,50-68,72-88,96-195;IIAA197-261.

A. MEDICAL REPORTS

1. First Set of Stein Competency Evaluation Reports

In January 2019, Manson began his outpatient competency restoration treatment at Stein and attended sessions once per week. IAA117. Manson participated in this first segment of treatment until September 2019. IAA117. At that point, three (3) Stein evaluators evaluated Manson and found that he was not competent to stand trial under the Dusky standard. IAA26.

a. Dr. Mohammad Asim Khan

On September 13, 2019, Dr. Mohammad Asim Khan, a licensed psychiatrist, evaluated Manson and reviewed his records to determine if he was competent to stand trial under the Dusky standard. IAA27. In his report dated September 16, 2019, Dr. Khan found that Manson was not competent because while Manson had the ability to understand the nature of the criminal charges against him, he did not have the ability to understand the nature as well as the purpose of the proceedings and did not have the ability to aid and assist counsel in his defense with a reasonable degree of rational understanding. IAA27.

Dr. Khan noted that Manson scored thirty (30) percent on his legal process pre-test and then began competency restoration treatment in which the Slater Method was used, which he explained was a “tool to educate lower intellectually functioning clients on topics related to competency restoration.” IAA28. Interestingly, Dr. Khan noted that Manson “largely complied” with the attendance requirements. IAA28.

Applying the Dusky standard to Manson, Dr. Khan found that Manson demonstrated he understood the charges against him, but struggled with more complex concepts such as plea bargaining. IAA29-30. That being said, Dr. Khan believed that Manson could improve in the areas in which he struggled if he

continued his education, outpatient restoration treatment at Stein, and worked with his attorney. IAA30.

b. Dr. Shera D. Bradley

Dr. Shera D. Bradley, a licensed psychologist, also evaluated Manson for competency during his first segment of competency restoration at Stein on July 15, 2019. IAA31. In her report dated September 17, 2019, after interviewing Mason and reviewing his records, Dr. Bradley found Manson was not competent to stand trial under the Dusky standard. IAA31. Specifically, she found that Manson failed to meet all three prongs of the standard as he did not: (1) demonstrate a rational factual understanding of the criminal charges, (2) demonstrate a rational and factual understanding of the nature of the and purpose of the court proceedings, and (3) demonstrate the ability to aid and assist counsel in his defense with a reasonable degree of rational understanding. IAA31.

Dr. Bradley reviewed Manson's records and found that he was diagnosed with Borderline Intellectual Functioning. IAA36,38. She further found that during his first month of competency restoration treatment at Stein, he appeared to have a "simplistic understanding" of his charge and basic legal concepts, but had not retained the information when he was later tested. IAA38. That being said, Dr. Bradley noted that Manson was able to retain some factual knowledge of his charges

and the courtroom personnel, but echoed Dr. Khan that Manson did not demonstrate a rational understanding of the plea-bargaining process or how to proceed with his case. IAA38. Ultimately, however, Dr. Bradley found that while Manson was not competent pursuant to Dusky at the time of the evaluation, he could become competent with more individual sessions directed toward his deficits. IAA38.

c. Dr. Patrick Bennet

On July 15, 2019, Dr. Patrick Bennet, a licensed psychiatrist, evaluated Manson, reviewed his records, and drafted a report on July 24, 2019. IAA39. Applying the Dusky standard to Manson, he found that Manson failed to meet all three (3) prongs, but also noted that he believed there was a “substantial probability” that Manson’s competency could be restored “in the near future.” IAA39.

Dr. Bennet noted that while Manson appeared to have attended his competency restoration classes on a weekly basis, there were occasional “no-shows.” IAA41. Ultimately, Dr. Bennet found that while Manson had made progress in understanding his charges and the legal process, he was unable to assist in defense strategy, which would prevent him from assisting his attorney. IAA43.

2. Second Set of Stein Competency Evaluation Reports

After Manson completed his first six (6) month segment of competency restoration at Stein, he continued his treatment for a second segment where he was evaluated by three (3) more evaluators. IIAA218.

a. Dr. Eric Bossi

Dr. Eric Bossi, a licensed forensic psychiatrist, was one of the evaluators that evaluated Manson during his second segment of Stein competency restoration treatment. IAA63. After reviewing Manson's reports and interviewing him, Dr. Bossi drafted a competency evaluation report dated March 11, 2020. IAA58.

In Dr. Bossi's report, he noted that Manson had a IQ of sixty-seven (67) and was diagnosed with Borderline Intellectual Functioning. IAA59-60. However, he noted that while Manson had previously scored thirty (30) percent on his legal process pre-test that was administered on January 14, 2019, he had increased this score to eighty-three (83) percent in a subsequent test administered on October 7, 2019. IAA60.

As for specific competency areas, Dr. Bossi noted that Manson provided a rational account of his charges. IAA61. Specifically, Manson stated he was charged with "sexual assault with a minor under 14 and lewdness with a minor under 14 three times." IAA61. Moreover, he was able to articulate that the charges were Category A felonies, which carried possible sentences of one (1) year to life. IAA61.

Additionally, Manson was able to accurately articulate the potential pleas of guilty, not guilty, and no contest. IAA61-62. Indeed, Manson explained that a plea bargain is when “the DA gives you a bargain for reduced charges,” which could result in a lower sentence. IAA61. He explained that he could accept the plea bargain by pleading guilty or no contest and was able to rationally describe some elements he felt would be favorable in a plea bargain. IAA61.

In describing the roles of courtroom personnel, Manson articulated that the State’s role was to prove that he was guilty, while the public defender would assist him. IAA61. Further, he explained that the judge was neutral and the jury was the body that would determine if he was guilty or not guilty. IAA61. He also articulated possible risks he could face by proceeding to trial. IAA61. Further, Manson was able to provide examples of witnesses and evidence relevant to his case and stated he did not want to testify if his case were to proceed to trial. IAA62.

As for his relationship with his attorney, Manson described that he trusted his attorney and would follow his advice as well as knew the best way to help his attorney was to speak with him. IAA61. Moreover, Manson accurately described the appropriate courtroom behavior and that he could be held in “contempt of court” if he did not act appropriately. IAA62.

Dr. Bossi then provided the following list of findings that convinced him that Manson understood the nature of his criminal charges and the nature of the proceedings:

1. He is aware of his charges and their severities. He offered a rational account of the alleged offense.
2. He understands the range and nature of the possible penalties if convicted.
3. He has a realistic appraisal of the defenses available to him, including the potential pleas of guilty, not guilty, and no contest.
4. He was able to outline a plea bargain and would be able to rationally weigh the risks and benefits of a plea bargain, if available, with attorney assistance and advice.
5. He understands the roles and objectives of various courtroom participants including the judge, prosecutor, defense attorney, witnesses, and jury.
6. He understands the concept of evidence.
7. He understands the adversarial nature of the courtroom proceedings.

IAA62.

Additionally, Dr. Bossi found that the following findings supported that Manson was able to assist his attorney with a reasonable degree of rational understanding:

1. Based on my interview, he demonstrated the capability to adequately relate to and communicate with others. He did not exhibit any gross or substantial deficits in his thought process or communication abilities.
2. He is able to plan a legal strategy with the assistance of his attorney, and he stated he would follow his attorney's advice and felt his attorney was trustworthy.
3. He has learned the content presented in competency groups as evidenced by improvement in his written test score from 30% to 83%.

This demonstrates that he has the capacity to comprehend and follow instruction as well as learn and retain material.

4. He has no self-defeating motivations.

5. He understands proper courtroom decorum.

IAA63. In sum, despite Manson's intellectual limitations, Dr. Bossi found that Manson met all three (3) prongs of the Dusky standard and was competent to stand trial. IAA63. In coming to this conclusion, Dr. Bossi recognized that while Manson could benefit from having discussions using simple terms and concepts to assist him, he had a basic but fundamental understanding of courtroom procedures and had "no gross or substantial deficits" in the abilities necessary to assist counsel. IAA63.

b. Dr. Sarah Damas

Dr. Sarah Damas, a licensed psychologist, also reviewed Manson's records and conducted a competency evaluation with him during his second segment at Stein on March 11, 2020. IAA51. Dr. Damas memorialized her findings in her competency evaluation report dated March 23, 2020. IAA51. Dr. Damas also employed the Dusky standard and found that Manson satisfied all three (3) prongs. IAA51.

Dr. Damas also recognized that Manson had been previously tested and had an IQ of sixty-seven (67), read at a fourth-grade level, and had been diagnosed with Borderline Intellectual Functioning. IAA54. She also recognized that at the beginning of the first segment of his competency restoration treatment at Stein, Manson scored thirty (30) percent, which had since increased to eighty-three (83)

percent. IAA55. Accordingly, Manson had demonstrated much improvement in his second segment of treatment where he was attending restoration sessions twice per week instead of just once. IAA57.

Dr. Damas then detailed her competency evaluation of Manson. IAA55. In addition to the information noted above under Dr. Bossi, Dr. Damas found that Manson demonstrated an understanding of the severity of his charges, but was further educated on the definition of “consensual.” IAA55. Further, Manson accurately listed the potential pleas he could enter as well as the possible verdicts of guilty or not guilty if he were to proceed to trial. IAA55. However, Manson was further educated on the definition of not guilty by reason of insanity and guilty but mentally ill. IAA56.

As for his understanding of guilty plea agreements, Dr. Damas found that Manson provided rational responses when given hypothetical plea bargain scenarios, including that he would not agree to register as a sex offender and spend his life or many years in prison. IAA56. Moreover, while he was unsure if the State had any evidence against him, he questioned whether the note he wrote to the victim’s mother could be used against him and he was further educated on evidence. IAA56.

Manson also identified his attorney and stated that he would tell his attorney if he did not understand something in court and if a witness was lying on the stand.

IAA56. Dr. Damas found that while Manson appeared to be hesitant to seek help from his attorney in understanding concepts, he was advised to write down questions he had for his attorney prior to meeting with him and was encouraged to take notes during his conversations with his attorney. IAA57. Dr. Damas suggested that another accommodation Manson's attorney could employ would be to use simple terms and check to ensure Manson understood what was being presented. IAA57.

c. Dr. Daniel Sussman

Dr. Daniel Sussman also evaluated Manson during his continued competency restoration treatment at Stein. IAA64. After Dr. Sussman reviewed Manson's reports and participated in his evaluation, he noted his findings in a report dated March 22, 2020. IAA64.

After reviewing Manson's background, Dr. Sussman noted that Manson had previously been diagnosed with Unspecified Intellectual Disability, Borderline Intellectual Functioning, and an Unspecified Substance-Related Disorder. IAA65-66. However, he independently found only that Manson had a diagnosis of Borderline Intellectual Functioning and an Unspecified Learning Disorders. IAA68. As for his competency restoration treatment at Stein, Dr. Sussman noted that Manson attended thirty-one (31) competency restoration groups and missed two (2) sessions. IAA67.

As for Dr. Sussman's competency findings he found that Manson had the ability to comprehend his charges, sentencing, and court proceedings. IAA67. In particular, he found:

- *Ability to understand criminal charges*: with excellent self-recital.
- *Awareness of misdemeanor/felony class and possible range of sentences*: excellent.
- *Ability to understand possible pre-trial pleas*: with good self-recital.
- *Ability to understand and differentiate possible trial outcomes*: with fair self-recital. Aware of risks of going to trial.
- *Awareness of Not Guilty by Reason of Insanity pleas/outcomes*: with poor self-recital. Poor retention at first when explained. Retention subsequently poor-fair.
- *Ability to understand plea bargaining*: with good self-recital.
- *Understanding of the role of the Judge, Public Defender, and Prosecutor*: with excellent self-recital.

IAA67-68.

Further, he found that Manson had the ability to assist in his own defense based on:

- Willingness to cooperate with defense counsel and follow advice: Good stated intent.
- Awareness of encounters with counsel: IDs P.D. Page by name and states they met 5 times.
- Ability to appraise the legal defenses available: Poor self-recital. Fair self-recital.
- Likelihood of appropriate courtroom deportment: Good stated intent.
- Ability to assist counsel with pertinent and plausible accounting regarding his behavior and whereabouts at time of arrest: Good spontaneous recital of allegations. "At that time I didn't know I was violating the law."

- Capacity to testify relevantly, and challenge prosecutorial evidence/witnesses: Poor-fair. The defendant is yet to consider exoneratory defenses.

IAA68. In sum, while Dr. Sussman found that Manson could benefit from further “brief procedural competency training,” he was competent regarding his ability to understand the charges as well as court proceedings and assist in his own defense pursuant to Dusky. IAA68.

3. Dr. Sharon Jones-Forrester’s Neuropsychological and Competency Evaluation

Dr. Sharon Jones-Forrester, who was hired by Manson, conducted both a neuropsychological evaluation and a competency evaluation of Manson based on her interviews with Manson individually, Manson’s parents, and Manson and his attorney on September 26, 2019, October 11, 2019, and April 23, 2020 respectively. IAA72,99-101. Dr. Jones-Forrester documented her findings in a report dated May 29, 2020. IAA72.

Dr. Jones-Forrester’s prefaced in her report that she went beyond what is required in a competency evaluation alone and stated:

It should be stated that neuropsychological evaluation examines intellectual, neurocognitive, psychological functioning comprehensively, and thus includes neurocognitive testing over and above what would typically be included in competency evaluation alone. Significant intellectual and neurocognitive disability can undermine competency, and do so in this case.

IAA72. In other words, Dr. Jones-Forrester explained that she evaluated Manson's competency independently and in addition to his neuropsychological evaluation. IAA72.

As for Dr. Jones-Forrester's competency related concerns, she made several findings. IAA72-76. First, she found that the results of Manson's neuropsychological evaluation revealed that he had an intellectual disability, poor comprehension skills, and struggled with understanding complex legal information. IAA73. Specifically, she opined that Manson read at a 2.3 grade level and had learning disabilities that went beyond what is expected of someone with a learning disability alone, which would cause him to have difficulty understanding verbal and written information. IAA73.

Second, Dr. Jones-Forrester found that Manson had a good rapport with his attorney and he stated that when he did not understand information, he was willing to ask for clarification and repetition of information. IAA73. However, she also found that Manson would sometimes have to ask his father for further explanation. IAA73. Dr. Jones-Forrester expressed concern that based on Manson's disability, he would be unable to identify when he failed to understand a concept and could not appreciate the consequences of his misunderstanding. IAA73. Based on these findings, she believed that Manson would have a significant barrier in assisting

counsel with his defense and advocate for himself when he misunderstood information or was unsure of the consequences of his legal decisions. IAA73.

As for Manson understanding his charges, Dr. Jones-Forrester found that he could “concretely” state his charges but could not explain them. IAA73. The example she used to demonstrate why she believed Manson failed to understand his charges comprised of his inability to articulate the difference between lewdness and sexual assault as well as his difficulties understanding general concepts related to sexual information. IAA73. Dr. Jones-Forrester also found that Manson struggled with information regarding sentence ranges and how that would be determined. IAA73.

Additionally, Dr. Jones-Forrester found that with regard to Manson’s understanding of court proceedings, he first had difficulty understanding “the nuances and complexity” of members in the legal community. IAA73. Notably, save his understanding of the role of the jury, she found that while Manson could accurately identify the roles of the other members of the legal community, he could not elaborate on those roles. IAA73. She was also concerned that Manson had only a “concrete” understanding of court proceedings and appropriate court behavior, including not being able to provide information regarding what he should do to alert his attorney if he believed something in the proceeding was inaccurate. IAA73.

In sum, Dr. Jones-Forrester found that Manson would struggle with competency because he was “very concrete, easily confused, and [would] have marked difficulty understanding nuanced or complex legal information.” IAA73. Moreover, she found that his deficits would result in him possibly misunderstanding information and agree to information he misunderstood. IAA73. Additionally, she found that Manson’s intellectual disability, learning disabilities, and significant neurocognitive deficits would negatively impact his understanding of legal information and the legal consequences with factual and rational understanding. IAA73. Dr. Jones-Forrester went as far as to say that she believed Manson’s intellectual disability, which went beyond what is expected of a learning disability alone, and neurocognitive deficits were expected to be lifelong and he would not be amenable to restoration. IAA73-74.

Dr. Jones-Forrester then described her findings related to her observation of Manson and his attorney. IAA74. With regard to Manson’s ability to recall and relay facts of his case and charges, she found that Manson could not accurately report important facts related to the detailed facts and timeline of the case. IAA74. Dr. Jones-Forrester also shared her concern with Manson’s inability to understand after counsel attempted to assist. IAA74. In this finding, she used the example that Manson did not understand the meaning of the word “consent.” IAA74. She

explained that Manson could “concretely” understand that it was illegal to engage in sexual activity with someone underage, but she was troubled because he could not explain “why this is criminal, the relationship between age and ability to consent, nor could he understand how consent could not be given legally regardless of the nature of the relationship he had with the alleged victim.” IAA74. Further, Dr. Jones-Forrester noted that Manson struggled with understanding the difference between lewdness and sexual assault. IAA74. She explained that even though Manson’s attorney explained concepts when Manson was confused, he continued to have difficulties. IAA74.

Dr. Jones-Forrester also noted that Manson continued to struggle in his understanding of the roles of legal community and court proceedings because he demonstrated a “very concrete” understanding. IAA74. Further, Manson seemed to have difficulty understanding his counsel’s explanation of various matters related to sentencing. IAA74.

Moreover, Dr. Jones-Forrester explained that Manson demonstrated comprehension difficulties regarding offers and the negotiation process because he demonstrated only a “concrete” understanding and had no appreciation for how to effectively engage in appropriate decision-making as well as weighing the advice of counsel with regard to potential offers. IAA75. However, with prompting, Manson

did explain that he would review an offer to determine if it was “good,” but he could not articulate what went into his decision-making. IAA75. Dr. Jones-Forrester further indicated that Manson demonstrated “concrete” confusion on issues such as sex offender registration and the difference between probation and house arrest even after his attorney explained the concepts to him. IAA75.

Dr. Jones-Forrester was also concerned with Manson’s struggles regarding remembering and relating back advice of counsel. IAA75. She mentioned that even with accommodations, Manson struggled to explain counsel’s advice and the reasons underlying the advice. IAA75. Moreover, Manson seemed to have a “very limited understanding” with weighing the outcomes of going to trial as well as the strengths and weaknesses of evidence. IAA75. Notably, Dr. Jones-Forrester aired that this concern was based on examples such as Manson’s belief that the State could not satisfy its burden of proof unless it presented video or photographic evidence. IAA75. He further explained that without this type of evidence, the State would have a hard time proving the case. IAA75. Also, based on these concerns, Dr. Jones-Forrester stated she was concerned that Manson’s insight into the adversarial nature of the legal process affected his competency, and more specifically, his factual and rational understanding. IAA75.

Dr. Jones-Forrester added that Manson's "polite and cooperative manner, agreeableness, and relative strong memory skills in comparison to his other neurocognitive deficits" could have caused him to engage in rote memorization to appear competent, but he in fact was not able to engage in legal decision-making to assist his counsel with a reasonable degree of factual and rational understanding. IAA76.

As for Manson's neurocognitive evaluation, Dr. Jones-Forrester found that Manson had an IQ score of seventy (70) and reading comprehension at the 2.3 grade level, which she found would cause issues with attention and concentration as well as mild problems with mental tracking and processing information quickly. IAA84. Further, she opined that Manson suffered from Pica, ADHD, Mild Intellectual Disability, Unspecified Major Neurocognitive Disorder, Attention-Deficit/Hyperactivity Disorder, Specific Learning Disorder with Impairment in Reading, Specific Learning Disorder with Impairment in Mathematics, and Specific Learning Disorder with Impairment in Written Expression. IAA86-87. Notably, Dr. Jones-Forrester also expressed concern that while Manson was able to benefit from repetition, his verbal memory problems would persist even after multiple exposures to the same information. IAA84. Moreover, she found that he could have problem solving problems and struggle shifting his attention. IAA84. Additionally, she

explained that the accommodations employed during Manson's competency restoration, including using the Slater Method, the support of his competency evaluators, and his strong rote memorization skills in comparison to his neurocognitive deficits made him appear competent after his second effort at competency restoration. IAA85. Based on all of her findings, including both her competency findings and neurocognitive findings, she found that Manson failed to meet the Dusky standard and he would not be amenable to restoration based on his lifelong intellectual disability and neurocognitive deficits. IAA85.

B. CHALLENGE HEARING TESTIMONY

1. Dr. Sharon Jones-Forrester

Dr. Jones-Forrester testified at Manson's Challenge Hearing. IAA99. Dr. Jones-Forrester testified that she was hired by the Special Public Defender's Office to assist Manson, but had no experience in actual competency restoration. IAA100,128.

During the competency portion of Dr. Jones-Forrester's interview with Manson she evaluated Manson independently, used very simple open-ended questions to evaluate his understanding of his charges, sentencing, the roles of various members of the legal community, court proceedings, and his ability to assist

his counsel. IAA101-02. She explained that she found that Manson struggled in most of those areas, which concerned her in finding him competent. IAA102-03.

As for his knowledge of his charges, he demonstrated a basic understanding, but had difficulty understanding the concept of age and consent as well as the difference between lewdness and sexual assault, which Dr. Jones-Forrester admitted were sophisticated legal concepts. IAA102,130. However, he understood the age of consent, that under the law he engaged in illegal behavior, he was facing prison time, and that if he lost his trial he could go to prison. IAA130. He also had a very “concrete” understanding of his sentencing range. IAA102.

As for his understanding of the roles of the various parties in the courtroom, Manson demonstrated a “concrete,” but accurate, understanding. IAA102. However, he seemed to have confusion about his own role and how he could assist his counsel beyond stating that he should talk to his attorney. IAA102. Further, Manson seemed to have difficulty with understanding court proceedings in that he knew he had to be quiet in court but could not articulate how to identify any comprehension difficulties during proceedings and how to communicate with counsel if something inaccurate was said during the proceedings. IAA103.

As for the neuropsychological evaluation, Dr. Jones-Forrester explained that she employed the Weschsler Adult Intelligence test to assess Manson’s IQ. IAA103.

She also employed tests to evaluate his attention, concentration, processing speed, language and spatial skills, memory, and executive and fine motor skills. IAA103. Dr. Jones-Forrester also considered cultural factors in her analysis. IAA103. Based on her tests, she found that Manson had an IQ of 70, which was in the low-average range. IAA104.

She also found that he had difficulties with attention, mental tracking, processing speed, language and spatial skills, as well as variable memory skills and poor executive functioning and fine motor skills. IAA105. Manson's academic skills were generally at a third-grade level with the exception of his reading comprehension which was at a 2.3 grade level and his spelling, which was at a 6.2 grade level. IAA105. Dr. Jones-Forrester explained that such information was important because it demonstrated that he continued to have difficulties despite having educational interventions. IAA105.

Dr. Jones-Forrester further elaborated that he had significant difficulties with his attention skills at an amount that was strongly consistent with ADHD over and above his intellectual disability. IAA106. Additionally, although his processing speed was one of his strengths, she found that he struggled with mental tracking, which in effect made him very likely to be distracted and miss information, including at court proceedings. IAA106.

As for his language skills, Dr. Jones-Forrester found that Manson had a low vocabulary, which made him “very concrete” and struggle with answering questions in a “well-thought out manner and considering all aspects of a question before responding.” IAA106.

Dr. Jones-Forrester went on to discuss her finding that Manson had poor spatial skills. Further, he had variable memory skills, which according to Dr. Jones-Forrester meant that Manson would “benefit significantly” from information that is repeated, but would struggle when he was asked to recall complex information. According to her, this explains Manson’s poor memory of his competency training and retention of advice by counsel. IAA107.

As for his executive functioning, Dr. Jones-Forrester found that Manson struggled with problem solving, abstract and deductive reasoning, impulse control, and the ability to shift his attention, which, according to her, would make Manson vulnerable to missing or misunderstanding information and possibly acting impulsively. IAA107-08.

In her opinion, all of Manson’s difficulties would impact Manson’s comprehension of court proceedings and undermine his ability to understand his charges as well as court proceedings and his ability to assist his counsel. IAA108. Dr. Jones-Forrester also found that even if information was broken down for

Manson, he would have comprehension difficulties based on his neurocognitive functioning. IAA108.

Dr. Jones-Forrester then testified about the evaluation she conducted to observe Manson with defense counsel on April 23, 2020, which was significantly after his second set of Stein evaluations were completed in March 2020. IAA109. She found that it was important to observe Manson's interactions with defense counsel in order to see if he had continued difficulties with accommodations. IAA125.

Dr. Jones-Forrester observed Manson and counsel for one and a half hours to evaluate Manson's understanding of his charges, case facts, the roles of the members of the legal community as well as court proceedings, sentencing as well as negotiations, the adversarial nature of the legal process, his ability to retain advice from his attorney, and his ability to engage in hypothetical reasoning to address possible outcomes. IAA109-110. She observed that defense counsel employed simple questions, but Manson had difficulties with all of these subjects. IAA110-11.

According to Dr. Jones-Forrester, Manson had difficulty with understanding the word consent and its relationship with age. IAA110-11. Specifically, Dr. Jones-Forrester found that Mason was able to articulate it was wrong to have sexual activity

with a minor, but could not explain the reason for this. IAA110-11. In her opinion, because he did not understand this he could not meet the Dusky standard. IAA111.

Although Manson had a “fairly accurate if concrete” understanding of defense and prosecution, he appeared to have troubles with identifying the roles of the judge, jury, his own role, and what he could do to assist counsel. IAA112. She found that he still struggled with understanding court proceedings, including how to recognize comprehension difficulties as well as if anything in the proceedings was inaccurate and how he could communicate with counsel during proceedings. IAA112. Dr. Jones-Forrester found that Manson struggled with understanding sentencing ranges in that he was unable to understand how sentencing might be “stacked” and the relationship between his charges, which she found would impact his ability to assist counsel. IAA113. However, Dr. Jones-Forrester also found that he had a “generally good but “concrete” understanding” of negotiations, which could mean a lesser sentence for him. IAA113. Nevertheless, he struggled with nuances such as registering as a sex offender and could not distinguish between probation and house arrest. IAA113-14. She found that even though defense counsel appeared to attempt to accommodate Manson, his comprehension difficulties continued. IAA114. Dr. Jones-Forrester further expressed concern with Manson’s inability to retain counsel’s advice that had been previously given. IAA114.

As for Manson's ability to understand possible outcomes of going to trial, he struggled during this observation. IAA116. Dr. Jones-Forrester offered the example that Manson believed that the State could not satisfy its burden of proof unless there was photographic or video graphic evidence and could not articulate anything else that could be used against him at trial. IAA116. Further, Manson struggled with identifying "concrete" information regarding evidence and witnesses against him and could not elaborate on those factors in the context of the proceedings. IAA117. It was Dr. Jones-Forrester's opinion that Mason was unable to appreciate the risks. IAA117. It was also Dr. Jones-Forrester's opinion that even though defense counsel did his best to use "concrete" and simple language, Manson still had the aforementioned difficulties. IAA122-23.

Dr. Jones-Forrester then discussed her interview with Manson's parents that she conducted on October 11, 2019 in order to better understand Manson's developmental history. IAA120-21. Dr. Jones-Forrester ultimately found that Manson was unable to sufficiently retain the information he learned by rote memorization at Stein. IAA123. She found that while individuals with intellectual disabilities are able to become competent, Manson had neurocognitive deficits over and above his IQ score and intellectual disability. IAA124-25. She suspected that this included ADHD, a developmental history of Pica after eating lead paint as a

child, and physiological features consistent with potential genetic disorders. IAA125-26.

In conclusion, Dr. Jones-Forrester found that Manson would be unlikely to be “significantly restorable.” IAA126. However, during cross-examination, Dr. Jones-Forrester explained that while she had memorialized in her report that Manson had “difficulty understanding nuances or complex information,” she agreed that requiring understanding of nuanced and complex information is not the standard, but in fact that the standard is relatively low as far as being able to assist counsel, understanding the charges, and understanding the proceedings. IAA132. Moreover, she testified that Manson understood that under the law he could not engage in his charged crimes and he understood the role of his defense counsel and the State. IAA138. Dr. Jones-Forrester testified that she agreed with the Stein evaluators’ employment of the Slater Method and the only concern that she had with the restoration process she found was that Manson had continued difficulties that would be difficult to detect from competency restoration alone without observing him with his attorney. IAA140-42.

Dr. Jones-Forrester was later recalled to the stand by defense counsel for further questioning. IIAA234. During this she explained that based on her neuropsychological testing of Manson she found that he was good at rote

memorization and benefitted from repetition and review, but struggled with recalling complex information after a delayed time period. IIAA234. She found that Manson would benefit from repetition and review. IIAA234-35. In Dr. Jones-Forrester's opinion, she believed that based on her observations, defense counsel did his best by employing the accommodations to assist Manson, which was comprised of using open-ended questions, using simpler language, breaking concepts down, and using all of the accommodations suggested. IIAA235. However, she found that Manson was unable to retain the information he had learned at Stein. IIAA236. She further explained that she used the Dusky standard and merely employed the cognitive findings to that standard to find that he was not competent under Dusky. IIAA237. More specifically, Dr. Jones-Forrester found that Manson had a factual, not rational understanding making him not competent. IIAA237. For example, she explained that while Manson answered he had to be quiet in court, he could not articulate the exceptions to that and was not familiar with his intellectual and neurocognitive difficulties to convey miscomprehension. IIAA237-38.

Dr. Jones-Forrester further testified that she did not go beyond the Dusky standard and found that Manson's cognitive deficits in addition to his intellectual disability were important to consider because they impacted his comprehension. IIAA239. Dr. Jones-Forrester also explained that she diagnosed Manson with

Unspecified Neurocognitive Disorder, which she agreed there was a difference between major and minor for which professionals in general can disagree, but she diagnosed Manson with this disorder because it was a conservative diagnosis. IIAA241. She further clarified that she believed that Manson had cognitive difficulties over and above what one could expect from someone that suffers solely from an intellectual disability or ADHD alone. IIAA241. She found that although the individuals at Stein were able to observe Manson and with high level of support were able to help him, she found that he could not retain the information to sufficiently be restored to competence. IIAA242. Dr. Jones-Forrester further believed that even if he was given ADHD medication to help with his focus, that would not be sufficient to assist him based on all of the other neurocognitive issues. IIAA243.

Dr. Jones-Forrester also disagreed with Dr. Sussman's disagreement with her diagnosis because she felt that he misunderstood. IIAA244. When asked, Dr. Jones-Forrester explained that when she questioned Manson about why he thought that the crimes he was charged with were illegal, the fact that he could not articulate anything other than that he was told it was illegal was problematic in that it showed he did not have a factual, let alone rational understanding. IIAA246. Ultimately, Dr. Jones-

Forrester opined that it would be difficult for Manson to assist his counsel during the proceedings. IIAA250.

2. Dr. Eric Bossi

Dr. Eric Bossi, a certified competency evaluator that evaluated Manson in March 2020, also testified at the Challenge Hearing. IAA145. Dr. Bossi testified that in the first segment of Manson's restoration treatment, Manson had been attending competency restoration classes at Stein weekly, except for some classes he missed, from January to September, but the entire competency restoration period was nine (9) months. IAA166. After this first segment, the evaluators found that Manson was not competent yet. IAA166-67. Manson then continued his competency restoration from September to March with increased sessions. IAA167. Thus, they spent about one (1) year using the Slater Method, which Dr. Bossi explained is a method to ensure an individual retains information as opposed to rote memorization. IAA168. Notably, Dr. Bossi specifically testified that despite Dr. Jones-Forrester's testimony regarding Manson's alleged difficulties, he did not find that Manon was employing rote memorization when answering the panel's questions. IAA147.

Dr. Bossi testified that he conducted an evaluation of Manson in a panel format with Dr. Sarah Damas and Dr. Sussman. IAA145-46. Dr. Bossi explained that this format was used because Manson was undergoing outpatient treatment,

which was the typical format used in outpatient competency evaluations. IAA146. However, his assessment was independent of the other evaluators. IAA174.

With regard to Manson's ability to assist his defense counsel with strategy, Dr. Bossi testified that Manson could explain that counsel told him he should not go to trial and the reason that recommendation was made was because of potential witnesses and evidence, including an apology letter he had written which could be used against him. IAA148-49.

Dr. Bossi recalled that the panel did not discuss the concept of consent with Manson. IAA149. However, the panel did ask him questions to evaluate his understanding of the roles of different individuals in the courtroom, how he might interact with those in the courtroom, and the role of the legal process as well as his role. IAA149. Dr. Bossi clarified that the questions they asked did not dictate a yes or no answer, but instead were aimed at getting Manson to elaborate as much as possible as opposed to just having him regurgitate answers. IAA150. He also confirmed that it did not appear that Manson was repeating from rote memorization because the panel asked him questions in different ways and he did not appear to struggle as one that was relying on rote memorization would have. IAA150-51.

As for Manson's rational understanding, Dr. Bossi found that Manson was able to rationally explain various aspects of his case, including that he understood:

(1) he was charged with a sexual offense with a minor; (2) the law says that what he did was wrong; (3) that he could be punished for his actions; and (3) he had a good rapport with defense counsel. IAA150-51. In response to the district court's questioning, Dr. Bossi also explained that Manson had a rational understanding as far as decisions were concerned based on two (2) examples. IAA152-53. First, Dr. Bossi repeated the example he gave Manson regarding his counsel's recommendation not to go to trial. IAA152-53. Dr. Bossi explained that it was more than just a factual understanding in that Manson was able to explain that he understood the reason for that recommendation and that was because of specific evidence in his case, including that the victim as well as her mother could testify against him and his apology letter included in the arrest report which could be used against him. IAA152-54. Moreover, he was able to explain that if he went to trial he would probably get a lot of prison time and he did not want that. IAA152-54. Additionally, when the panel asked Manson about plea bargains he was able to go beyond a factual understanding and rationally provide a plea bargain that would be good for his case, i.e. one he would accept. For instance, Manson explained he did not want a plea bargain that would require him to register as a sex offender or that would require a long prison sentence. IAA153. All of this demonstrated that Manson

had a rational appreciation as well as decision making ability that went beyond just being able to give a definition of what evidence means. IAA153-54.

Additionally, Dr. Bossi testified that he did not have Dr. Jones-Forrester's report at the time of the evaluation because it was subsequently drafted. IAA154. That being said, he did review the report and it did not change his mind that Manson was competent under the Dusky standard. IAA154. Dr. Bossi explained that while he understood that Manson had some limitations, he did not agree with Dr. Jones-Forrester's assessment that Manson's limitations rose to the level of preventing him from participating in the legal process. IAA155. In other words, Dr. Bossi found that Dr. Jones-Forrester was looking for a level of sophistication that he and his colleagues were not. IAA155-56. He later elaborated that he went over pleas with Manson in multiple ways. IAA159-160. First, Manson was generally asked to explain the different types of pleas and the results of such pleas. IAA159-160. Then, they would come back around later and ask the individual to name the type of plea he would enter if he wished to go to trial to ensure it is not rote memorization. IAA159-160. Further, he testified that he reviewed notes regarding Manson's restoration wherein a social worker employed a role-play to test Manson's understanding of evaluating different plea options. IAA173. Specifically, the social worker would explain that he or she was playing the role of the attorney and would

tell Manson he was offered a deal and explain the conditions of the deal and would ask if Manson should take the deal. IAA173. Notably, the social worker would present good deals, poor deals, or a questionable deal. IAA173. According to the paperwork that Dr. Bossi reviewed, Manson responded appropriately and made rational choices regarding the hypothetical plea bargains that were offered. IAA173.

Dr. Bossi went on to discuss that there are certain accommodations that can be made for individuals with intellectual disabilities to ensure understanding and communication with their attorney. IAA156. First, he explained that the attorney can use simple terms when explaining concepts, checking to make sure that the individual is understanding and can restate the concepts back. IAA156. Additionally, Dr. Bossi suggested that there was also research that supported having a cognitive facilitator assist with cognitive limitations as an intermediary between the attorney and the individual to help facilitate communication. IAA156. During court proceedings, simple terms could be used to explain concepts to the individual, options for additional recesses, conferences between the defendant and the attorney. IAA157. Dr. Bossi also provided the example from Vermont where cognitive facilitators are used in the courtroom to assist these defendants. IAA157. Dr. Bossi further provided that research regarding how to accommodate defendants, including a paper published in the American Academy of Psychiatry and the Law in 2019

which cites the Department of Justice recommendations as well as the National Center for Criminal Justice and Disability on what accommodations can be made with attorneys and inside of the courtroom. IAA157. He mentioned that there were also decisions in the State of Washington about accommodations. IAA157.

Moreover, Dr. Bossi testified that most people with intellectual disabilities who are incompetent can be restored to competency. IAA157-58. Indeed, he even explained that there was a 2017 Texas Tech study wherein they examined individuals with IQs lower than Manson's and found they were able to restore eighty (80) percent of them. IAA158. In another study, with individuals with a lower IQ, sixty (60) percent of those individuals could be restored. IAA158.

Dr. Bossi also testified that he did not feel the need to evaluate Manson's interaction with defense counsel because most competency evaluations are completed without observing attorney reactions. Dr. Bossi explained that he did not feel there was specific concern to conduct such an observation because he had enough information to form an opinion. IAA158.

Dr. Bossi testified that he was able to determine that Manson was able to make a rational decision versus just following counsel's advice based on his ability to explain why he believed going to trial was not recommended. IAA161. Instead of Manson stating he would do whatever his attorney said, Manson articulated the

evidence against him, that it was a lot of evidence to overcome, and if he went to trial he could lose which could mean a long prison sentence which he did not want. IAA161. Further, Manson explained that he did not want to register as a sex offender and was hoping he could get put on probation, but he understood that if he went to trial and lost that could mean a long prison sentence. IAA162. Manson was also able to explain his general understanding of probation which meant he would have follow certain rules and stay out of trouble. IAA162-63. In sum, Dr. Bossi found that Manson had a sufficient ability to consult with his lawyer with a reasonable degree of rational understanding. IAA163.

Dr. Bossi also explained that Manson had a rational and factual understanding of the proceedings against him, the nature of the court proceedings as well as his own position in the proceedings at the accused, the role of his attorney, his willingness to work with and communicate with his attorney, the role of other proceedings and the parties involved (he struggled a bit with the concept of a jury), that the proceedings were adversarial and he was being a accused of a crime by the prosecutor and that his defense attorney would defend him, he understood the charges against him, and he understood the possible outcomes of verdicts in the case. IAA162-64.

3. Dr. Daniel Sussman

Dr. Daniel Sussman testified that he was one of the certified evaluators that evaluated Manson on March 11, 2020. IAA176. During the two (2) hour interview, Dr. Sussman testified that he and the other evaluators asked questions in several different ways to evaluate whether Manson truly understood his charges. IAA176. Dr. Daniel Sussman testified that in addition to all of the other information he reviewed, as referenced in his report, since the evaluation, he has been able to review Dr. Jones-Forrester's report. IAA177.

Dr. Sussman explained that after evaluating Manson, he found that Manson had the sufficient ability to consult with his attorney with a degree of rational understanding as well as a rational understanding of the proceedings against him. IAA177.

Further, Dr. Sussman confirmed that he deemed Manson's ability to understand the nature of the charges against him, the possible verdicts and penalties he was facing with excellent ability. IAA178. Ultimately, Dr. Sussman found that Manson was competent pursuant to Dusky. IAA178-79. Dr. Sussman also testified that he believed that although he and the other evaluators did not extensively dive into whether he was aware of the risks of going to trial, they did briefly touch on that with Mason and received good responses. IAA179. Further, they discussed Manson's understanding of whether he violated the law based on Manson stating

that he did not know he was violating the law when he committed the underlying offenses. IAA179-180. Dr. Sussman explained that he informed Manson that his underlying charges were strict liability and discussed that ignorance of the law is not a defense but that his intellectual capacity could play a role, to which Manson had a good response. IAA180-81. However, Dr. Sussman explained that this was really more of a defense issue than a competency issue and that he moved on from the issue with Manson because he felt that Manson had provided a solid explanation of his side of the allegations and his response to the idea that his capacity could be mitigating as opposed to exoneratory. IAA181-82. He felt that based on Manson's responses, he could assist counsel. IAA182.

Dr. Sussman further explained that his review of Dr. Jones-Forrester's report did not change his opinion that Manson was competent. IAA182. In fact, he found that Dr. Jones-Forrester's assessments was a "revolutionary alteration of the way competency determinations go." IAA182. Indeed, he found that Dr. Jones-Forrester's report went beyond what is required under Dusky. IAA183. Further, he elaborated that Manson's explanations were logical and plausible and noted that Dr. Jones-Forrester made frequent references to Borderline Intellectual Functioning and other cognitive findings and that is not what a competency determination requires as individuals that have cognitive defects, including psychotic symptoms, can be found

competent. IAA183. He explained that Dr. Jones-Forrester's report went beyond the three (3) prongs of the Dusky standard and in fact bypassed it. IAA184. He explained that these additional findings could be used as mitigation at trial as opposed to during a competency determination. IAA183-84. Most importantly, he testified that with a reasonable degree of medical certainty that Manson satisfied a finding of competency, was amenable to competency restoration, and disagreed that Manson lacked capacity. IAA184. Dr. Sussman testified that Manson had participated in thirty-one (31) competency restoration groups and while he could benefit from further brief training, which would only be for the purpose of reinforcing the minor misunderstanding he had regarding the concept of guilty by reason of insanity, that one misunderstanding was not enough to find that he was not competent. IAA184.

Thus, Dr. Sussman explained that he agreed with Dr. Jones-Forrester on Manson's diagnosis of Borderline Intellectual Function, but he did not agree with her diagnosis of ADHD, and the major neurocognitive disorder. IAA185-86. Dr. Sussman warned that competency is a test that stands on its own and the minute one disjoins competency from cognitive problems, one could have many cognitive problems. IIAA202. In other words, Dusky is designed to assess the specific prongs and one cannot just come up with cognitive deficits to find that someone is incompetent. IIAA202-03. Doing so would be a revolutionary way of looking at the

competency issue. IIAA203. Dr. Sussman then clarified that cognitive disorders could play a role in finding someone incompetent, but the cognitive disorders must be evaluated using the Dusky standard. IIAA203. Dr. Jones-Forrester's report was trying to have the cognitive deficits stand on their own, which is a "revolutionary new way of trying to shoehorn in incompetency." IIAA203. Thus, he found that Dr. Jones-Forrester's findings went outside of the bounds of the Dusky standard "to find cognitive deficits that she says could stand alone to constitute incompetency irrespective of" the other evaluators' findings. IIAA203-04.

More specifically, he testified that what disorders he would find consequential to finding someone incompetent, such as Alzheimer's dementia, a severe head injury, or strokes, but he found that Manson's intellectual disability did not rise to the level of major neurocognitive disorder. IIAA214. Regardless, he found that Dr. Jones-Forrester's finding was unsubstantiated. IIAA215. On cross-examination, Dr. Sussman testified that he believed that Manson could make a rational decision on whether to testify if he was patiently counseled. IIAA208.

4. Dr. Sarah Damas

Dr. Sarah Damas, another of Manson's Stein evaluators, also testified at the Challenge Hearing. IIAA217. In addition to completing the evaluation, she frequently spoke with Manson's caseworker at Stein during his outpatient

competency restoration treatment who worked with him weekly. IIAA217. Dr. Damas also participated in Manson's first competency evaluation in September 2019 when he finished six (6) months of treatment. IIAA218. Subsequently, Manson was re-admitted to the outpatient program and after that treatment a second round of evaluations were completed. IIAA218.

Dr. Damas further explained that she found that he was not competent during his first round of treatment, but then found him competent after his second and explained the improvement she saw in Manson. IIAA218. Specifically, she saw that Manson had more motivation during the second round and more improvement in terms of Manson retaining information as he was only going to sessions weekly during the first competency and was going twice per week during the second round. IIAA219.

Dr. Damas explained that when Manson was asked questions during his competency restoration treatment, the Slater Method was employed, which meant that he would be asked open-ended questions in different ways to ensure that someone is not just parroting information from the class. IIAA219. Additionally, during the classes, role playing was used he was not just parroting the information and to ensure that he knew how to use the information. IIAA220. In particular, she testified that they would ask Manson questions in different ways. IIAA222. Dr.

Damas recalled that Dr. Sussman had a higher vocabulary that Manson found confusing, so he would ask for clarification, specifically he would say he did not understand or they would ask him if he understood and he would reply. IIAA222. If Manson responded that he did not understand, the evaluators would use simpler language and provide examples. IIAA222-23.

Subsequent to her evaluations of Manson, Dr. Damas reviewed Dr. Jones-Forrester's evaluation report. IIAA220. Dr. Damas clarified that Dr. Jones-Forrester's finding in her report that he read at a second grade level did not broadly mean he could only comprehend information at that level, it was only specific to his reading level in that specific test. IIAA220.

Dr. Damas testified that she believed Manson would benefit from ongoing reeducation classes as the case progressed because she noticed that when Manson was only going to his competency classes once per week he would have issues retaining information and improved when his classes were increased to twice per week. IIAA224. Dr. Damas also testified that if Manson had ADHD, and if she would have known, he could have also been given medication to assist with that. IIAA224.

Dr. Damas explained that she used the Dusky standard to evaluate Manson. IIAA224. In employing this standard, she found that: (1) Manson had the sufficient

present ability to consult with his lawyer with a reasonable degree of rational understanding, (2) he had a rational factual understanding of the proceedings, (3) he understood the nature and the purpose of the court proceedings, (4) he understood his own role, defense counsel's role, the judge's role, the prosecutor's role, and the roles of the other parties, and (5) from the beginning, he could accurately state his charges and the potential sentencing, including that he could serve up to life in prison. IIAA225.

Importantly, Dr. Damas recounted the improvements she saw in Manson from the first time he was evaluated to the second. IIAA225. Specifically, she found that Manson had a better understanding of plea bargaining and the consequences of taking a case to trial and he appeared to have a rational understanding as he stated that he would be okay with probation but did not want to go to prison and register as a sex offender. IIAA225-26. To Dr. Damas, it appeared that Manson could now weigh his options. IIAA226. Also, he now understood the confidentiality between he and his attorney. IIAA226. Ultimately, she changed her finding from not competent to competent. IIAA225-26.

Dr. Damas further testified that after reviewing Dr. Jones-Forrester's report, she did not find Manson's answers to her concerning. IIAA228. She explained that she found that Dr. Jones-Forrester's questions were complex as well as abstract and

Manson's answers showed that he understood the basis of consent and that he committed a crime because of the victim's age. IIAA228. She explained when abstract questions are asked of someone with an intellectual disability, they may not be able to answer the question the first or second time. IIAA228. Dr. Damas recalled that he was not educated specifically on consent, but Manson did have the capacity to learn. Indeed, she agreed with Dr. Sussman's finding that Manson improved legal tests from thirty (30) percent to approximately eighty (80) percent, which demonstrated he could learn information. IIAA229.

Dr. Damas also testified that she believed when Manson was asked how he should behave in court and all he replied was he "must be quiet" was a good first answer. IIAA230. When further questioned, Dr. Damas explained that she did not think asking such question in an open-ended way and the fact that he had no answer did not shed light on when he had a rational understanding or not because it could have been that he did not understand the question counsel was asking. IIAA230.

Dr. Damas further explained that there were ways to accommodate if Manson was asked a confusing question. IIAA231. Specifically, she stated that it was common for that to happen with someone who had lower functioning and that the question could be rephrased in simpler terms. IIAA231. However, if that did not work, then examples could be used, and if the individual still could not answer, then

the answer could be explained and the individual could be asked later if he understood. IIAA231. Other accommodations that could be employed included avoided leading questions, taking short breaks, avoiding frustrating questions about time or complex sequencing, provide praise or encouragement, and highlight important information. IIAA233. Dr. Damas clarified that just because someone could not recite an answer, did not mean that he did not understand. IIAA231. Indeed, she explained that competency is not based on whether a person answers test questions appropriately, but instead whether the individual is capable of learning and understanding information. IIAA232.

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it found Manson incompetent without the possibility of restoration and dismissed his charges. Despite there being substantial evidence of Manson competency, the district court found that due to Manson's lifelong intellectual and neurocognitive, the standards for competency under Dusky and NRS 178.400 could not be satisfied. Indeed, three (3) licensed evaluators, who evaluated Manson after his approximately one (1) year of competency restoration classes, found that Manson was competent, whereas one (1) psychologist, that met with Manson twice, concluded he was incompetent. Moreover, the latter psychologist employed a higher standard for competency, which

the district court erroneously adopted. Regardless, the district court abused its discretion by finding that Manson could not be accommodated at trial even though there was testimony that suggested he could be competent if the district court provided accommodations at trial. Therefore, the district court's Amended Decision and Order should be reversed and the matter should be remanded for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FOUND MANSON INCOMPETENT WITHOUT THE POSSIBILITY OF RESTORATION

Despite the evidence that Manson adequately met the standards set by Dusky that deemed him competent to stand trial, the district court erroneously found that Manson was incompetent without the possibility of restoration and dismissed his charges without prejudice. IIAA278-283.

A district court's determination of competency after a competency evaluation is a question of fact that is entitled to deference on review. Calvin v. State, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006). This Court has also stated that a determination will not be overturned if it is supported by substantial evidence. Id.

In Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789 (1960), the United States Supreme Court provided that the appropriate standard for competency

evaluation was whether the defendant “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.” The Nevada Supreme Court echoed the Dusky standard by explaining that “the test to be applied in determining competency is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him.” Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991) (*citing Melchor-Gloria v. State*, 99 Nev. 174, 178-180, 660 P.2d 109, 113 (1983)). Similarly, this Court has concluded that an “incompetent defendant” is one who lacks “the present ability to understand either the nature of the criminal charges against him or the nature and purpose of the court proceedings, or is not able to aid and assist his counsel in the defendant at any time during the proceedings with a reasonable degree of rational understanding.” Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008).

Nevada has also set forth statutory standards when evaluating a defendant’s competency. Specifically, NRS 178.400 provides:

1. A person may not be tried or adjudged to punishment for a public offense while incompetent.
2. For the purposes of this section, “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 assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

When a reasonable doubt exists as to a defendant's competency, a hearing is statutorily and constitutionally required. Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000). "The doubt mentioned in NRS 178.405 means doubt in the mind of the trial court, rather than counsel or others." Williams v. State, 85 Nev. 169, 174, 451 P.2d 848, 852 (1969). The trial court has discretion to determine whether such a doubt has been raised. Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113. However, a district court's decision regarding competency will be overturned if it is determined that the court abused its discretion. Tanksley v. State, 113 Nev. 844, 944 P.2d 240 (1997).

More recently, in Calvin, 122 Nev. at 1182, 147 P.3d at 1099, this Court evaluated whether the aforementioned factors of NRS 178.400(2) complied with the Dusky standard for evaluating a defendant's competency. The Court confirmed that the factors under NRS 178.400(2) comply with the governing Dusky standard and explained:

under Nevada statutory law a defendant is incompetent to stand trial if he either is not of sufficient mentality to be able to understand the nature

of the criminal charges against him or he is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.

Id. at 1182–83, 147 P.3d at 1100 (internal citation omitted). The Court further emphasized that conducting an accurate competency evaluation is imperative to ensure a defendant is competent to stand trial. Id. at 1183, 147 P.3d at 1100. It stated that while a district court need not evaluate every record and hear testimony from all witnesses to achieve an accurate evaluation, it is best practice to “consider a wide scope of relevant evidence at every stage of the competency proceeding.” Id. at 1183, 147 P.3d at 1100. However, “[t]he trial court resolves conflicting evidence at a competency hearing.” Calambro v. Second Jud. Dist. Ct., 114 Nev. 961, 971, 964 P.2d 794, 800 (1998) (*citing* Ogden v. State, 96 Nev. 697, 615 P.2d 251 (1980)). The district court’s findings will be sustained on appeal when substantial evidence exists to support them. Ogden, 96 Nev. at 698, 615 P.2d at 252 (*citing* Hunt v. State, 92 Nev. 536, 554 P.2d 208 (1977) (“That the evidence is insufficient to warrant the judgment cannot be maintained, as there is substantial testimony for its support ... [and] ... the case seems to have been fairly tried and properly decided, both in fact and law.”))

In the instant case, after Manson was found competent pursuant to Dusky by three (3) licensed Stein evaluators, Manson challenged such findings and the district

court set the matter for a Challenge Hearing. IAA90-94. At the Challenge Hearing all three (3) of the licensed Stein evaluators, Dr. Bossi, Dr. Sussman, and Dr. Damas testified and discussed the evidence that supported their findings of competency. IAA145,176;IIAA217. Manson called Dr. Jones-Forrester, who had completed both a neuropsychological evaluation and a competency evaluation with Manson after he was found competent, to testify about her findings underlying her decision to find that Manson was not competent to stand trial. IAA99. Despite Dr. Bossi, Dr. Sussman, Dr. Damas, and, even to some extent the defense's witness, Dr. Jones-Forrester discussing overwhelming evidence of Manson's competency under the Dusky standard, the district court found that Manson was incompetent without the possibility of restoration and dismissed his charges without prejudice. IIAA282.

By finding that Manson failed to meet the three (3) prongs of the Dusky standard for which competency restoration would never be possible, the district court adopted and applied a standard that sets the bar for a finding of competency higher than what is required under the law. Indeed, despite all three (3) Stein evaluators finding that Manson was competent after approximately one (1) year of competency restoration classes at their facility, the district court found Dr. Jones-Forrester's neuropsychological and competency evaluation and "revolutionary" standard for competency more compelling. IAA168. While the law provides district courts with

the discretion to weigh conflicting competency findings, the law does not permit district courts to adopt a standard for competency higher than what is permitted under law. Calvin, 122 Nev. at 1183, 147 P.3d at 1100; Calambro, 114 Nev. at 971, 964 P.2d at 800. While the State has not found Nevada law that discusses the limitations of this discretion, there are cases that shed light on the analysis.

For instance, this Court has previously justified a district court's finding of competency when it was based on the amount of time an evaluator spent with a defendant and whether there were other experts of the same opinion. In Pigeon v. State, 133 Nev. 1061, unpublished, 2017 WL 6043408 *1 (2017) (No. 67083, filed December 1, 2017), this Court reviewed a district court order finding a defendant competent. In that case, the defendant was referred to a forensic facility, Lake's Crossing, for a competency evaluation. Id. At a subsequent competency hearing, a Lake's Crossing doctor testified that while the defendant was diagnosed with chronic schizophrenia paranoia as well as a personality disorder and was not taking medication, he was not suffering from delusions. Id. The doctor also explained that he discussed with the defendant the nature of the charges, the specific allegations against him, and his understanding of the legal process and court system, and that [the defendant] understood the charges and legal process." Id. At this hearing, the defense presented an expert who shared a conflicting opinion. Id. This Court stated

it was within the district court's discretion to rely on the Lake's Crossing doctor's opinion, "particularly given that [he] spent more time with [the defendant] and his opinion of competency was supported by two other doctors from Lake's Crossing." Id. (citing United States v. Hoskie, 950 F.2d 1388, 1394 (9th Cir. 1991) (discussing when a district court may credit findings of a government expert over those of a defense expert)).

In Pancake v. State, 134 Nev. 993, 413 P.3d 835, unpublished, 2018 WL 1129141 *1 (2018) (No. 71894, filed February 26, 2018), this Court reviewed a district court's decision that found a defendant competent to stand trial. While reviewing the district court's decision this Court examined the district court's review of three (3) licensed evaluators' reports. Id. Two (2) of those reports found that the defendant was competent to stand trial because he was a malingerer, while one (1) of the evaluators concluded that the defendant was not competent to stand trial due to his "mental delays, impaired abilities, functional confusion, and inability to appreciate the potential outcomes of the case." Id. The Court noted that while the latter psychologist had a suspicion that the defendant was a malingerer, she did not test the defendant regarding his efforts. Id. Subsequently, one (1) of the evaluators that found the defendant competent, drafted a supplemental report which challenged the testing conducted by the psychologist that found the defendant incompetent. Id.

This Court found that in light of two (2) of the three (3) licensed evaluators finding the defendant competent and the testing of the “outlier” psychologist being rebutted, there was substantial evidence supporting the district court’s finding of competency. Id. at *2.

As in the aforementioned cases, the three (3) Stein evaluators, whose facility monitored Manson for approximately one (1) year, found Dr. Jones-Forrester’s findings questionable, most importantly because she employed a standard of evaluation higher than what is required for a competency evaluation under Dusky.

As a preliminary matter, it should be noted that not only did Dr. Jones-Forrester conduct a competency evaluation of Manson, but she also conducted a neuropsychological evaluation of Manson and used the findings from each evaluation to determine whether he was competent to stand trial. IAA72,101. Interestingly, on the first page of the combined evaluation report, she prefaced:

It should be stated that neuropsychological evaluation examines intellectual, neurocognitive, psychological functioning comprehensively, and thus includes neurocognitive testing over and above what would typically be included in competency evaluation alone. Significant intellectual and neurocognitive disability can undermine competency, and do so in this case.

IAA72. Such “revolutionary” parameters for which to address whether a person is competent were challenged at the Challenge Hearing in several ways. Indeed, in addition to providing the evidence as to why they believed Manson was competent

to stand trial pursuant to Dusky, all three (3) Stein evaluators found that Dr. Jones-Forrester's report revealed that the knowledge and understanding she was requiring of Manson went over and beyond the legal standard.

First, while Dr. Bossi agreed that Manson had demonstrated some limitations, he did not agree with Dr. Jones-Forrester's assessment that his limitations rose to the level of preventing him in the legal process. IAA155. Indeed, Dr. Bossi explained that he was concerned that throughout Dr. Jones-Forrester's testimony at the Challenge Hearing, she explained that her findings of incompetency were based on Manson having "a basic but concrete or an accurate but concrete understanding of various topics." IAA155. Indeed, he explained that he was concerned with Dr. Jones-Forrester's use of the term nuanced in her report when referencing her findings which led her to find that Manson was incompetent. IAA155. He even highlighted Dr. Jones-Forrester's discussion regarding Manson's understanding of his charges and their nature to show how she was using a heightened standard for which he did not agree. IAA155.

In Dr. Jones-Forrester's report, she explained that one of the reasons she believed Manson did not understand his charges was because he could articulate the difference between lewdness and sexual assault as well as his general misunderstanding regarding general concepts of sexual information. IAA73. Dr.

Bossi explained that he disagreed with this information meaning that Manson misunderstood his charges and their nature for competency purposes as he explained:

To me, you know, for example if an individual understands that they're charged with a sexual offense but they understand that that was against the law, whether they know lewdness versus sexual assault does not mean that they are unable to understand their charges for example.

IAA155. Dr. Bossi ultimately found that Dr. Jones-Forrester was looking for Manson to demonstrate a “high level, complex level, a nuanced level” of understanding, a standard that is not required for a finding of competency. IAA155.

Similarly, Dr. Sussman took issue with Dr. Jones-Forrester’s findings. IAA182. According to Dr. Sussman, Dr. Jones-Forrester’s report had demonstrated a “revolutionary alteration of the way competency determinations go.” IAA182. Dr. Sussman elaborated that Dr. Jones-Forrester’s references to Borderline Intellectual Functioning as well as the other cognitive findings should not dictate a finding of incompetency as individuals that have cognitive defects could be found competent. IAA183. Indeed, he explained that Dr. Jones-Forrester’s report was attempting to have Manson’s alleged cognitive deficits stand on their own, which was a “revolutionary new way of trying to shoehorn incompetency.” IIAA203. Regardless, he found that Dr. Jones-Forrester’s finding of Manson suffering from a neurocognitive disorder was unsubstantiated. IIAA215.

Likewise, Dr. Damas testified that she too had concerns with Dr. Jones-Forrester's findings. IIAA228. Indeed, Dr. Damas similarly took issue with Dr. Jones-Forrester's concern with Manson not fully understanding of the concept of "consent." IIAA228. In her report, Dr. Jones-Forrester expressed concern regarding Manson's understanding of his charges and their nature because he did not understand the meaning of the word "consent." IAA74. More importantly, she had concern that Manson only "concretely" understood that engaging in sexual activity with someone under age was illegal, but could not explain why it was a crime. IAA74. Dr. Damas found that Manson had in fact demonstrated that he understood the basis of consent and that he committed a crime based on the victim's age. IIAA228. In fact, Dr. Damas pointed out that Manson was not educated specifically on consent, but he had the capacity to learn as evidenced by his legal test score increase from thirty (30) percent in his pre-test to approximately eighty (80) percent after he had attended competency restoration classes. IIAA229.

Despite the Stein evaluators express concerns, the district court agreed with and adopted Dr. Jones-Forrester's heightened standard for competency to find Manson was not only incompetent, but incompetent without the possibility of restoration. IIAA280-82. Indeed, in its Amended Order and Decision, the district court noted where all of the evaluators agreed, but heavily relied on Dr. Jones-

Forrester's heightened standard to find Manson incompetent without the possibility of restoration. IIAA280-82. Notably, she even relied on Dr. Jones-Forrester's concern regarding him being unable to "articulate the concept of consent." IIAA281. Additionally, the district court expressed concern with Manson's understanding based on Dr. Jones-Forrester's observation of Manson with his attorney and Manson's continued struggles despite his attorney's use of simple language and repetitive questioning. IIAA281. However, the district court did not wish to even attempt to pursue the other potential accommodations provided by the evaluators. Finally, and importantly, the district court found that Dr. Jones-Forrester's testimony that Manson's low IQ-score and neurocognitive deficits would be lifelong disabilities and could not be improved upon meant that he was incompetent without the possibility of restoration, despite clear evidence that Manson could improve as described above. IIAA281-82.

Regardless of how the district court weighed the conflicting evidence of Manson's competency, the district court abused its discretion by refusing to even attempt to accommodate Manson and proceed with trial. In addition to the accommodations, including using simple language, Dr. Jones-Forrester claims Manson's counsel employed during her observation of the two's interactions, the Stein evaluators provided additional accommodations that would assist Manson in

maintaining his competency. For instance, Dr. Sussman found that while Manson was competent, he could benefit from “further brief procedural competency training.” IAA68. However, even if that accommodation was not feasible, there were other accommodations suggested that could have been made. Indeed, the district court could have adopted the practice found in Vermont courts wherein a cognitive facilitator is used. Dr. Bossi explained that cognitive facilitators assist defendants with cognitive limitations and act as an intermediary between a defendant’s attorney and a defendant to facilitate communication. IAA156. Dr. Bossi also explained that the Department of Justice and the National Center for Criminal Justice and Disability as well as decisions out of Washington have outlined accommodations that could be made for defendants to competently stand trial. IAA157.

It bears noting that accommodations are made in nearly every trial. For instance, defendants and witnesses are permitted to receive the aid of interpreters of all languages during trial. See State v. Russell, 47 Nev. 263, 220 P. 552, 554 (1923). Defendants that suffer from physical disabilities such as hearing impairment receive headphones to ensure they can hear the proceedings. In cases where expert witnesses testify, it is unlikely the defendant of even average intelligence would understand the testimony of such witness. In such a case, it is defense counsel’s duty to explain the information to the defendant in a way he or she understands. NEVADA RULES OF

PROFESSIONAL CONDUCT, Rule 1.4(b). Further, in some cases, attorneys must explain expert testimony in simpler terms to members of the lay jury to ensure they understand the complex information as well. Thus, defendants, witnesses, and members of the jury are accommodated at trial. Yet, the district court exercised its discretion to rely on a heightened standard of competency to find that Manson could not be accommodated. Accordingly, the district court abused its discretion as there was substantial evidence of Manson's competency and there were measures that could ensure his competency at trial. Therefore, dismissal of Manson's charges without prejudice was not warranted and the district court's decision should be reversed.

CONCLUSION

Based on the foregoing the State respectfully requests that the district court's Amended Decision and Order be reversed and that the matter be remanded for further proceedings.

Dated this 4th day of May, 2021.

Respectfully submitted,

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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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,450 words.
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 and volume number, if any, of the transcript or appendix where the matter relied on 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 4th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 4, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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