IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA

Appellant,

vs.

TARIQ MANSON

Respondent.

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 SUPPLEMENTAL BRIEF

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I. SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in finding Tariq Manson incompetent without possibility of restoration. The burden of proof that should apply to a district court's decision in a challenge hearing is clear and convincing evidence. The State should have the burden of proof at challenge hearings as a rebuttable presumption of incompetence arises after the initial competency hearing. The competency standard that was applied here was the *Dusky*[1] standard and the district court made the determination of incompetence, which is a legal determination; the doctors only offered opinions. The competency standard that should be applied in a challenge hearing is the *Dusky* standard, however, there is more to the rational understanding requirement than the State asserts.

II. ARGUMENT

A. Introduction

Nevada has a two-tier competency system. Initially, any party, including the Court, may raise the issue of a defendant's competence. NRS 178.405. If there is doubt as to competency, the matter is referred

[1] *Dusky v. United States*, 362 U.S. 402 (1960).

to the competency court for a hearing. NRS 178.415. At that hearing, evidence as to incompetency is adduced and, if sufficient, the Court will refer the defendant for treatment and make an order that the defendant is incompetent. *Id;* NRS 178.425.

If treatment is deemed successful, the treating physicians' reports, which contain their opinions as to a defendant's competency, will be sent back to the court. NRS 178.450(2), 178.455. At that point, the parties may accept the physicians' opinions that the defendant is competent and a trial date will be set or the parties may challenge the treating physicians' opinions, which will result in an evidentiary hearing, also known as a "challenge hearing." NRS 178.420, 178.460(1). Nevada statutes are silent in establishing which party carries the burden of proof or the standard of proof in the challenge hearing.

Tariq Manson, an eighteen year old boy with lifelong intellectual disabilities, was allegedly having consensual sexual intercourse with T.C., who was thirteen years of age. RA 17-19. Due to concerns of counsel, Tariq was sent to competency court for an evaluation and was found to be incompetent. 1 AA 17. He was sent to Stein Forensic Facility where he received outpatient treatment for well over a year before the Stein doctors

found him to be competent. 1 AA 27-43, 51. Approximately one month after he completed treatment, a subsequent evaluation by Dr. Sharon Jones-Forrester found that Tariq was incompetent without possibility of restoration. 1 AA 72-89, 109. Dr. Jones-Forrester observed him interacting with his attorney and, despite his attorney incorporating all the recommendations of the Stein doctors, Tariq failed to retain what he had learned during treatment. *Id.*

At the subsequent challenge hearing, the district court ruled that Tariq was, in fact, incompetent without possibility of restoration. 2 AA 278. The State appealed that decision and the briefing in that appeal had been completed when this Court ordered additional briefing to consider four questions: what was the burden of proof at challenge hearings, who carries that burden, what competency standard was applied in this case, and what standard should a district court apply if not *Dusky*? Tariq incorporates, by reference, the statement of facts and argument previously filed with this Court and files his response to the additional questions.

. . .

B. This Court should find that the clear and convincing evidence or beyond a reasonable doubt burden of proof applies to a district court's decision in a challenge hearing associated with a competency determination.

The standard that should apply is clear and convincing evidence. Although other jurisdictions vary widely, ranging from preponderance of the evidence all the way to proof beyond a reasonable doubt.

Nevada offers more protection to its citizens in similar types of hearings. In retrospective competency hearings where the issue is to determine a defendant's competence post-conviction, the standard is clear and convincing. In bail hearings, where a defendant's liberty is at stake, the standard is also clear and convincing. In involuntary commitment hearings, where a defendant's liberty is also at stake, clear and convincing evidence is required as well. Thus, where liberty interests are at stake, Nevada provides more protection to its citizens by requiring a higher showing than preponderance of the evidence. The same rationale should apply here.

1. Federal and many State jurisdictions use preponderance of the evidence

A majority of federal jurisdictions mandate that, while a defendant's competence is presumed, if doubt as to competency arises, regardless of

the party presenting the doubt, the burden is on the government to prove competence by a preponderance of the evidence. *See* 18 U.S.C. §4241; *Brown v. Warden, Great Meadow Correctional Facility*, 682 F.2d 348, 349 (2nd Cir. 1982); *United States v. Di Gilio*, 538 F.2d 972, 988 (3rd Cir. 1976); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (retrospective competency hearing); *United States v. Velasquez*, 885 F.2d 1076, 1089 (3rd Cir. 1989); *United States v. Makris*, 535 F.2d 899, 906 (5th Cir. 1976); *United States v. Teague*, 956 F.2d 1427, 1432 n.10 (7th Cir. 1992); *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991).

On the other hand, state courts are more varied. Many states, either through case law or through statute, also use the preponderance of the evidence standard in competency determinations. *See McCarlo v. State*, 677 P.2d 1268, 1272 (Alaska Ct. App. 1984); D.C. Code 24-531.04(b); *People v. Ralon*, 570 N.E.2d 742, 749 (Ill. App. 1991); Iowa Code 812.8; *Jacobs v. Commonwealth,* 58 S.W.3d 435, 440 (Ky. 2001); *People v. Mixon*, 275 Cal. Rptr. 817, 818 (Cal. Ct. App. 1990); Colo.Rev.Stat. 16-8.5-113; Conn. Gen. Stat. §54-56d; *State v. Gerrier*, 197 A.3d 1083, 1087 (Me. 2018); *People v. Miller*, 376 N.Y.S.2d 393, 397 (N.Y. 1975); *State v. Coley*, 326 P.3d 702, 707 (Wash. 2014). At least one state uses the clear and

convincing evidence standard, *See Lackey v. State*, 615 So.2d 145, 153 (Ala. Crim. App. 1992), while at least two states use the beyond a reasonable doubt standard. *See Raithel v. State*, 372 A.2d 1069, 1072 (Md. Ct. App. 1977); *Manning v. State*, 730 S.W.2d 744, 748 (Tex. Crim. App. 1987).

2. Nevada uses a higher burden of proof in retrospective competency hearings and hearings which may end with a defendant's incarceration

Though a majority of federal and state courts use the preponderance of the evidence standard, Nevada is not required to follow the general majority opinion as to the standard of proof in competency proceedings. As Justices Rose and Young noted in their dissent in *Osburn v. State*, 118 Nev. 323, 328, 44 P.3d 523, 526-27 (2002):

> When interpreting a constitutional protection that appears in both the United States and Nevada Constitutions, we will usually defer to and follow the interpretations of the federal courts. . . . However, we are entitled to construe our Nevada Constitution to give more protection when federal interpretation falls short in fully recognizing the right or remedy given to our citizens.

Id., *citing Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

In Nevada, retrospective competency determinations arise when a defendant has challenged his competency to stand trial in a post-

conviction habeas petition. Such retrospective hearings require a higher burden of proof than preponderance of the evidence. After reversal on habeas, a defendant is required to establish that he was incompetent at the time of trial by clear and convincing evidence. *Doggett v. State*, 91 Nev. 768, 771-72, 542 P.2d 1066, 1068 (1975); *Doggett v. Warden*, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977). While a retrospective competency hearing is not the same as a challenge hearing, both hearings determine a defendant's competence and there is no reason why the same standard of proof should not be used despite when the hearing is held. The timing may be different but the determination being made is the same. To be clear, while on habeas a defendant bears the burden of proof, Tariq is not advocating that the burden at a challenge hearing be placed on the defendant. At a challenge hearing, the burden should always rest with the State and the standard of proof should be clear and convincing evidence.

Similarly to Nevada, the state of Alabama has a two tier system for determining competency. There, a defendant has the initial burden to produce proof of reasonable grounds to doubt competence. Once those reasonable grounds are established, the burden shifts to the prosecution

to prove competence by clear, unequivocal and convincing evidence. *See Lackey v. State*, 615 So.2d 145, 153 (Ala. Crim. App. 1992). As the Third Circuit Court of Appeals stated in *United States v. Di Gilio*, 538 F.2d 972, 988 (3rd Cir. 1976): "Evidence showing competency must be more persuasive than that showing incompetency." *See also Cooper v. Oklahoma*, 517 U.S. 348, 366 (1996) (while a state may require a defendant to prove his incompetence, the standard of proof cannot be higher than preponderance of the evidence).

Here, the standard of proof in challenge hearings should be clear and convincing evidence. In *United States v. Di Gilio*, 538 F.2d 972 (3rd Cir. 1976), when the defendant suggested that the standard to be used to determine competence should be proof beyond a reasonable doubt, the court determined that the government is only required to prove elements of the crime charged beyond a reasonable doubt. *Id.* at 988. The court reasoned that other "subsidiary issues" were only required to be proven by a preponderance of the evidence, such as the voluntariness of a confession or fourth amendment suppression. *Id.* Thus, the court did not believe a more rigorous standard was necessary than preponderance of the evidence for competency hearings. *Id.*

In Nevada, however, there are some types of "subsidiary issues" that must be proven by clear and convincing evidence. For example, the involuntary admission of a person to a mental health facility requires proof that the person is a danger to themselves or others by clear and convincing evidence. *See* NRS 433A.310; *Vu v. Second Judicial Dist. Ct.*, 132 Nev. 237, 238, 371 P.3d 1015, 1016 (2016).[2] Likewise, bail and

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[2]To the extent that *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996) suggests otherwise, the reasoning does not apply here. Oklahoma suggested that requiring a *defendant* to prove *incompetence* by clear and convincing evidence was supported by *Addington v. Texas,* 441 U.S. 418 (1979), where the Court found that due process required a standard of clear and convincing evidence in involuntary commitment proceedings. In rejecting that argument, the Court found that the tests for involuntary commitment and competence are different (incompetent and danger to self or others vs. present ability to understand and aid counsel) and can result in different outcomes (an incompetent person who is not a danger is not subject to civil commitment).

Conversely, in Nevada, incompetence has been established at the time of a challenge hearing. If the court upholds that finding, the court is required to determine whether a defendant is a danger to himself or others. NRS 178.460. If the criminal case is dismissed, the State may still move for involuntary commitment and the court must determine, by clear and convincing evidence, whether the defendant has a "mental disorder" and is a danger to himself or others. NRS 178.461(3). Thus, in Nevada, the court must determine factors similar to those in involuntary commitment proceedings when finding incompetency. Further, the State has discretion to move for involuntary commitment even though a defendant was found incompetent but not a danger to himself or others in a challenge hearing. Accordingly, the two tests the Supreme Court

custody determinations must be made by clear and convincing evidence. *Valdez-Jimenez v. Eighth Judicial Dist. Ct.,* 136 Nev. 155, 166, 460 P.3d 976, 980 (2020). The issue in common with these cases is a fundamental liberty interest. Involuntary restriction of a defendant's liberty requires a finding of proof by clear and convincing evidence in favor of involuntary commitment for mental health treatment or that bail, instead of own recognizance release, is appropriate.

In competency determinations, if a defendant is found incompetent, his liberty is in jeopardy as well. *See* NRS 178.461(3). If a defendant is incompetent and dangerous to himself or others, he must be conveyed into custody and detained for treatment at a secure facility until found competent. *See* NRS 178.425(1). Incompetent defendants who cannot make bail or who are not released on their own recognizance remain in custody throughout that treatment. If a defendant is incompetent without probability of attaining competency and the criminal case is dismissed, the State can move for involuntary commitment. *See* NRS 178.460, 178.461.

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distinguished in *Cooper* are intertwined in Nevada. Further, the outcomes in Nevada can be the same as a defendant who is not a danger to himself or others can still be subject to involuntary commitment. In this respect, *Cooper* is distinguishable.

To require a finding of competency at a challenge hearing only by a preponderance of the evidence is not consistent with the higher protections afforded to Nevada citizens when their pretrial liberty is at stake. Accordingly, because of the very real potential for deprivation of liberty, the proper burden of proof at challenge hearings is clear and convincing evidence.

3. Beyond a reasonable doubt is not outside the realm of possibility

The plain language of NRS 178.405(1) clearly states that: ". . . if doubt arises as to the competence of the defendant, the court shall suspend the proceedings . . ." This Court has interpreted that to mean the "doubt" required by statute must be "reasonable doubt" with "substantial evidence" of incompetence. *See Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983); *Goad v. State*, 137 Nev. Adv. Op. 17, *, 488 P.3d 646, 654 (2021).

At least two states, Texas and Maryland, use the beyond a reasonable doubt standard in competency determinations. *See Raithel v. State*, 372 A.2d 1069, 1072 (Md. Ct. App. 1977); *Manning v. State*, 730 S.W.2d 744, 748 (Tex. Crim. App. 1987). In Maryland, the court is to

determine whether the accused is competent beyond a reasonable doubt. *Id.* Texas, on the other hand, follows the common law:

> [C]ase law through the years is fairly clear that a defendant has the burden of proving by a preponderance of the evidence, his incompetency to stand trial or his insanity at the time of the offense. Case law is also clear that the burden of proof shifts to the State if a prior, unvacated adjudication of incompetency or insanity is shown. We hold, consistent with common law, that if such prior adjudication for *incompetency* is shown, the State must then prove the accused's competency to stand trial beyond a reasonable doubt.

Id. at 748. (citations omitted) (emphasis in original).

In Nevada, this Court has determined that the "doubt" required by NRS 178.405(1) is "reasonable doubt" as to competence that is in the mind of the Court. *Lucas v. State*, 96 Nev. 428, 433, 610 P.2d 727, 731 (1980). Accordingly, if there must be "reasonable doubt" as to competence, the next logical step would be to require that, once incompetence has been established, there must be a subsequent finding of competence beyond a reasonable doubt at a challenge hearing as there is an unvacated finding of incompetence at the time of the hearing. Because there was an unvacated finding of incompetency at the time of the challenge hearing in the instant matter, a beyond a reasonable doubt standard could be applied. *See* 2 AA 44-46.

4. If this Court determines preponderance of the evidence is the correct standard, it is urged to emphasize that it is the weight of the evidence, not the number of evaluations, that controls

The United States Supreme Court, in *Medina v. California*, 505 U.S. 437, 452 (1992), left the determination as to the burden of proof and who carries that burden to the states, finding that the California procedure of requiring a defendant to prove incompetence by a preponderance of the evidence was "constitutionally adequate." *Id.* If this Court is inclined to use the preponderance of the evidence standard, Tariq urges this Court to make clear that this does not mean that the determination turns upon the number of doctors presented by each side. As the United States District Court for the District of Kansas noted in *United States v. Landa-Arevalo*, No. 16-20016-07, 2021 U.S. Dist. LEXIS 215210, at *5-6; 2021 WL 5177400 (Dist. Kan. November 8, 2021):

> The preponderance standard does not require the party bearing that burden to capture 51 percent of the quantity of the evidence, or even 50.1 percent of it. This is so because the factfinder need not weigh the "quantity of evidence." *In re Winship*, 397 U.S. at 371 n.3 (Harlan, J., concurring). Instead, the ultimate measure" of conflicting evidence is "quality and not quantity." *Weiler v. United States*, 323 U.S. 606, 608, 65 S.Ct. 548, 89 L.Ed. 495 (1945). A party satisfies this burden "if the factfinder believes by the thinnest conceivable margin that the points to be proved are so[.]" 1 Christopher B. Mueller &

Laird C. Kirkpatrick, *Federal Evidence* §3:5 (Thomson Reuters ed., 4th ed. 2013).

In the instant matter, the proper standard of proof at a challenge hearing should be clear and convincing evidence due to the pretrial liberty interests involved. If the Court decides that the applicable standard of proof is a preponderance of the evidence, the Court should reject the State's argument that it met this burden by showing that the number of doctors finding Tariq competent was more than the number of doctors presented by the defense. The State's argument is incorrect as it is not the quantity of the evidence but the quality that counts.

C. The State should have the burden of proof in a challenge hearing associated with a competency determination

Determining who bears the burden of proof in competency determinations can be difficult in that usually, with regard to standard motions, the moving party bears the burden. In competency determinations, however, *any* party can suggest that there is an issue as to a defendant's competence and the district court itself can raise the issue *sua sponte*. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966).

In Nevada, the burden of proof in a challenge hearing should be placed on the State to establish that a defendant is competent once the

initial ruling of incompetence has been made[3]. This is consistent with a majority of federal jurisdictions. *See supra* Part B(1). Further, once an initial determination of incompetence has been made, the district court enters an order making a written finding of incompetence. This is what happened in the instant matter. 1 AA 17, 44.

Once the order of incompetence was issued, a rebuttable presumption arose pursuant to NRS 47.250(11), which indicates that a "disputable" presumption includes the fact "[t]hat a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties." Here, the district court's initial order of incompetence, a judicial record, was not conclusive in that it could still be challenged pursuant to NRS 178.460. Further, because it specifically found Tariq to be incompetent, it correctly set forth the rights of the parties and Tariq

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[3] While in an *initial* competency hearing it is proper to have a presumption of competence and place the burden on the defendant to prove incompetence by a preponderance of the evidence, *see Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996), *citing Medina v. California*, 505 U.S. 437 (1992), the questions this Court has asked Tariq to answer were specifically limited to challenge hearings, which occur after a finding of incompetence has already been made. Accordingly, the issue of who bears the burden and what is the burden in initial competency hearings in Nevada is not addressed.

remained incompetent until that order was changed; until the presumption of incompetence was rebutted.

The Stein doctors' opinions that Tariq was competent were just that – opinions – and did noting to rebut the judicial finding of incompetence unless no challenge hearing was requested. *See* NRS 178.450(2), 178.455(1), 178.460(3). Accordingly, because the State alleged that Tariq was competent and disputed the order of the district court that Tariq was incompetent, the State bore the burden to rebut the presumption of incompetence.

Other states have likewise either found that the burden lies with the prosecution or places the burden on the party asserting that the defendant is competent. *See Lackey v. State*, 615 So. 2d 145, 152 (Ala. Crim. App. 1992); *State v. Rodgers*, 1994 Del. Super. LEXIS 167, at 14 (Sup. Ct. Del. April 14, 1994); *People v. Swallow*, 301 N.Y.S.2d 798, 802 (N.Y. 1969); *People v. Ralon*, 57 N.E.2d 742, 749-50 (Ill. App. 1991). It is the assertion of competence that is key to determining which party bears the burden.

Here, the State is asserting that Tariq is competent. Because the district court made findings and entered an order finding Tariq incompetent, a presumption of incompetence arose and that presumption

continues until rebutted. The State, as challenger to this rebuttable presumption, bears the burden of proof.

D. The district court applied the correct competency standard

During the challenge hearing in the instant matter, 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. Now, the State has alleged on appeal that the district court used too high a standard in determining that Tariq was incompetent with no possibility of restoration, however, the State has failed to allege exactly what standard the district court used, if not *Dusky*. OB 49-50. The standard the district court used was, in fact, the *Dusky* standard. *See Dusky v. United States*, 362 U.S. 402 (1960); NRS 178.400; 2 AA 278-82.

The *Dusky* standard has been codified in Nevada at NRS 178.400(2) and states that the term "incompetent" means:

[T]hat the person does not have the present ability to:

> Understand the nature of the criminal charges against the person;
>
> Understand the nature and purpose of the court proceedings; or
>
> Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

This is a judicial determination for which psychiatric professionals only offer their opinions. *See* NRS 178.460(3) ("the judge shall make and enter a finding of competence or incompetence); NRS 178.455(1) (the Administrator "shall report to the court in writing his or her specific findings and opinion"); NRS 178.450(2) (the Administrator shall offer an opinion as to whether the defendant is of sufficient mentality to understand the nature of the charge against him and assist in his own defense). Further, expert opinion is not binding on the trier of fact. *See Allen v. State*, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983); *Ogden v. State,* 96 Nev. 697, 698, 615 P.2d 251, 252 (1980); *accord United States v. Makris,* 535 F.2d 899, 908 (5th Cir. 1976), *Mass. Commonwealth v. Jones*, 90 N.E.3d 1238, 1249 (Mass. 2018). Accordingly, *none* of the doctors who testified at Tariq's challenge hearing were qualified to make the final

judicial determination of competency, regardless of what medical standard they allegedly used. *See Kansas v. Hendricks,* 521 U.S. 346, 359 (1997) (legal definitions need not mirror medical definitions).

While the *Dusky* standard is supposedly a "low" standard, "it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events. . . .'" *Dusky v. United States*, 362 U.S. 402, 402 (1960). As the Ninth Circuit Court of Appeals stated in *Odle v. Woodford*:

> After all, competence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense. *See Dusky*, 362 U.S. at 402; *see also* Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 457-59 (1967). The judge may be lulled into believing that a petitioner is competent by the fact that he does not disrupt the proceedings, yet this passivity itself may mask an incompetence to meaningfully participate in the process.

238 F.3d 1084, 1089 (9th Cir. 2001).

Dusky may be a relatively "low standard," but rational understanding requires more than just parroting back answers expected by evaluators. It includes such skills as the mental acuity to digest evidence, helping counsel to prepare an effective defense, discussing the

case with counsel with a rational degree of understanding, making reasoned decisions based upon the evidence and potential consequences, understanding the potential consequences of those decisions, participating in a trial, evaluating witnesses, advising counsel during the trial, and evaluating the evidence. *See Dusky v. United States*, 362 U.S. 402, 402 (1960); *Odle v. Woodford*, *Id.*; *People v. Swallow*, 301 N.Y.S.2d 798, 803 (N.Y. 1969). And this mental acuity must continue throughout trial and sentencing. *Swallow, Id.*, NRS 178.405. All these factors are included in the *Dusky* mandate that a defendant have sufficient mental acuity to aid and assist counsel in the defense with a reasonable degree of rational understanding. Chief District Curt Judge Bell understood this standard.

Looking at the district court's Amended Decision and Order, 2 AA 278-82, it sets forth that the correct legal standard is the *Dusky* standard. *Id.* at 279-80. The next section of the order deals with Tariq's rational understanding of the charges, the purpose of the court proceedings, and ability to assist counsel. *Id.* at 280.

The court set forth Tariq's history of mental disability, which was required under *Drope v. Missouri*, 420 U.S. 162, 179 (1975). The court noted that all the doctors agreed that Tariq had a low IQ score. 2 AA 280.

And while only Dr. Jones-Forrester and Dr. Foerster did the actual testing, all experts agreed that Tariq functioned at a third or fourth grade level. 1 AA 34, 54, 59, 73, 105. Based upon this agreement as to impaired functioning, the district court found that Tariq was "functionally illiterate" which "impair[ed] his ability to comprehend information." 1 AA 280. The district court's finding was supported by substantial evidence as well as common sense. An eight or nine year old child (a third or fourth grader) with Tariq's disabilities would not be expected to comprehend and understand the information involved with Tariq's criminal charges, let alone whether to make a plea deal which would likely result in prison time.

Next, the court looked at Dr. Jones-Forrester's neurocognitive testing relating to Tariq's attention, mental tracking, processing speed and executive functioning skills.[4] 2 AA 280. Because the trial process is essentially verbal in nature, long in duration, and can move very quickly, testing in these domains was a good predictor of how Tariq would both

[4]While the Court found these four domains of note, Dr. Jones-Forrester actually tested Tariq over a wider range, including concentration, language, spatial skills, memory and fine motor skills. 1 AA 105.

comprehend and function during trial. *See United States v. Hoskie*, 950 F.2d 1388, 1393 (9th Cir. 1991) (because trial is verbal, a test which eliminates verbal and cultural bias is not a good predictor of a defendant's ability, rationally and factually, to comprehend the trial process). The court found that Tariq's problems in these areas would make him vulnerable to distraction and misunderstanding information during legal proceedings. 2 AA 280-81.

While all three Stein doctors agreed that Tariq had intellectual disabilities, they disagreed with Dr. Jones-Forrester as to the degree of the effect of these disabilities. The court acknowledged a point that the Stein doctors stressed: that intellectual disability does not necessarily mean someone is incompetent. 1 AA 157-58; 2 AA 281.

The court also noted that, while there was general agreement that Tariq had intellectual disabilities, only Dr. Jones-Forrester took the time to do the neuropsychological evaluation in order to determine whether Tariq had the actual skills to function sufficiently to aid counsel during trial – the required "rational understanding" pursuant to *Dusky*. 2 AA 280-81. The Stein doctors performed no testing on the extent of Tariq's disabilities but disputed "the degree to which [Tariq] was affected by his

intellectual deficits," citing Tariq's improvements during treatment. At the same time, however, the Stein doctors acknowledged that this improvement may diminish with time.[5] 2 AA 281. *See Dusky v. United States*, 362 U.S. 402 (1960), NRS 178.400(1) (the court must consider a defendant's "present ability" in evaluating competency).

Because Tariq's difficulties with attention, mental tracking, processing speed, and executive functioning skills would likely impair his ability to aid counsel during trial and, as the Stein doctors noted, any improvements from treatment may diminish over time (which they did), the court clearly applied the *Dusky* standard (aiding counsel in the defense and present ability), and the court's finding was supported by substantial evidence. Because only Dr. Jones-Forrester did the appropriate testing, the evidence that Tariq was unable to function during legal proceedings was unrebutted. *See United States v. Di Gilio*, 538 F.2d 972, 988 (3rd Cir. 1976) ("[e]vidence showing competency must be

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[5]Dr. Jones-Forrester's evaluation was approximately a month after Tariq's treatment at Stein concluded. 1 AA 27-43; 51. As will be explained in more detail below, Dr. Jones-Forrester ascertained that Tariq was unable to retain the information he learned after more than a year at Stein even though only a month had passed by the time she re-evaluated him. 1 AA 72-89; 109.

more persuasive than that showing incompetency."); *United States v. Hoskie*, 950 F.2d 1388, 1394 (9th Cir. 1991) (it is clear error to rely upon opinions that do not refute evidence of an incompetent defendant's inability to retain information).

The court also acknowledged the recommendations Drs. Damas, Bossi and Sussman made for "further brief procedural competency training" and that defense counsel explain terms simply. 2 AA 281. Then, the court noted the deciding factor: that *none* of the Stein doctors observed Tariq interact with counsel while Dr. Jones-Forrester, the defense expert, did exactly that and found that Tariq had not retained the information learned at Stein. 1 AA 109-10, 114-15, 123, 139. Thus, the defense evidence that Tariq did not retain information from his treatment, is again unrefuted. *Id.; see also Hoskie,* 950 F.2d at 1394.

Tariq's interaction with and ability to aid counsel in the defense is at the heart of the *Dusky* standard. The district court relied heavily on Dr. Jones-Forrester's observation of the interaction between Tariq and his attorney:

> Dr. Jones-Forrester spent ninety minutes observing Mr. Manson interact with defense counsel in April 2020. At that evaluation, Dr. Jones-Forrester observed Mr. Manson's

> diminished understanding of his charges and court proceedings. Mr. Manson 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. Despite defense counsel's consistent use of simple language and repetitive questioning throughout the interaction, Mr. Manson struggled to identify how facts of the case could be used for or against him or what the risks were of going to trial as opposed to accepting a plea bargain. The April 2020 evaluation demonstrated that Mr. Manson cannot assist his counsel during the proceedings with a reasonable degree of rational understanding.

2 AA 281.

The district court's evaluation of the evidence here was the *Dusky* standard in action. It was necessary for Tariq to understand the concept of consent due to the charges and the facts of his case. He was charged with sexual assault of a minor under fourteen and lewdness with a child under fourteen, but this minor victim engaged in sexual relations with Tariq willingly. 1 AA 5; RA 17-19. An eight or nine year old child in the same situation[6] as Tariq would not understand the legal concept that a child cannot consent to sexual intercourse so it was imperative that Tariq

[6]Tariq functioned at a third or fourth grade level. 1 AA 34, 54, 59, 105.

have some understanding of this concept per *Dusky* as it was related to his understanding of his charges.

The fact that Tariq insisted he could not be convicted without video or photographic evidence demonstrated Tariq's lack of rational understanding. As the court noted, in order to make decisions, such as whether to testify or whether to enter into a plea agreement, it was imperative that Tariq understand the evidence against him. 1 AA 148-49. This falls under *Dusky* as his inability to understand the evidence impairs his ability to aid counsel in his defense with a reasonable degree of rational understanding.

Despite the importance of Tariq's ability to aid counsel (a standard taken directly from *Dusky*), the Stein doctors did no observation of Tariq and his attorney. Dr. Bossi indicated that, although it's possible to request such an observation, "[m]ost competency evaluations are – are done without – without observing attorney interactions" and because he felt he had sufficient information to form an opinion, he did not request one here. 1 AA 158. When asked what his opinion would have been had he been present at Dr. Jones-Forrester's observation session, he declined to answer. *Id.* at 171-72.

The district court then, based upon Tariq's deficits, his inability to understand the charges, the proceedings or to aid counsel in his defense, and the fact that his deficits were life-long, found that he was incompetent without the possibility of restoration. This was a statutory finding pursuant to NRS 178.425. It is not a finding required by *Dusky*.

Dr. Bossi indicated that an individual understanding that they've been charged with sexual assault and knowing that is against the law is sufficient. 1 AA 155. This is incorrect. 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). "[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle v. Woodford*, 238 F3d 1084, 1089 (9th Cir. 2001). The district court did not use too high a standard, the State used too low a standard.

Dr. Jones-Forrester's observation of Tariq's interaction with his attorney one month after completion of over a year of treatment at Stein was the deciding factor. This evidence went directly to the heart of *Dusky* and dealt with Tariq's present ability to aid counsel in his defense with a reasonable degree of rational understanding. Tariq's understanding had to be more than merely regurgitating information and this observation demonstrated that Tariq lacked the required rational understanding. This evidence was unrefuted by the State and, thus, the district court reached the correct conclusion using the *Dusky* standard and it was supported by substantial evidence. *See 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). There was no error and a "higher standard" was not applied.

E. The *Dusky* standard applies to competency determinations

The problem is not the *Dusky* standard, the problem is the State's narrow interpretation of the *Dusky* standard. The *Dusky* standard is the only applicable standard, but the State should be reminded that "[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).

The State's issue was with the evidence, not the *Dusky* standard. Dr. Jones-Forrester, in doing a neuropsychological evaluation of Tariq, was not using "too high a standard" in determining competence, she was simply providing her *opinion* and appropriately supporting that opinion with the evidence she had collected.[7] The neuropsychological evaluation was evidence relevant to competence as his deficits will have an effect on how he functions and aids counsel in the defense. Dr. Jones-Forrester then took her evaluation one step further and observed Tariq's interaction with his attorney and found that Tariq did not retain the information he had learned at Stein even though only a month had passed since his treatment was completed. 1 AA 109-10, 114-15, 123, 139. This is exactly

[7]The State never objected to Dr. Jones-Forrester's evaluation. Generally, failure to raise a proper objection will preclude appellate review. *Wilkins v. State*, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980).

the wide range of evidence that the district court needed to evaluate. *See Calvin, Id.*

Further, the district court did not use too high a standard and, in fact, used the *Dusky* standard in evaluating the wide range of evidence. The district court understood that the term "rational understanding" did *not* mean that an individual understanding that they've been charged with sexual assault and knowing that is against the law is sufficient. 1 AA 155.

In *People v. Swallow*, 301 N.Y.S.2d 798, 803 (N.Y. 1969), a case subsequent to *Dusky*, the New York Supreme Court explored, in depth, the meaning of "rational understanding" in regard to the ability to aid counsel in formulating a defense and noted:

> There is judicial authority for the proposition that far more is required to find a defendant capable of standing trial than the existence of a mere mask of sanity. Casual surface understanding and superficial ability to assist counsel will not suffice as a predicate for a determination that defendant is sane.
>
> In *People ex rel. Bernstein v. McNeill,* (48 N.Y.S.2d 764, 766) the court in rejecting an institutionalized defendant's claim that he was prepared for trial said, in part: "Ability to make a defense, however, means more than capacity to discuss his case with his attorney, answer questions, and to understand the nature of legal proceedings. If relator is to go to trial, he

> should be able to discuss with counsel, rationally, the facts relating to his case which are within his recollection. He should also be able, rationally, to consider the evidence offered against him, to advise with his attorney concerning it, and to make such decisions as may be necessary for him to make during the course of such a trial."
> . . .
>
> The word "understanding" requires some depth of understanding, not merely surface knowledge of the proceedings.

The New York Supreme Court then continued:

> It is noted in Competency to Stand Trial: A Call to Reform (59 J. Crim. L., C. & P.S., 569, 574 [1968]) that:
>
> > "The defendant must be able to follow the evidence, assist counsel in evaluating the testimony of witnesses, and be able to meet the stresses of a long trial without his rationality or judgment breaking down." And "In applying the functional test, the mental condition of the defendant must not be evaluated in a vacuum, but must be considered in relation to the circumstances of the case. The anticipated length and complexity of the trial is an important factor. The defendant who would be competent for a one-day trial might well deteriorate under the stress of a long proceeding."

Swallow, 301 N.Y.S.2d at 803.

As the United States Supreme Court warned in *Dusky v. United States*, 362 U.S. 402, 402 (1960): "We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that

'the defendant [is] oriented to time and place and [has] some recollection of events.'" Rational understanding requires more. It requires "the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001).

Here, *Dusky* is the appropriate standard and the State's interpretation of *Dusky* does not adequately take into account Tariq's lack of ability to aid in the defense and the "rational understanding" requirements. Dr. Jones-Forrester's evaluation provided the substantial evidence required to support the district court's finding. That finding should be given deference and not disturbed on appeal.

III. CONCLUSION

The District Court's determination that Tariq Manson was incompetent without possibility of restoration was a factual determination supported by substantial evidence 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 *Dusky*.

In a challenge hearing, the burden should be on the State to establish competence by clear and convincing evidence. That burden lies properly with the State as a finding that Tariq was incompetent had already been made and not rebutted. The proper standard is clear and convincing evidence because of the potential liberty interests involved. The *Dusky* standard was used here and, going line-by-line through the district court's order bears this out. Tariq could not sufficiently interact with his attorney even after all of the Stein doctors recommendations were followed. Further, the evidence that Tariq failed to retain information he learned during restoration treatment was unrefuted and could not be ignored.

Finally, the *Dusky* standard is the appropriate standard, however, there should be more appreciation for the term "rational understanding" in that it has more significance than a defendant simply being able to know he's been charged with an offense and that it's against the law. Rational understanding requires not only understanding but also the ability to take an active role during trial. Tariq Manson did not have this

ability and, therefore, the district court's decision was not only correct, but it was supported by substantial and unrefuted evidence and must be affirmed.

DATED this 13th day of April, 2022.

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 7,083 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 13th day of April, 2022.

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_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 13th day of April, 2022, a copy of the foregoing Respondent's Supplemental Brief was served as follows:

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Dated: 4/13/2022

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