

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA

Appellant,

vs.

TARIQ MANSON

Respondent.

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Docket No. 82038

Direct Appeal From Amended Decision and Order Dismissing Case
Eighth Judicial District Court
The Honorable Linda Bell, District Judge
District Court No. C-18-335833-1

RESPONDENT'S ANSWERING BRIEF

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I. STATEMENT OF THE ISSUES

The District Court did not abuse its discretion in finding Tariq Manson incompetent without possibility of restoration. The finding was supported by substantial evidence including Tariq's neurocognitive evaluation. Neither did the District Court or Dr. Sharon Jones-Forrester use too high a standard in evaluating Tariq's abilities. Further, the Stein Doctors were not credible.

II. STATEMENT OF THE FACTS

According to the police reports filed in the Commitment and Order in the District Court on October 29, 2018¹, RA 17-19, Tariq Manson, an eighteen year old boy with lifelong intellectual disabilities, was having sexual intercourse with the alleged victim in this case, T.C. RA 17-19. According to both T.C. and Tariq, the two met on Facebook and became boyfriend and girlfriend. RA 17. Tariq was seventeen to eighteen years old at the time and T.C. was thirteen years of age. RA 17-19. The sex

¹While the State included the first page of the Commitment and Order in the Appellant's Appendix (1 AA 13), this was actually a twenty-two page document, some of which was not included in the Appellant's Appendix. Since the full document is relevant to this Appeal, Tariq filed the Respondent's Appendix.

was consensual in that Tariq did not force T.C. to have sex – she willingly had sex with Tariq. RA 17-19. Tariq was charged with one count of sexual assault of a child under fourteen as well as three counts of lewdness with a child under fourteen. 1 AA 5-6. Defense Counsel became concerned regarding Tariq’s mental abilities and arranged for a psychological evaluation by Dr. Lisa Foerster on June 22, 2018. 1 AA 27. Dr. Foerster found Tariq to have borderline intellectual functioning, a learning disability and he functioned at a fourth grade level. 1 AA 28, 54.

In anticipation of a possible plea, Counsel then referred Tariq to Licensed Clinical Social Worker, John Pacult, for a psychosexual evaluation. 1 AA 32. Mr. Pacult recommended Tariq’s referral to specialty court for a full competency evaluation. 1 AA 41. Mr. Pacult questioned whether Tariq could be rehabilitated sufficiently to establish his competency. 1 AA 43.

On or about October 24, 2018, Counsel requested that Tariq be referred for a competency evaluation. 1 AA 31. On November 8, 2018, Tariq was evaluated by Dr. Charles Colosimo, and found to be incompetent. 1 AA 17. On December 11, 2018, Dr. Sunshine Collins also found Tariq to be incompetent. 1 AA 17. The District Court ordered Tariq

to be sent, on an outpatient basis, for competency restoration treatment on December 31, 2018, to Stein Forensic Facility. 1 AA 17. Treatment began on January 14, 2019. 1 AA 28. In September of 2019, after nine months of treatment, Tariq was evaluated by Dr. Mohammad Khan, Dr. Shera Bradley and Dr. Patrick Bennett². 1 AA 27-43.

Dr. Mohammad Kahn reviewed the previous evaluations of Dr.'s Collins, Colosimo and Foerster. 1 AA 27. Dr. Khan reviewed Tariq's school records, the Stein Forensic Facility (Stein) records, collateral legal information and conducted a 50 minute interview with Tariq. 1 AA 27.

Dr. Kahn found:

Mr. Manson does not suffer from any apparent mental illness. However, he has been diagnosed with learning disorders and appears to have intellectual limitations which are currently impairing his adjudicative competence. He has a simple and factual understanding of his charges and basic courtroom proceedings. However, his understanding of more complex processes such as plea bargaining is limited. His ability to rationally assist in his defense is also limited. He may ultimately improve in these areas with continued education and working with our outpatient restoration team and working with his attorney.

²Dr. Sharon Jones-Forrester, Ph.D., also evaluated Tariq at the request of Counsel on September 26, 2019. 1 AA 72. Dr. Jones-Forrester conducted a second evaluation April 23, 2020. 1 AA 72. Her report will be discussed below.

1 AA 30.

Likewise, Dr. Shera Bradley also found Tariq to be incompetent.³ 1 AA 31. Dr. Bradley reviewed police and court records, the previous evaluations, school records and records from Stein. She, along with Dr. Bennet and Dr. Damas, interviewed Tariq for thirty-five minutes. 1 AA 31-32.

Dr. Bradley noted that Tariq had difficulties retaining the information he had learned and difficulties understanding plea bargains and verdicts. 1 AA 35. This understanding of plea bargaining did not improve even though Tariq studied the materials at home, neither did he “demonstrate a rational understanding of his legal situation.” 1 AA 35. Dr. Bradley noted that “[i]t was apparent he was not retaining additional information related to the plea bargaining process taught in the previous sessions. Although he retained some factual knowledge regarding his charges and the courtroom personnel, he did not demonstrate a rational understanding of the plea bargaining process.” 1 AA 38. Dr. Bradley

³Dr. Bradley was also working with her Psychological Assistant, Sarah Damas, Psy.D. Dr. Damas did a subsequent evaluation on Tariq which will be discussed in more detail below.

expressed concern that, given his polite and acquiescent nature, Tariq may be hesitant to seek help from his attorney in understanding legal concepts. Dr. Bradley recommended that Counsel use simple terms in communicating with Tariq and frequently check for understanding. 1 AA 38.

Dr. Patrick Bennet also reviewed school records, previous evaluations, court and police records and did a thirty-five minute interview with Tariq. 1 AA 31, 39-40. Dr. Bennet also noted Tariq's continuing difficulties in comprehension of the plea bargaining process. 1 AA 41-42. Dr. Bennet disagreed with Mr. Pacult's suggestion that Tariq may never be restored to competency but indicated ". . . he is still unable to formulate any kind of defense strategy at this time, thus preventing him from being able to assist his attorney in his defense." 1 AA 43. The only further recommendation made by Dr. Bennet was that Tariq have "adequate and continued assistance" in order to restore competency. 1 AA 43.

The District Court then re-committed Tariq to continued treatment. 1 AA 44-46.

Tariq continued his treatment at Stein for another six months on a twice weekly basis. 1 AA 57. Tariq was consistent with treatment. 1 AA 57. On March 23, 2020, he was evaluated by Dr. Daniel Sussman, Dr. Eric Bossi and Dr. Sarah Damas who found Tariq to be competent. 1 AA 51-68. Dr. Damas, Dr. Bossi and Dr. Sussman all met with Tariq in a “panel”. 1 AA 51. They spent one hour speaking with Tariq about what he had learned at Stein. 1 AA 51, 65. Dr. Damas was the only one of the three doctors who noted that Dr. Sussman was educating Tariq during the assessment regarding potential pleas of not guilty by reason of insanity and guilty but mentally ill⁴. 1 AA 56. When Tariq was unable to discuss the evidence against him and was unsure if the note he wrote apologizing for his alleged crimes could be used against him, he was again “educated on evidence”. 1 AA 56. In addition, during the assessment, Tariq had to

⁴Dr. Daniel Sussman is also a licensed Nevada attorney. 1 AA 64. If Tariq requested information from him to aid his understanding, an attorney-client relationship may have existed. *See Todd v. State*, 113 Nev. 18, 24, 931 P.2d 721, 724-25 (1997) (An attorney-client relationship may be implied where a person seeks advice or assistance which pertains to matters within the attorney’s professional competence and the attorney gives the desired advice or assistance). At the very least, Dr. Sussman’s objectivity was destroyed when he engaged in educating Tariq then evaluated him regarding his legal knowledge based upon that “education”.

be “educated on the definition of consensual.” 1 AA 55. Dr. Damas also noted that Tariq had indicated his potential sentence as “one year to life in prison.”⁵ 1 AA 55.

Despite these obvious deficiencies, Dr. Damas found Tariq competent. 1 AA 56-57. Further, Dr. Damas noted that Tariq would be hesitant in asking questions of his counsel when he failed to understand a concept. 1 AA 57. The only recommendations Dr. Damas made were that Tariq write down his questions and take notes during his meetings with his attorney and that his attorney explain terms simply and check for understanding. 1 AA 57. In making her finding, she relied on legal records, school records, prior evaluations, and the Stein competency restoration records. 1 AA 51-52.

Dr. Bossi completely failed to note that Dr. Sussman “educated” Tariq on concepts during the assessment. 1 AA 58, 60. Dr. Bossi noted that Tariq understood the range of possible penalties even though Tariq incorrectly stated the penalties as “one year to life”. 1 AA 61, 62. Dr.

⁵The Sexual Assault charge carries a potential sentence of thirty-five years to life, NRS 200.366, while the Lewdness charges carry a potential sentence of ten years to life for each of the three counts. NRS 201.230.

Bossi found that Tariq had a “realistic appraisal of the defenses available to him, including the potential pleas of guilty, not guilty and no contest” and that Tariq “understands the concept of evidence” but failed to mention Tariq being “educated” on these and other issues during the evaluation. 1 AA 55, 56, 62.

Dr. Bossi relied solely upon the panel interview as well as all prior evaluations, the legal file and the competency restoration notes. 1 AA 57. The only recommendation Dr. Bossi made was that Tariq would “benefit from having discussions conducted using simple terms and concepts to aid his understanding.” 1 AA 63.

Dr. Sussman also failed to mention that he participated in the “education” of Tariq during the interview. 1 AA 64-68. Dr. Sussman immediately noted, however, that Tariq should be monitored by clinical personnel in order to maintain the improvements he had made. 1 AA 64. Dr. Sussman noted that Tariq’s Fund of Knowledge and Long Term Recall were both poor to fair, that Tariq had a poor knowledge regarding possible pleas and poor retention of possible pleas. 1 AA 67-68. Tariq’s ability to appraise legal defenses was poor and there were concerns regarding his capacity to testify and challenge the State’s witnesses, including the fact

that Tariq had yet to consider “exoneratory defenses”. 1 AA 68. Dr. Sussman found that Tariq was competent to stand trial. 1 AA 67-68. The only indication Dr. Sussman gave to Tariq’s obvious shortcomings was his suggestion that Tariq “could benefit from further brief procedural competency training.” 1 AA 68.

Dr. Sussman made no recommendations for accommodation. 1 AA 64-68. He reviewed Tariq’s medical chart at Stein, the legal case file and the evaluations conducted only by Doctors Colosimo, Collins and Foerster. 1 AA 65.

These evaluations were completed on or about March 23, 2020. 1 AA 51-68. On April 23, 2020, approximately one month later, Tariq was again evaluated by Dr. Sharon Jones-Forrester. 1 AA 72-88. Dr. Jones-Forrester’s evaluation of Tariq consisted of two parts, the first of which was on September 26, 2019, and concluded with the second portion on April 23, 2020. 1 AA 72-88. She found that Tariq was incompetent under the *Dusky*⁶ standard, without the possibility of restoration. 1 AA 72-88.

Dr. Jones-Forrester reviewed Tariq’s school records, police records,

⁶*Dusky v. United States*, 362 U.S. 402 (1960).

records from the Social Security Administration, a Mental Status Examination conducted in 2008 by Dr. Kalodner, a speech and language evaluation, and all previous psychological assessments, including the assessment by John Pacult, LCSW⁷. 1 AA 88. Dr. Jones-Forrester did a collateral interview with Tariq's mother and father. 1 AA 88. Dr. Jones-Forrester also completed a neuropsychological evaluation. 1 AA 72-88. She worked with Counsel on how to incorporate the recommended accommodations. 1 AA 134-35. She also spent approximately one and a half hours observing Tariq's interaction with his attorney subsequent to his competency restoration at Stein. 1 AA 72, 109.

In September of 2019, Dr. Jones-Forrester found that Tariq's intellectual and neurocognitive disabilities were undermining his ability to rationally understand the charges against him and the court proceedings, as well as his ability to aid and assist Counsel. 1 AA 73. Tariq had intellectual disabilities, poor comprehension skills, struggled with understanding complex legal information and, if he failed to

⁷Although the evaluations of Dr.'s Colosimo and Collins were not listed as having been reviewed on Dr. Jones-Forrester's report, this was an oversight. 1 AA 119. She did review these two evaluations. *Id.*

understand his attorney, he would ask his father for clarification – leading to more confusion. 1 AA 73. Tariq’s disability was so severe that he would have trouble recognizing when he failed to understand something, which posed a “significant barrier” in his interactions with Counsel. 1 AA 73. He had little understanding of his charges, his potential sentences and the roles of those involved in the court process. 1 AA 73.

Specifically, he will tend to be very concrete, easily confused and will have marked difficulty understanding nuanced or complex information. He will tend to be gullible and easily manipulated, has extremely low processing, has poor expressive and receptive language skills and will significantly struggle with reasoning, problem-solving, and thinking through the consequences of his actions and responses. As such, he will be very vulnerable to misunderstanding information and may also readily agree to information that he has entirely misunderstood. Each of these difficulties will be more pronounced when he is stressed, rushed, anxious, in unfamiliar situations, or when information is presented to him in a rapid and complex manner.

1 AA 73.

Subsequent to Tariq’s competency restoration treatment at Stein, Dr. Jones-Forrester again evaluated Tariq and his interactions with Counsel, on April 23, 2020. 1 AA 74. Tariq was again evaluated using the *Dusky* standard. 1 AA 74.

Tariq was unable to understand the meaning of the word consent in the context of sexual assault with a child under fourteen. 1 AA 74. While he could concretely state that “you shouldn’t have sex with someone under 14”, he also explained that consent was “forcing somebody”. Tariq was completely unaware of the concept of a fourteen year old’s capacity to consent versus “forcing somebody” to have sex. “[N]or could he understand how consent could not be given legally regardless of the nature of the relationship he had with his alleged victim.” 1 AA 74. With regard to the charges, these concepts were clearly and simply explained by his Counsel, however, Tariq continued to have persistent difficulties and evinced a lack of factual and rational understanding. 1 AA 74.

As to Tariq’s understanding of the roles of members of the legal community, this had not changed from when she first evaluated him. 1 AA 74. When discussing courtroom decorum, Tariq understood the importance of being quiet but “. . . continued to be unable to appreciate any potential risks related to failing to understand information or appropriately alert his attorney of inaccuracies during court proceedings . . .”. 1 AA 74.

Tariq's limitations on understanding his potential sentence remained as they had when he was last evaluated at Stein. 1 AA 74. When Counsel explained the potential sentence structure (35 to life and 10 to life rather than the one year to life he told the Doctors at Stein), ". . . Tariq demonstrated difficulty accurately understanding his counsel's explanation of the range of sentencing, how sentencing is determined by his charges, how sentencing may be stacked, and the relative likelihood of each end of the sentencing range." 1 AA 74.

Tariq failed to understand the plea negotiation process, other than his concrete understanding that the process could lead to a lesser sentence, and although he indicated he would "read over the offer and decide if it's good", he could articulate no factors he would consider in order to make this determination. 1 AA 75. He failed to understand "the process of registering as a sex offender" and the difference between house arrest and probation. 1 AA 75.

Tariq was unable to identify any past advice his attorney had given him. 1 AA 75. Tariq was unable to recall advice Counsel had given him earlier that same day and was only able to concretely state the last thing Counsel said to him regarding whether or not to go to trial. 1 AA 75.

When asked to explain his understanding of this advice, Tariq was unable to do so. 1 AA 75. Tariq was unable to weigh the relative strengths and weaknesses of the evidence and witnesses against him in discussions with Counsel relating to whether or not to go to trial. 1 AA 75. He had no concept of his rights and when a simplified version of the burden of proof was discussed, Tariq stated he couldn't be convicted unless there was video or photographic evidence of his alleged crimes. 1 AA 75.

Dr. Jones-Forrester opined that Tariq's "improvement" during his time at Stein stemmed from his polite and cooperative manner, his strong memory skills may have made him able to engage in rote memorization (the ability to learn effectively from repetition, 2 AA 235) and appear competent "without the necessary accompanying ability to functionally engage in legal decision-making and assist counsel in his defense with a reasonable degree of factual and rational understanding." 1 AA 76.

To understand why Tariq failed to retain information or demonstrate rational understanding and to support her assessment that he was without possibility of restoration, Dr. Jones-Forrester referred to the neurocognitive testing. 1 AA 77-79. Tariq had an IQ of 70, he had the reading comprehension of a 2.3 grade level and reading fluency of a 3.2

grade level, his sustained attention was significantly impaired, his mental tracking skills and processing speed were impaired, and he had poor language comprehension. 1 AA 79. There was mild impairment in the long term retention of information, deductive reasoning was moderately impaired, and he had clear and consistent (lifelong) adaptive functioning deficits. 1 AA 79-82. Dr. Jones-Forrester noted:

He will have substantial problems with abstract and deductive reasoning, problem solving, generating alternative solutions, and thinking through the consequences of his actions. He will also struggle with cognitive flexibility and effectively shifting his attention.

1 AA 84.

Tariq did not complete high school, was in special education classes since kindergarten and had a history of early behavior problems. 1 AA 83. He was granted Social Security Disability payments with a disability onset beginning at age 3. 1 AA 83. His Individualized Education Plans (IEP's) noted "continued difficulties despite consistent special education accommodations and interventions, and the need for continued assistance, prompts, modeling, and verbal cues" and he was non responsive to special education interventions. 1 AA 83. Dr. Jones-Forrester opined that this lifelong pattern of performance was consistent with long-term intellectual

disabilities over and above learning disabilities. 1 AA 83. Further, Dr. Jones-Forrester indicated Tariq also met the diagnostic criteria for ADHD over and above his intellectual and learning disabilities. 1 AA 83-84.

Dr. Jones-Forrester took into account Tariq's neurocognitive deficits, his intellectual disabilities, his learning disabilities and the lifelong nature of these issues in determining he was incompetent without possibility of restoration. 1 AA 85. All of these deficits "negatively impact[ed] his ability to have clear factual and rational understanding of information related to his case and court proceedings, and his ability to participate in his defense with a reasonable degree of factual and rational understanding." 1 AA 85. Reviewing the Stein records and the accommodations used during treatment:

. . . I strongly suspect that these accommodations, including the use of the Slater Method, the support of his competency restoration providers, and his relatively stronger rote memorization skills in comparison to his other more pronounced neurocognitive deficits made him able to appear to be competent after his second effort at competency restoration. However, neither of these outpatient commitments for competency restoration included direct observation of Tariq's interactions with his defense attorney, Deputy Special Public Defender Daniel Page, who continues to have significant concerns about Tariq's competency. In directly observing Tariq's interactions with his attorney, it is clear that despite

his past two commitments for competency restoration, Tariq continues to be incompetent.

1 AA 85.

Dr. Jones-Forrester found that Tariq was incompetent pursuant to the *Dusky* standard in that he had no present ability to consult with his lawyer with a reasonable degree of rational as well as factual understanding and he did not demonstrate a present ability to rationally or factually understand the proceedings against him. 1 AA 72-88. Due to Tariq's lifelong documented intellectual disabilities and the neurocognitive testing results, he would have no possibility of restoration to competency. 1 AA 72-88.

Once these evaluations were submitted, Tariq's Counsel requested a Challenge Hearing. 1 AA 90, 109. The hearing began on July 24, 2020, and was continued to August 28, 2020. 1 AA 96; 2 AA 197. On July 24th, Dr. Jones-Forrester testified for Tariq while Dr. Bossi and Dr. Sussman testified for the State. On August 28th, Dr. Sussman's testimony concluded and Dr. Damas also testified for the State. 2 AA 198. Dr. Jones-Forrester testified for Tariq in rebuttal. 2 AA 198.

During her testimony, Dr. Jones-Forrester explained that she did both a competency and neuropsychological evaluation on Tariq, which were independent from each other, that she did a collateral interview with Tariq's parents and also observed Tariq's interaction with Counsel. 1 AA 101. She testified that, during the competency evaluation, she used simple, open-ended questions to ascertain Tariq's understanding of the charges, sentencing, roles of various members of the Court, his understanding of court proceedings and his ability to assist counsel. 1 AA 101-02.

She testified regarding the neuropsychological portion of her examination. 1 AA 103. She found Tariq had an IQ of 70. 1 AA 104. She explained the neuropsychological component of her assessment looked at "multiple cognitive domains" including attention, concentration, mental tracking, processing speed, language and spatial skills, memory and executive skills that are well beyond what we can determine by IQ alone." 1 AA 104. She found Tariq to have significant difficulties in several of these domains. "When we apply this functionally, it suggests that in the context of court proceedings he's very likely to be distractible, he's likely to miss and misunderstand information, he's likely to be very slow to

process information which means he'll also miss important information in the context of court proceedings.” 1 AA 105-06.

She further explained what the neuropsychological evaluation disclosed about Tariq's memory skills:

. . . Mr. Manson has variable memory skills. What I mean by that is his recall for complex and highly-structured information is poor, whereas his rote memorization skills are quite good. What that suggests is that when he hears information repeated to him frequently and consistently he is able to benefit significantly from that repetition. However, when he has to later recall or when he has to recall complex information, he significantly struggles with that, and I think that at least partially explains his poor memory both of his competency restoration training and his poor retention of advice of counsel.

1 AA 107.

These neurocognitive issues functionally impair his comprehension and, thereby, his ability to rationally understand his charges, his court proceedings, the information presented in court and his ability to assist counsel. 1 AA 108. Because of the continuing concerns of Counsel, Dr. Jones-Forrester met with both Tariq and his Counsel in order to assess Tariq's interaction with his attorney. 1 AA 109, 135. She observed that Tariq had continuing problems relating to all the factors under *Dusky* - “across the board”, even where the questions and information was

simplified and repeated and Tariq's understanding was checked. 1 AA 109-18. These problems were consistent with what would be expected given Tariq's intellectual disability and neurocognitive deficits. 1 AA 112.

Dr. Jones-Forrester explained what resources she looked at and the collateral interviews she did when making her evaluation of Tariq's competency. 1 AA 119-122. She noted that all three doctors who found Tariq to be competent also suggested accommodations and/or continuing treatment. 1 AA 122, 134-35. In disagreeing with the assessments indicating Tariq was competent, Dr. Jones-Forrester indicated:

One of the things that's notable especially with regard to memory is that Mr. Manson has good rote memory. So when Stein provided – used the Slater Method, I truly believe that Stein made every effort to accommodate those considerations; they used frequent repetition and high levels of structure and support. All of those things allowed him to engage in rote memorization sufficient to appear to be restored to competency and yet some month later from the – the end of March until April 23rd he wasn't able to retain that information. So we see the initial benefit of rote memorization, but unfortunately he didn't retain sufficiently the – those accommodations that were provided at Stein.

1 AA 123.

While Dr. Jones-Forrester expressed her belief that people with intellectual disabilities can be restored to competence using the Slater

Method, Tariq is different due to the severity of his neurocognitive disabilities and the effect those disabilities have on his ability to comprehend and retain information. 1 AA 124. Dr. Jones-Forrester diagnosed Tariq with mild intellectual disability, unspecified neurocognitive disorder, ADHD, and specific learning disorders including math, reading and written expression. 1 AA 125-26, 141-42. She did not believe that Tariq was competent at the time and it was unlikely that he could be restored to competency and, had the doctors at Stein observed Tariq interact with his attorney, Tariq's lack of rational understanding would have been evident. 1 AA 124, 126. She indicated, on cross examination, that Tariq's understanding of sentencing had actually decreased after his time at Stein and that Tariq lacked insight into his comprehension difficulties which resulted in him being unable to recognize when he has failed to understand information. 1 AA 136-37, 139-40.

Dr. Eric Bossi then testified and admitted that his evaluation was conducted in a panel format with Dr.'s Damas and Sussman and that Dr. Sussman asked a majority of the questions. 1 AA 145-46. Dr. Bossi expressed how Stein attempts to control for rote memorization, which he characterized as simply "regurgitating information". 1 AA 147-48. When

the District Court Judge began asking questions about whether Tariq was educated on potential defenses rather than whether he should go to trial or enter a plea, Dr. Bossi admitted that the specific topic of defenses did not come up during the evaluation. 1 AA 148-49. In response, the Court noted that “[j]ust because, you know, in order for somebody to make a rational decision about whether they’re going to plead guilty or go to trial that’s a really critical part of that decision.” 1 AA 149. Dr. Bossi then further admitted that they never discussed the concept of consent with Tariq⁸. 1 AA 149.

At this point, the District Court Judge interrupted again:

I’m sorry. I’m sorry, Mr. O’Brien, I just wanted to – because it – it – it appears from the reports that he has a – I would say he has a factual understanding. My concern is more with the rational understanding so does have the ability to make decisions about whether to plead guilty or not guilty, whether he should testify or not testify, go to trial, have a judge, have a jury, and I – I’m must a little bit unclear on that from the – the reports. So Mr. O’Brien, maybe that’s more actually for you if you could address that issue because that’s where my concern is.

1 AA 151.

⁸Dr. Damas, however, notes that Tariq “. . . was educated on the definition of consent.” 1 AA 55.

When Dr. Bossi answered the Court's questions with Tariq's factual understanding of the charges and the court process, the Judge interrupted again and asked for clarification about rational understanding and the ability to make decisions in order to plead guilty or go to trial, "... not just understanding what the thing is itself." 1 AA 152. Dr. Bossi then explained that Tariq was asked about the advice his attorney gave him – that he shouldn't go to trial – and when he was asked why, Tariq indicated that there was a witness and he would get a lot of time in prison. When asked about plea bargains and what he might accept, he indicated he didn't want to register as a sex offender or be in prison for a long time. Despite the very concrete nature of the answers Tariq gave, that was sufficient for Dr. Bossi to conclude Tariq had a rational understanding. 1 AA 152-53.

When Dr. Bossi was asked about Tariq's understanding of the evidence, he talked about Tariq's concern about the apology letter Tariq had written being used against him. 1 AA 153. Dr. Bossi did not mention that Tariq had to be educated on this issue during the assessment or

explain the discrepancy between his and Dr. Damas's report of the same issue⁹. 1 AA 56, 153.

Dr. Bossi then accused Dr. Jones-Forrester of using too high of a standard in evaluating Tariq's competency. 1 AA 155. He mis-construed Dr. Jones-Forrester's report and indicated that she was looking for Tariq to have a nuanced and complex understanding of various aspects of the legal process¹⁰. 1 AA 155. Dr. Bossi then made suggestions as to accommodations that could be made in order to aid Tariq during trial. 1 AA 156. While he referenced using simple terms and checking understanding, he also testified that a cognitive facilitator could be used during trial, additional recesses could be called and additional conferences

⁹Per Dr. Damas's report: "Mr. Manson indicated *he did not know* if the prosecutor has any potential evidence against him. He was unsure when asked if the note he allegedly wrote to the alleged victim's mother could be used against him and was educated on evidence." 1 AA 56. Dr. Bossi's report states: "Mr. Manson provided some examples of possible witnesses and evidence in his case and stated he did not have to testify if his case went to trial." 1 AA 62.

¹⁰A thorough review of Dr. Jones-Forrester's report indicates that she is clearly evaluating Tariq pursuant to *Dusky*. 1 AA 72-88. While she does use the words "nuance" and "complex" several times in her report, this is, more often than not, relating to the complexity of the information Tariq needed to rationally understand rather than the complexity of his understanding. 1 AA 73.

between Tariq and his attorney could be utilized to check understanding¹¹. 1 AA 156-57. He was not concerned that he had not observed Tariq interact with his attorney because most evaluations are done without observing such interactions and he had enough information to form an opinion. 1 AA 158.

The Judge again questioned Dr. Bossi as to whether Tariq had the ability to *not* follow counsel's advice, to which Dr. Bossi replied that Tariq was inclined to agree with his attorney and follow his advice. 1 AA 160-61. When the State asked for further clarification, Dr. Bossi responded that Tariq was able to say why he wanted to follow Counsel's advice, which was to not go to trial. 1 AA 161. Dr. Bossi then noted that, when asked why his attorney recommended he should not go to trial, Tariq was able to cite the evidence and witnesses and that there was a lot of evidence to overcome and that if he went to trial he would probably get prison time.¹² 1 AA 161.

¹¹The extent of Dr. Bossi's recommendation for accommodations in his written report consisted of "He will benefit from having discussions using simple terms and concepts to aid his understanding." 1 AA 63.

¹²This testimony is in direct contrast to Dr. Damas's report indicating Tariq did not know if there was evidence against him and was unsure, when asked by evaluators, whether the apology letter he

On cross examination, Dr. Bossi agreed that Tariq's response to questions were very brief and concise. 1 AA 168. He agreed that he had no specialized training in how memory works, other than what he learned in medical school. 1 AA 169. Dr. Bossi also admitted that he was not present and made no observations of Tariq's interaction with his attorney. 1 AA 169. Dr. Bossi also indicated that Tariq was never questioned about any reason why he should go to trial or any evidence in his favor should he go to trial. 1 AA 170-71.

When Counsel gave Dr. Bossi the hypothetical situation of being in Dr. Jones-Forrester's shoes and observing what she observed, would he still believe Tariq was competent, Dr. Bossi could not say. 1 AA 171. He did agree, however, that it was possible Tariq had deteriorated to the point that his answers to questions were insufficient to establish his competency. 1 AA 172.

wrote could be used against him. 1 AA 56. When the State subsequently asked Dr. Bossi if Tariq needed prompting as far as what evidence there was against him, Dr. Bossi indicated that there was no prompting needed that Tariq spontaneously discussed the evidence against him - contrary to Dr. Damas's report. 1 AA 162.

The next witness was Dr. Daniel Sussman. 1 AA 176. Dr. Sussman disputed that he took the lead in evaluating Tariq and asserted that the evaluation lasted approximately two hours.¹³ 1 AA 176. Dr. Sussman, who had been listening to both Dr. Jones-Forrester's and Dr. Bossi's testimony, agreed that Tariq was competent. 1 AA 177. He admitted to educating Tariq during his evaluation – but only as to the possible plea of not guilty by reason of insanity. 1 AA 178. As to other areas where Tariq “was educated” during the interview, Dr. Sussman did not mention them. 1 AA 176 - 2 AA 216. Dr. Sussman initially admitted they never covered the subject of the risks of going to trial but he did state that they “touched upon it” because Tariq was aware he would have to register as a sex offender. 1 AA 179.

As to Dr. Sussman's assessment of Dr. Jones-Forrester's evaluation, he disagreed with her and thought she used too high a standard to evaluate Tariq, calling her evaluation was “tortuous”, “highly nuanced” and constituted “a revolutionary alteration of the way competency determinations go.” 1 AA 182-83. Dr. Sussman accused Dr. Jones-

¹³Both Dr. Damas and Dr. Bossi noted the interview was sixty minutes. 1 AA 51, 58.

Forrester of making “frequent references to a lot of specific cognitive spheres and that’s not what competency determination is all about . . .”.

1 AA 183.

Dr. Sussman then opined that what Dr. Jones-Forrester presented as a basis for finding Tariq incompetent was, in fact, something that the defense could use during trial to establish a diminished capacity defense.

1 AA 184. When the Judge questioned him as to whether he was aware that diminished capacity was not a defense in the State of Nevada, Dr. Sussman professed his ignorance. 1 AA 185.

Although Dr. Sussman agreed substantially with Dr. Jones-Forrester’s diagnosis of Tariq, he indicated he disagreed with her diagnosis of major neurocognitive disorder because such a disorder arises from major etiologies like dementia, stroke, or Huntington’s disease and only at a time when the disease is severe and prominent¹⁴. 1 AA 185-87.

¹⁴Later in his testimony, Dr. Sussman included herpes, encephalopathy, and HIV in this list of underlying etiologies and was then requested to review the Diagnostic and Statistical Manual (DSM) relating to Unspecified Major Neurocognitive disorder. 2 AA 201-02. He admitted that allowed for “virtually any underlying general medical condition”. *Id.* Subsequently, Dr. Jones-Forrester directly quoted from the DSM with regard to the definition of Unspecified Major Neurocognitive Disorder. It specifically indicates this diagnosis is to be

As to the areas where he and Dr. Jones-Forrester agreed, Dr. Sussman indicated that such a diagnosis should “stand on its own” and not be included in a competency evaluation because people with an IQ of 55 or 60 can be found competent under *Dusky*. 1 AA 187-88.

On cross examination, when asked if it would be of help to him to observe Tariq interacting with Counsel, Dr. Sussman did not believe Tariq’s knowledge and competency could deteriorate “absent some bad profound event or him getting into using marijuana” or other drugs and, thus, he did not see a need to observe Tariq with his attorney. 1 AA 188-89. When Counsel pointed out that Dr. Sussman’s evaluation noted that Tariq could benefit from continuing restoration assistance¹⁵, Dr. Sussman indicated “no, what I – what I thought was that he had a weak answer one little focal area with the not guilty by reason of insanity understanding what that’s all about so he could benefit from getting a real brief tune up . . .” although Dr. Sussman did admit that continuing Tariq’s treatment

used in situations where the “precise etiology cannot be determined”. 2 AA 240.

¹⁵What Dr. Sussman actually noted was “[i]n order to maintain the improvement that Mr. Manson has made, he should be monitored by the appropriate clinical personnel.” 1 AA 64.

could not hurt. 1 AA 189-90. At that point, due to technical difficulties (this was a video court appearance using COVID protocols), the Court continued the hearing. 1 AA 192-95.

The Challenge Hearing resumed on August 28, 2020, with the continuing cross examination of Dr. Sussman. 2 AA 197, 199. Dr. Sussman insisted that a competency evaluation under *Dusky* is independent of a person's cognitive problems and the fact that a defendant may have cognitive disabilities does not establish that a person is incompetent under *Dusky*. 2 AA 202-03. When Counsel challenged that assertion, Dr. Sussman backtracked and indicated that cognitive deficits could be a reason for a person to be incompetent under *Dusky* but, cognitive deficits "cannot stand on their own to constitute incompetency" and they have to "manifest in the *Dusky* standard". 2 AA 203. Dr. Sussman indicated that Dr. Jones-Forrester was attempting to substitute cognitive deficits for competency. 2 AA 203-04.

Counsel then explained that, when Tariq was asked how he should act in court and his answer was to be quiet – a factual understanding – and when Tariq was asked was there another time when he should speak and Tariq could not answer, did that affect the evaluation, Dr. Sussman

replied with the fact that Tariq is a shy person and court was intimidating. 2 AA 206. Dr. Sussman then talked about Tariq taking the stand in his defense. 2 AA 206. At that point the Judge interrupted him to ask whether he felt that Tariq had the ability to make a reasoned decision as to whether he should testify. 2 AA 207. Dr. Sussman's response was that most defendants would defer to their attorney. *Id.* When the Judge indicated that was not the question she had asked, Dr. Sussman admitted that they did not delve into that issue. 2 AA 207. When Counsel presented Dr. Sussman with the fact that there was substantial discussion, in the simplest of terms, of his right to testify during Dr. Jones-Forrester's evaluation, Dr. Sussman indicated that Tariq gave a fairly adequate explanation during Dr. Sussman's evaluation and whether or not to testify "requires a lot of development between counsel and defendant". 2 AA 211-13.

The State then called Dr. Sarah Damas to the stand. 2 AA 217. Dr. Damas explained that she had contact with Tariq outside of the evaluation because she oversaw the competency restoration program at Stein but admitted that she spoke to the caseworker that worked with him and she gave no indication of direct contact with Tariq. 2 AA 217. She

added that she also participated in Dr. Bradley's previous competency evaluation. 2 AA 217-18. Dr. Damas opined that he showed improvement in motivation, taking notes and asking questions and that, because his participation was increased to twice per week, he retained information better. 2 AA 218-19.

Dr. Damas explained the methods used to attempt to control for the parroting back of information or rote memorization. 2 AA 219-20, 222-23. These include reviewing previously discussed information, role playing, asking questions in an open ended manner and in different ways, and using hypothetical questions. *Id.* Using these tools, they evaluate Tariq's understanding by talking to him and asking questions. 2 AA 221-22.

Dr. Damas indicated it would be absolutely beneficial for Tariq to have ongoing competency restoration classes as the case progressed. 2 AA 224. Dr. Damas acknowledged that Tariq's untreated ADHD could have an effect on Tariq's ability to retain information or his confusion – as suggested by Dr. Jones-Forrester. 2 AA 224.

On cross examination, Dr. Damas agreed that Tariq has cognitive disabilities and that she did not do any neuropsychological testing. 2 AA

227. She also admitted that she was unaware of his ADHD diagnosis. 2 AA 228.

In attempting to explain why Tariq did not answer when asked if there are any times he should not be quiet in court, Dr. Damas indicated that she suspected Tariq was confused by the question and that the question should be asked in simpler terms. If that did not work, give an example or explain the answer and check back later to see if the information was retained. 2 AA 231. Although Dr. Damas recalled that Counsel did ask simple, multiple, open ended questions in keeping with the Slater Method, Dr. Damas implied that the questions may have been the problem rather than Tariq's memory. 2 AA 231-33. She suggested further accommodations to include avoiding leading questions, taking short breaks, avoiding frustrating questions about time or complex sequencing or the reasons for behavior, providing praise and encouragement, and highlighting important information.¹⁶ 2 AA 233. At

¹⁶The only accommodations Dr. Damas suggested in her written evaluation were that Tariq write down his questions, take notes during his meetings with counsel, and that counsel explain terms simply and check to ensure Tariq understood the material presented. 1 AA 57.

the conclusion of Dr. Damas's cross examination, the State rested. 2 AA 233.

Dr. Jones-Forrester testified in rebuttal. 2 AA 234. Initially, she explained that rote memorization meant Tariq benefitted from repetition and review, but that he struggled with more complex information - especially after a delayed time period. 2 AA 234, 236. Rote memorization did not simply mean parroting or regurgitation. 2 AA 236. She noted that Tariq had good short-term memory but that her concern was that he was not retaining information sufficient to meet the *Dusky* standard, even after a relatively short period of time. 2 AA 235, 236.

Dr. Jones-Forrester reiterated that Counsel had followed the exact recommended accommodations and made significant efforts to state information clearly, using open ended questions, provide support and reinforcement, to avoid technical and confusing jargon and to break things down simply so that Tariq could understand. 2 AA 235. She also explained that, despite allegations that she went beyond the *Dusky* standard in reaching her conclusions, there was nothing in her report that went beyond *Dusky*. 2 AA 237-38. She agreed with the Stein doctors that the "bar is low" when it comes to the *Dusky* standard but that her report

talked about the ways Tariq's neurocognitive functioning were pertinent to the *Dusky* standard as it "gets specifically to factual and rational understanding" and it is important to consider because it directly impacts his comprehension. 2 AA 239. It was the effect of Tariq's cognitive disabilities on his rational understanding that caused Dr. Jones-Forrester to come to the conclusion that he was incompetent. 2 AA 238. By no means did Dr. Jones-Forrester think that Tariq's understanding had to be sophisticated, but he had to have sufficient rational understanding to meet the *Dusky* standard and that is where Tariq fell short. 2 AA 238.

Tariq had cognitive difficulties over and above what would be expected from intellectual functioning deficits and ADHD alone and that leads to a higher degree of comprehension difficulty. 2 AA 241. Dr. Jones-Forrester believed the piece the Stein doctors were missing was the observation of Tariq interacting with his Counsel while using the accommodations they suggested. Had they done this, they would have discovered that Tariq was not retaining the information and did not have a rational understanding required under *Dusky*. 2 AA 242-43. If Tariq took medication for his ADHD, it would be insufficient given all his neurocognitive issues. 2 AA 243.

Dr. Jones-Forrester indicated Tariq's intellectual and neurocognitive deficits were well documented and long term. 2 AA 244. She found that his disability was so long term and significant that he is not amenable to restoration and the best evidence of that was the direct observation of Tariq's interaction with Counsel. 2 AA 244.

On cross examination, Dr. Jones-Forrester explained that, by using the words "nuanced" and "complex" in her report she was talking about even in those rare circumstances where Tariq had a rudimentary factual understanding, he did not have a full understanding. 2 AA 245. As an example, Dr. Jones-Forrester indicated that while Tariq could identify the role of the defense and the prosecution, he could not understand the role of the judge or the jury or have an appreciation of his own role as the Defendant. 2 AA 245. No sophisticated understanding is necessary but a rational and factual understanding is needed pursuant to *Dusky*. *Id.*

Tariq's significant comprehension difficulties were evidenced by the fact that he believed he could not be convicted absent video evidence of his crimes. This indicates that Tariq had difficulties in weighing the evidence against him which Dr. Jones-Forrester found to be "profoundly problematic in terms of his understanding." 2 AA 247. Further, Tariq

had no appreciation for the fact that it is more difficult to convict someone based solely upon witness testimony versus where there is physical evidence - that was a degree of detail that Tariq did not possess. 2 AA 247.

Dr. Jones-Forrester's main concern was that, even with the recommended accommodations, after approximately thirty days, Tariq was not retaining the competency restoration information. 2 AA 249. In closing, Dr. Jones-Forrester noted that, with regard to Tariq's appreciation of his own cognitive disabilities:

It presents multiple concerns. To put it in the most practical terms, it is not merely that he will have comprehension difficulties, it is that he has low insight so he can't even accurately identify when he doesn't understand something and be able to identify that to counsel and seek assistance. All of these things will significantly undermine his ability to assist counsel in his defense during proceedings. So it's not simply that he has comprehension difficulties, it's that he doesn't have insight such that he can even recognize when those comprehension difficulties occur for him.

2 AA 250.

During closing arguments, the Judge questioned the State regarding concerns relating to Tariq's ability to rationally understand the proceedings. The State agreed with the Court that Tariq had to be able

to rationally make a decision on two things: 1. going to trial or take a negotiation; and 2. whether to testify. 2 AA 254. The Court was concerned that the Stein doctors failed to evaluate Tariq on that issue. 2 AA 255. The Court expressed a belief that there was a fundamental difference between knowing who the different players were or what it means to plead guilty or not guilty and having the ability to make an analysis of whether it is a good idea to plead guilty or not guilty or testify or not testify rather than just doing what the lawyer tells you to do. 2 AA 256. The Court expressed that a person had to understand everything well enough to make those kinds of decisions and this information was not forthcoming from the Stein doctors, but that Dr. Jones-Forrester provided it. 2 AA 257-59. The Court took the matter under advisement. 2 AA 261.

The District Court entered the Amended Decision and Order on October 6, 2020, finding Tariq incompetent without the possibility of restoration and dismissing the underlying criminal case. 2 AA 278. The District Court's reasons for finding Tariq incompetent without possibility of restoration included Dr. Jones-Forrester's evaluation of Tariq, and her observation of Tariq interacting with his attorney, which raised doubt as

to his ability to understand the nature of the charges and his role in the proceedings. 2 AA 279-80.

The District Court found Tariq to have a documented history of learning disability and that his academic skills were at a third grade level. *Id.* Tariq's IQ was either 70 pursuant to Dr. Jones-Forrester's evaluation or 67 according to the Stein doctors. *Id.* His low academic skills and functional illiteracy impaired his ability to comprehend information. *Id.* Tariq's deficits in his attention, mental tracking, processing speed, and executive functioning skills made him vulnerable to distraction and misunderstanding information during court proceedings. 2 AA 280-81. The Court noted that while intellectual disability does not automatically render someone incompetent, Dr. Jones-Forrester's evaluation demonstrated that Tariq lacked the required rational understanding of the nature of the charges and his role in and the purpose of the proceedings. *Id.*

The Stein doctors acknowledged Tariq's disabilities but disputed the degree he was affected by his deficits. 2 AA 281. The Stein doctors did not perform testing as to Tariq's disabilities. *Id.* They noted Tariq's improvement while at Stein but acknowledged that his progress could

diminish over time. *Id.* While the Stein doctors recommended further accommodations, none of the Stein doctors observed Tariq's interaction with Counsel. *Id.*

Dr. Jones-Forrester did observe Tariq's interaction with Counsel and observed Tariq's diminished understanding of the charges and court proceedings. *Id.* The District Court noted that Tariq was "unable to articulate the concept of consent, particularly how age affects a person's ability to consent to sexual contact. At one point, Mr. Manson insisted that charges against him could not be proven unless the State presented video or photo evidence of the alleged crime." *Id.* Despite Counsel's following the Stein doctors recommended accommodations, Tariq could not identify how the facts of the case could be used against him or the risks of trial versus entering into a plea bargain. The District Court found that Dr. Jones-Forrester's evaluation demonstrated that Tariq could not assist his attorney. *Id.*

The District Court relied upon the neurocognitive evaluation to establish that Tariq was incompetent without the possibility of restoration, specifically, that Tariq's documented disabilities were lifelong. While Tariq's educational shortcomings may improve with training, the

District Court found that it would not be enough given his neurocognitive deficits. 2 AA 281-82.

The State filed the Notice of Appeal on October 28, 2020. Tariq Manson herein files his Answering Brief.

III. SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion when it found Tariq to be incompetent without the possibility of restoration as this finding was factual and supported by substantial evidence. Tariq had a documented, lifelong history of intellectual disability. He has a low IQ and substantial issues with retaining information even though his rote memorization was relatively strong. The evidence revealed that Tariq was unable to retain the information he learned during treatment even after as little as one month later.

The District Court, as the trier of fact, was entitled to rely upon Dr. Sharon Jones-Forrester's evaluation. Dr. Jones-Forrester's evaluation relied solely upon the *Dusky* standard, was more thorough than that of the Stein doctors, she conducted collateral interviews, reviewed more documentation, and observed Tariq's interaction with his attorney. Dr. Jones-Forrester's evaluation evidenced that, due to his well documented

intellectual disabilities, Tariq was failing to retain information and was not competent.

Further, the Stein doctors were not credible and, as such, the District Court was free to ignore their reports. There were multiple inconsistencies between the three doctors. There were substantial issues relating to Tariq's rational understanding that the Stein doctors never assessed or discussed. They engaged in educating Tariq during his competency evaluation thus destroying objectivity and their review of documentation was limited. Accordingly, the District Court properly found that Tariq was incompetent without the possibility of restoration and properly dismissed the case.

IV. ARGUMENT

A. The District Court did not Abuse its Discretion When it Found Tariq Manson Incompetent Without the Possibility of Restoration and Dismissed the State's Case

1. Standard of Review

A person who is not competent in that he "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). As this

Court has noted: “The conviction of an accused while he is legally incompetent violates due process.” *Calvin v. State*, 122 Nev. 1178, 1183, 147 P.3d 1097, 1100 (2006), *quoting Drope v. Missouri*, 420 U.S. 162, 180 (1975).

A District Court’s determination as to competency after a competency hearing is a factual judicial determination and is entitled to deference on appeal. Such factual determination will not be overturned on review if it is supported by substantial evidence. *Calvin v. State*, 122 Nev. 1178, 1182, 147 P. 3d 1097, 1099 (2006); *Ogden v. State*, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980). Substantial evidence is evidence that “a reasonable mind might consider adequate to support a conclusion.” *Pancake v. State*, 2018 Nev. Unpub. LEXIS 153, 413 P.3d 835, 2018 WL 1129141 (February 26, 2018), *quoting Steese v. State*, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

2. Applicable Law

In determining whether a defendant is incompetent and, therefore, not subject to criminal prosecution, the test is whether a 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.” *Dusky v. United States*, 362 U.S. 402 (1960). Likewise, NRS 178.400 codifies this standard:

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.

Further, these findings are conjunctive in that, if competency is challenged, all components must be found to be established. If one of the required components is missing, a defendant is incompetent and cannot stand trial until competency has been restored. *Calvin v. State*, 122 Nev. 1178, 1183, 147 P.3d 1097, 1100 (2006). Competency issues may arise at any time during the proceedings. See NRS 178.405; *Jones v. State*, 107 Nev. 632, 637-38, 817 P.2d 1179, 1182 (1991);. Further, a defendant’s competency can change over the course of legal proceedings and, accordingly, competency is an ongoing determination that the Court must

monitor. *Ferguson v. State*, 124 Nev. 795, 802-03, 192 P.3d 712, 718 (2008).

The evidence a District Court must consider in determining competency is not limited and can include the defendant's demeanor, his irrational behavior, medical opinions, defense counsel's representations, the defendant's history, and evidence related to any treatment the defendant has had. *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *Calvin v. State*, 122 Nev. 1178, 1183, 147 P.3d 1097, 1100 (2006); *Ferguson v. State*, 124 Nev. 795, 802-03, 192 P.3d 712, 718 (2008). A single instance of unusual behavior may be sufficient indicia for a District Court to question a defendant's competency. *Morales v. State*, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000); *Drope v. Missouri*, 420 U.S. 162, 180 (1975). In fact, "[a]ccuracy is best served when the district court and any appointed experts consider a wide scope of relevant evidence at every stage of the competency proceeding, including initial doubts as to the defendant's competency, the experts' evaluation, and the hearing after the evaluation." *Calvin v. State*, 122 Nev. 1178, 1183, 147 P.3d 1097, 1100 (2006).

At a competency hearing, where there is conflicting psychiatric testimony, “the trier of fact resolves the conflicting testimony of the witnesses.” *Ogden v. State*, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980). While a Court is entitled to accord greater credibility to the State’s experts than to the defense experts, such discretion rests squarely with the trier of fact. *United States v. Hoskie*, 950 F.2d 1388, 1394 (9th Cir. 1991). The State points to no authority which mandates that the trier of fact accord greater weight to the State’s experts than the Defense experts.

3. The District Court’s Order Contained Reference to Substantial Evidence to Support the Court’s Decision

I. Tariq’s History of Intellectual Disabilities

In the instant matter, the District Court relied upon Dr. Sharon Jones-Forrester’s evaluation and came to the conclusion that Tariq Manson was incompetent without the possibility of restoration. In the findings as to competency, the District Court specifically relied upon Tariq’s lifelong history of intellectual disability which was well documented in his educational records, his records from the Social Security Administration and in collateral interviews with his parents. 1 AA 72-88. Tariq has a learning disability, an IEP throughout his

education, an IQ of either 70 or 67, and his third grade academic skills render him functionally illiterate and impair his ability to comprehend. 2 AA 280.

In fact, the experts agreed on this issue in that Dr. Jones-Forrester, Dr. Damas, Dr. Sussman, Dr. Bennet, Dr. Bradley and Dr. Kahn all noted Tariq’s educational history, intellectual deficits and low IQ. 1 AA 27-43, 51-68. As the District Court noted in its Order, all three Stein doctors agreed that Tariq has intellectual disabilities – they simply disputed the degree these disabilities affected Tariq’s competency. 2 AA 281. The District Court was not at liberty to ignore this well-established documented history of intellectual disability. *See Drope v. Missouri*, 420 U.S. 162, 179 (1975) (a defendant’s demeanor during trial may obviate the need to rely upon psychiatric prediction of capabilities but this does not justify “ignoring the uncontradicted testimony of . . . [a] history of pronounced irrational behavior.”) *quoting Pate v. Robinson*, 383 U.S. 375, 835-36 (1966).

...

ii. The Neuropsychological Evaluation was Used to Determine that Tariq's Disabilities Would Prejudice him During Trial and that he was Incompetent Without Possibility of Restoration

A review of the District Court's Order reveals that the Court considered Dr. Jones-Forrester's Neuropsychological Evaluation for two purposes: First, how his disabilities impair his ability to comprehend information and second, whether his disabilities render his incompetency permanent or temporary. 2 AA 280-81.

As to the impairment of his ability to comprehend information, the District Court noted that Tariq is functionally illiterate and that he has difficulties in attention, mental tracking, processing speed and executive functioning skills. 2 AA 280. In finding that these disabilities would make Tariq vulnerable to distraction and misunderstanding information during "crucial legal proceedings", the District Court took into consideration the rapid pace and increased stress a trial would have on Tariq's limited ability to understand.

The competence necessary in order to stand trial includes "... the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense", not

just passively observing the proceedings. *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001). Here, the Court properly considered how Tariq's diminished attention, mental tracking, processing speed and executive functioning skills will impair his ability to process information with sufficient speed, comprehension and lack of distraction in order to maintain his competence during trial.

Dr. Jones-Forrester's evaluation substantiated the District Court's finding: "Each of these difficulties will be more pronounced when he is stressed, rushed, anxious, in unfamiliar situations, or when information is presented to him in a rapid and complex manner." 1 AA 73. Conversely, despite the goal of determining whether Tariq was competent to *stand trial*, none of the Stein doctors even considered how Tariq's disabilities would affect him in a trial situation and whether he could maintain his competence during trial. Accordingly, the State was able to refute this evidence and the Court was entitled to rely upon it. *See United States v. Hoskie*, 950 F.2d 1388, 1394 (9th Cir. 1991) (unrefuted evidence of the defendant's inability to retain information); *Ogden v. State*, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980) (Trier of fact resolves conflicting testimony).

The second way that the Court relied upon the neuropsychological evaluation was when it came to the conclusion that Tariq was without possibility of restoration. 2 AA 281-82. Dr. Jones-Forrester's evaluation disclosed that Tariq's disabilities were lifelong. *See Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (Records revealing an extensive history of impairment suggest that mental problems would continue). In order to establish the extent of Tariq's disabilities, Dr. Jones-Forrester looked at his educational records, his records from the Social Security Administration, his IEP, previous psychological and competency evaluations, a mental status examination done in 2008, a speech and language evaluation, and conducted collateral interviews with Tariq's parents. 1 AA 88. Conversely, none of the Stein doctors were as thorough in their evaluation of Tariq's history so this evidence, as well, is unrefuted. *See United States v. Hoskie*, 950 F.2d 1388, 1394 (9th Cir. 1991); *Ogden v. State*, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

...

iii. Neither Dr. Jones-Forrester nor the District Court Applied Too High a Standard in Evaluating Tariq's Understanding of the Concepts When the Evidence Established Tariq's Inability to Retain Information

During the challenge hearing, the Stein doctors and the State accused Dr. Jones-Forrester of using too high a standard and expecting Tariq to have a nuanced and complex understanding when the *Dusky* standard required only a basic understanding of the charges, the nature and purpose of the court proceedings and an ability to assist counsel with a reasonable degree of factual and rational understanding. 1 AA 155, 182-83. However, a review of Dr. Jones-Forrester's evaluation reveals that she applied the *Dusky* standard throughout her evaluation and she did not expect Tariq's rational understanding to be nuanced or complex. 1 AA 72-88. Dr. Jones-Forrester's concern was that the information Tariq was being taught was, itself, nuanced and complex and it was the impact that Tariq's neurological and cognitive deficits had on his ability to rationally understand such nuanced and complex information. 1 AA 73. In fact, the District Court Judge expressed the same concerns regarding Tariq's factual versus rational understanding and repeatedly questioned the Stein doctors regarding this issue. 1 AA 149, 151-52, 160-61; 2 AA 207-08.

The State takes issue with the fact that Dr. Jones-Forrester did a neuropsychological evaluation in the first instance, accusing her of using a “revolutionary” standard to address competency. (OB 57). As far as Dr. Sussman was concerned, he indicated that Tariq’s borderline intellectual functioning and other cognitive disabilities should not dictate a finding of incompetency. 1 AA 183. However, as Dr. Jones-Forrester explained:

I think by no means is there a sophisticated understanding necessary. I agree with the Stein doctors that the *Dusky* standard bar is low, as it should be. However, the *Dusky* standard does require both factual and rational understanding and unfortunately even in those rare cases where Mr. Manson has actual understanding, his rational understanding is not sufficient to meet that bar.

Dr. Jones-Forrester went on to explain that

Cognitive functioning is of course pertinent to *Dusky* because it gets specifically to factual and rational understanding. By no means do we need neuropsychological testing in I would say most cases related to competency. That’s why this is done relatively rarely. However, with Mr. Manson, we have a complex cognitive profile in which he has cognitive deficits well above what we could expect just from the intellectual disability alone and these things are really important to consider because they directly impact his comprehension.

2 AA 238-39.

Further, Dr. Bossi challenged Dr. Jones-Forrester’s evaluation as looking for too much understanding from Tariq. 1 AA 155. Dr. Bossi

indicated that an individual understanding that they've been charged with sexual assault and knowing that is against the law is sufficient. *Id.* Dr. Bossi explained that a defendant knowing the difference between lewdness and sexual assault does not mean that the person is unable to understand their charges. *Id.* Likewise, the State asserts that it was not necessary for Tariq to understand "general concepts of sexual information". OB 58.

Dr. Bossi's argument misses the mark and fails to take into account that *Dusky* requires that a defendant understand *his* charges. *See* NRS 178.400(2)(a). Here, Tariq was charged with both sexual assault and lewdness with a minor. 1 AA 5-6. Accordingly, it is imperative under *Dusky* that he know the difference between the two charges.

Further, the State is quoting from Dr. Jones-Forrester's report, the entirety of the sentence being: "For example, he was unable to articulate the difference between lewdness and sexual assault and demonstrated significant difficulties understanding general concepts related to sexual information and decision making in general." 1 AA 73. What is interesting about the State's reliance on this quote is that it was from the September, 2019 evaluation - done prior to Tariq's completion of his

treatment when *all* doctors involved concluded that Tariq was incompetent. 1 AA 73.

Once Tariq finished treatment and Dr. Jones-Forrester evaluated him again, she found that he had clear confusion regarding his charges - specifically relating to the term “consent” but that he was now able to “concretely identify an understanding that it was illegal to engage in sexual activity with a minor, after going through competency restoration, and being told multiple times.” 1 AA 74. Dr. Jones-Forrester noted, however, that Tariq had no concept of the relationship between age and the ability to consent. *Id.* And even though Dr. Damas had concerns with this finding, 2 AA 228, the relationship between age and consent is directly relevant to Tariq’s charges given the facts of his case. Further, the fact that a defendant understands very basic notions of punishment “is an insufficient basis for concluding that he has a rational understanding of the trial process and an ability to consult with his lawyer and assist in his defense.” *United States v. Hoskie*, 950 F.2d 1388, 1393 (9th Cir. 1991).

However, key factor in the District Court’s determination dealt with Tariq’s ability to retain the information he learned while at Stein –

because he was unable to retain the information, there could be no rational understanding no matter what standard was used. *See United States v. Hoskie*, 950 F.2d 1388 (9th Cir. 1991) (Ignoring unrefuted evidence that the defendant was unable to retain information was error). While the District Court considered the evidence the Stein doctors presented, the Court was concerned that Stein conducted no neurological testing, that they acknowledged Tariq's retention of information could diminish over time, and that they failed to observe Tariq's interaction with his attorney. 2 AA 281.

The *Dusky* standard involves a defendant's *present ability* to consult with his lawyer with a reasonable degree of factual and rational understanding - which present ability must be constantly monitored as it is subject to change and can come up at any time. *See* NRS 178.405; *Jones v. State*, 107 Nev. 632, 637-38, 817 P.2d 1179, 1182 (1991); *Calambro v. Second Judicial Dist. Court of Nevada*, 114 Nev. 961, 972-73, 964 P.2d 794, 801 (1998); *Ferguson v. State*, 124 Nev. 795, 802-03, 192 P.3d 712, 718 (2008); *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991). The principal concerns of a competency hearing are to

determine whether Tariq “could comprehend and retain explanations of the judicial process so as to participate effectively in his trial.” *Id.*

In *United States v. Hoskie, Id.*, the Ninth Circuit Court of Appeals reversed a defendant’s conviction as well as the lower court’s finding that the defendant was competent. There, while the two experts agreed on the defendant’s diagnosis, they disagreed as to the ultimate question of competency. The Court stated:

Under those circumstances, because there is nothing in Dr. Grossman’s report or testimony to refute the defense evidence that even Hoskie’s rudimentary understanding vanished within minutes after the explanations, and because of Dr. Grossman’s heavy reliance on Hoskie’s ability to perform relatively mechanical functions as evidence of competency, we conclude that it was clear error to give greater weight to his report and testimony than to that of Dr. Tatro.

Id. at 950 F.2d at 1394.

Likewise, here, the major deciding factor for the District Court was Dr. Jones-Forrester’s observation of Tariq’s interaction with his attorney approximately a month after he completed treatment at Stein. 2 AA 281. While the Stein doctors recommended further training and accommodations in their reports, they failed to observe the interaction

between Tariq and his attorney.¹⁷ 2 AA 281. The Court found that Dr. Jones-Forrester spent an hour and a half observing Tariq with his attorney, during which she observed diminished understanding as well as his failure to retain information. 2 AA 281. The Stein doctors and the State completely failed to refute this evidence and, as the District Court noted, the Stein doctors agreed that Tariq's understanding could diminish over time. Further, the record is replete with concerns regarding Tariq's ability to retain information and Dr. Sussman recommended that Tariq should be monitored by clinical personnel in order to maintain his improvement. 1 AA 35, 38, 41, 54, 56, 60, 64.

¹⁷The State argues that the District Court should have implemented the accommodations the Stein doctors recommended at the challenge hearing. (Opening Brief 61). These accommodations included the use of a "cognitive facilitator" and other unspecified accommodations that the State of Washington uses. 1 AA 156-57. It should be noted, however, that the accommodations suggested by the Stein doctors in their written reports were incorporated in the interaction that Dr. Jones-Forrester observed between Tariq and his attorney. 1 AA 135-40. The additional accommodations suggested during the challenge hearing were prepared in anticipation of litigation. Accordingly, it can be surmised that these newly suggested accommodations were simply an effort to win a hearing rather than to aid Tariq at trial. Counsel fully incorporated the written recommendations and any suggestion that Counsel violated Rule of Professional Conduct 1.4(b) has no basis in fact. (OB 62-63).

With regard to the information Tariq was expected to retain but did not, the Court was specifically concerned with Tariq's inability to articulate the concept of consent and how age affects ability to consent. 2 AA 281. This issue is particularly relevant to both Tariq's understanding of the charges as well as his ability to aid counsel, especially given the facts of the case. Tariq was accused of sexual assault and lewdness with a child under 14, however, the evidence revealed that the issue was capacity to consent rather than forcible sexual assault. RA 17-19. The alleged victim never indicated that Tariq forced her to have sex, accordingly, it was important for Tariq to understand how age affects the ability to consent in order to understand his charges or to aid counsel in formulating a defense.

On the other hand, Dr. Bossi specifically indicated that they never discussed the issue of consent during Tariq's evaluation. 1 AA 149. Dr. Damas, however, notes that Tariq ". . . was educated on the definition of consent" during the evaluation. 1 AA 55. "Where there is conflicting evidence, it is the role of the trier of fact, not a court of errors, to resolve that conflict." *Gatlin v. State*, 96 Nev. 303, 304, 608 P.2d 1100 (1980).

The Court also relied upon Tariq’s inability to understand what evidence the State had against him, specifically his belief that he could not be convicted unless the State was able to produce video or photographic evidence of the alleged crime. 2 AA 281. This went directly to Tariq’s ability to assist counsel in that understanding the evidence is crucial to formulating a defense as well as making other decisions like whether to negotiate a plea or whether to testify.

Conversely, Dr. Bossi was asked about Tariq’s understanding of the evidence and he talked about Tariq’s concern about the apology letter Tariq had written being used at trial. 1 AA 153. Dr. Bossi, however, did not mention during his testimony that Tariq had to be educated on this very issue during the assessment. 1 AA 56. Dr. Damas’s report directly contradicts Dr. Bossi’s testimony: “Mr. Manson indicated *he did not know* if the prosecutor has any potential evidence against him. He was unsure when asked if the note he allegedly wrote to the alleged victim’s mother

...

...

could be used against him and was educated on evidence.”¹⁸ 1 AA 56. Because this evidence was conflicting, it was the District Court’s role as the trier of fact to resolve this conflict. *Gatlin v. State*, 96 Nev. 303, 304, 608 P.2d 1100 (1980). The fact that it was resolved in Tariq Manson’s favor is not error.

Tariq’s inability to retain the information he learned at Stein persisted even though Counsel incorporated all possible accommodations in his interaction with Tariq. Even then, Tariq was still unable to express a rational understanding of the evidence for and against him and the risks of going to trial versus taking a deal. During the challenge hearing, the Court specifically questioned Dr. Bossi regarding Tariq being evaluated as to his rational understanding of possible defenses as such understanding was central to a defendant’s decision whether to go to trial or take a deal. Dr. Bossi admitted that the specific topics of defenses, why Tariq should go to trial and evidence in Tariq’s favor did not come up

¹⁸Dr. Damas’s report indicates that Tariq was prompted as to whether the note he wrote could be used against him. 1 AA 56. Dr. Bossi testified at the challenge hearing that not only was Tariq able to recall this evidence against him but that he did so without prompting. 1 AA 162.

during the evaluation. 1 AA 148-49, 170-71. Thus, there being no evidence the State could present regarding Tariq's understanding of possible defenses, the District Court did not err in finding Tariq incompetent since a single incident could raise the indicia of incompetency. *Morales v. State*, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000); *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

b. The Stein Doctors were not Credible

It is the responsibility of the trier of fact to evaluate the credibility of witnesses. *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). The fact that the Stein doctors were expert witnesses did not make their testimony binding upon the Court and the District Court was free to reject their testimony. *Allen v. State*, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983). In addition to the numerous written and testimonial discrepancies between the Stein doctors set forth above, the doctors also lost credibility because they engaged in educating Tariq during the evaluation then evaluated him on the subjects on which they were just educating him. 1 AA 51-57. This destroyed their objectivity.

Dr. Sussman evinced a lack of knowledge regarding the DSM definition of Unspecified Major Neurocognitive Disorder - Tariq's

diagnosis. 1 AA 185-86; 2 AA 213-14, 239-40. Dr. Bossi admitted that relevant subjects, including Tariq's possible defenses and the issue of consent were never discussed during the evaluation as well as the fact that it was possible for Tariq's understanding to diminish over time. 1 AA 148-49, 172. The Stein doctors had limited review of documentation and relied heavily upon the notes taken during Tariq's competency restoration treatment at Stein. 1 AA 51-52, 58, 65. They did not review social security records, school district records, mental status examinations and psychological testing and speech and language testing from 2008, they did not conduct collateral interviews and did not do their own neurocognitive testing. There is no indication they ever considered how the stresses of a trial would affect Tariq given his disabilities. Most importantly, they never even considered observing Tariq's interaction with his attorney or made any effort to evaluate whether Tariq was able to retain the information he learned while going through treatment despite the passage of time.

The State suggests that, because there were three doctors from Stein who agreed that Tariq was competent and only one doctor – Dr. Jones-Forrester – suggested Tariq was incompetent, this was sufficient to

establish competency. In support of this assertion the State relies upon two unpublished decisions: *Pigeon v. State*, 2017 Nev. Unpub. LEXIS 1076, 408 P.3d 160, 133 Nev. 1061 (December 1, 2017) and *Pancake v. State*, 2018 Nev. Unpub. LEXIS 153, 413 P.3d 835, 2018 WL 1129141 (February 26, 2018). Despite the State's efforts to reduce this to a "numbers game", this is not how issues of competency are decided.

As noted in *Pigeon*, it is within the province of the Court to decide what weight to give an expert's testimony regarding competency. In *Pigeon* and *Pancake*, the Court looked at the number of doctors, the amount of time the doctors spent with the defendants, differences in testing and whether the doctor's opinions were sufficiently rebutted. *Id.* Here, Dr.'s Foerster, Colosimo, Collins, Kahn, Bradley, Bennet and Jones-Forrester as well as John Pacult, LCSW, all agreed that Tariq was incompetent. Only Dr.'s Sussman, Bossi and Damas indicated otherwise. Just comparing Dr. Jones-Forrester alone to the Stein doctors, she spent more time interacting with Tariq - 1.5 hours versus 1 hour together for the Stein doctors¹⁹. She reviewed more records. She conducted collateral

¹⁹Yet another discrepancy between the Stein doctors involved the amount of time spent in the evaluation. The Stein doctors did a panel

interviews and did neurological testing while the Stein doctors did none. Most importantly, Dr. Jones-Forrester tested Tariq's retention of information, she advised Counsel on how to speak to Tariq so that he could understand and she observed Tariq's interaction with his attorney. This evidence was unrebutted and the State's argument must fail. *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991).

V. CONCLUSION

The District Court's determination that Tariq Manson was incompetent without possibility of restoration was a factual determination, supported by substantial evidence, much of which the State failed to refute. Dr. Sharon Jones-Forrester conducted a thorough, comprehensive and well supported evaluation of Tariq's disabilities in addition to observing Tariq's interaction with his attorney after he completed competency restoration treatment at Stein. The fact remains that Tariq Manson, due to his lifelong neurocognitive deficits, was unable to retain sufficient information to establish competency pursuant to

style evaluation which Dr. Damas and Dr. Bossi indicated took an hour. 1 AA 51, 58. Dr. Sussman testified that the evaluation took two hours. 1 AA 176.

Dusky. As such, he had no present ability to understand the nature of his criminal charges or court proceedings or to aid and assist his attorney with a reasonable degree of rational understanding. The District Court was correct in finding Tariq Manson incompetent without the possibility of restoration.

DATED this 5th day of August, 2021.

Respectfully submitted,

/s/ MELINDA E. SIMPKINS

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CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).
2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Century Schoolbook style.
3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 13,150 words.
4. 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 on is to be found. I understand that I

may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of August, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 5th day of August, 2021, a copy of the foregoing Answering Brief (and Respondent's Appendix) was served as follows:

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