In the Supreme Court of the State of Nevada

The State of Nevada, Appellant, vs. Vinnie Adams, Respondent.	No. 81782
The State of Nevada, Appellant, vs. Tariq Manson, Respondent.	No. 82038

Brief by Nevada Attorneys for Criminal Justice as Amicus Curiae, Supporting Affirmance for Manson & Adams

Rene L. Valladares
Federal Public Defender
*Stacy Newman
Assistant Federal Public Defender
Nevada State Bar No. #14245
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577

*Counsel for Amicus Curiae, NACJ

In the Supreme Court of the State of Nevada

The State of Nevada, Appellant, vs. Vinnie Adams, Respondent.	No. 81782
The State of Nevada, Appellant, vs. Tariq Manson, Respondent.	No. 82038

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Stacy Newman, Federal Public Defender, D. Nev.

/s/ Stacy Newman
Stacy Newman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

IDENTITY OF AMICUS CURIAE

Nevada Attorneys for Criminal Justice is a state-wide non-profit organization of criminal defense attorneys in Nevada. Nevada Attorneys for Criminal Justice has an interest in this case because the Court's ruling could affect the interactions of defense attorneys and clients who suffer competency issues. On January 13, 2022, this Court invited Nevada Attorneys for Criminal Justice to file an amicus brief addressing issues related to competency determinations in district courts. *See* Order (Jan. 13, 2022); *see also* NRAP 29(a).

INTRODUCTION

As put by the United States Supreme Court, "[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992); *see also Drope v. Missouri*, 420 U.S. 162, 171–72 (1975). A defendant's mental competence to stand trial is a fundamental prerequisite to participation in our adversarial system of criminal justice.

Consistent with the constitutional mandate, the Nevada legislature has codified this prerequisite under NRS 178.400(1) which states, "[a] person may not be tried or adjudged to punishment for an offense while incompetent." Nevada law further defines that a person is incompetent if he or she 1) does not have the present ability to understand the nature of the criminal charges against him or her, or 2) to understand the nature and purpose of the court proceedings or 3) to aid and assist in his or her defense at any time during the proceedings with a reasonable degree of rational understanding. *See* NRS 178.400(2). If, at any time, doubt arises as to the competency of the defendant, the court shall suspend the proceedings until the question of

competency is determined and until the defendant is determined to be competent. *See* NRS 178.405. Although competency may be raised more by defense counsel given their close relationship to a defendant, this statute suggests the responsibility of ensuring competence rest with the State, the court, and the defense alike.

The State similarly has a responsibility to provide restorative treatment when a defendant is deemed incompetent. NRS 178.425(1) outlines that:

> If the court finds the defendant incompetent, and dangerous to himself or herself or to society and that commitment is required for a determination of the defendant's ability to receive treatment to competency and to attain competence, the judge shall order the sheriff to convey the defendant forthwith … into the custody of the Administrator or the Administrator's designee for detention and treatment at a division facility that is secure.

If a defendant is deemed incompetent, but not a danger to him or herself or others, restorative treatment must be provided on an outpatient basis. *See* NRS 178.425(3). Subsequently, NRS 178.450 provides that the Division shall submit a report opining on a defendant's competency within three months after the order for commitment and treatment is issued in misdemeanor cases and within

six months after the order is issued in all other matters. If, despite restorative treatment, a defendant is found "incompetent with no substantial probability of attaining competency in the foreseeable future," the proceedings against the defendant must be dismissed. *See* NRS 178.425(5). However, the State retains mechanisms under which it could refile charges later and/or seek further civil commitment of the defendant under certain circumstances, such as if the defendant is deemed dangerous. *Id.;* NRS 178.461.

ARGUMENT

This Court invited NACJ to comment on four issues: "(1) what is the burden of proof that should apply to a district court's decision in a challenge hearing associated with a competency determination? (2) which party has the burden of proof in a challenge hearing associated with a competency determination? (3) what competency standard is alleged to have been applied by the district court in its decision below? and (4) what competency standard should a district court apply in a competency determination if not the Dusky standard?" *See State v. Manson*, Case No. 82038, Order (Jan. 13, 2022); *State v. Adams*, Order (Jan. 13, 2022).

In response, NACJ maintains the burden of proof should be on the State, the standard of proof should be clear and convincing evidence, the district court in both *Adams* and *Manson* applied the *Dusky* standard, and the *Dusky* standard should continue to apply.

I. The State bears the burden of proving a defendant competent to stand trial (Question Two).[1]

The State should have the burden of demonstrating a defendant is competent to stand trial. In *Cooper v. Oklahoma*, the United States Supreme Court held that an Oklahoma statute requiring defendants to prove incompetence to stand trial by clear and convincing evidence violated a defendant's due process rights under the fourteenth amendment. *Cooper v. Oklahoma*, 517 U.S. 348 (1996). In discussing the varying burdens of proof requirements in the fifty states, the court noted:

> Indeed, a number of States place no burden on the defendant at all, but rather require the prosecutor to prove the defendant's competence to stand trial once a question about competency has been credibly raised. The situation is no different in federal court.

---

[1] For the sake making its analysis clear, NACJ discusses this Court's second question first.

Id. at 361–362. The Ninth Circuit also assigns the burden of proof to the government. *United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991).

Nevada statutes likewise link the burden of establishing a defendant's competence to the State. For example, NRS 178.425 assigns the State the obligation to provide restorative treatment once a defendant is found not competent to proceed. *See* NRS 178.425(1) & (3). NRS 178.461 also offers the State a mechanism under which a defendant's detention may continue—even after charges are dismissed—should the State prove that a defendant, deemed incompetent with no substantial probability of restoration in the foreseeable future, is dangerous and in need of placement in a forensic facility. *See* NRS 178.461. Given the State's obligation to refrain from prosecuting an incompetent defendant, and the duty it retains to provide restorative treatment, it is a natural extension of the process that the State bear the burden of establishing a defendant is competent.

Moreover, the interest of the State in prosecuting in a defendant further supports that the burden rests on the State. In *Trueblood v. Washington State Dept. of Social and Health Services, et al.*, 73

F.Supp.3d 1311 (W.D. Wash 2014), a Washington District Court addressed issues concerning delays in restorative treatment. The court recognized that:

> The state has a legitimate interest in an efficient, cost-effective competency services apparatus … There is, however, no legitimate independent interest in delays within the system because delays undermine the state's "primary governmental interest" of bringing the accused to trial.

Id. at 1313. Indeed, the State has an interest in the restoration of a defendant so that criminal proceedings can resume. Given its role in providing effective and efficient competency services, it would be inconsistent to then shift the burden of establishing competence onto the defense. In other words, shifting the burden to the defense would undermine the State's interest in bringing an accused to trial.

Placing the burden of proof on the State also conforms with existing trial prerequisites, for which the State has previously been assigned the burden of establishing. For example, the State must file a criminal complaint, indictment or information and seek warrants in a criminal proceeding. *See* NRS 170.060; NRS 173.015; NRS 171.106. The State must also prove a defendant's guilt beyond a reasonable doubt.

See *Crawford v. State*, 121 Nev. 744 (2005). Further, the State has the burden of establishing searches are legal and the burden of establishing the admissibility of a defendant's statements following a proper *Miranda* warning. *See Lastine v. State*, 134 Nev. 538 (2018); *Howe v. State*, 112 Nev. 458 (1996); *see also Miranda v. Arizona*, 384 U.S. 436 (1966).

Placing the burden on the State is also consistent with other jurisdictions. In *United States v. Patel*, a Massachusetts district court completed an in-depth review of other jurisdictions' position on who bears the burden of proof. *United States v. Patel*, 524 F. Supp. 2d 107 (D. Mass 2007). The district court noted that, in adopting the view of the Third, Fifth and Ninth circuits, its position was that "it was the [State's] burden to establish competency to stand trial, not the defendant's burden to establish incompetency." *Id.* at 114. Further, it reasoned that "just as the [State] must establish other prerequisites to trial, the government must establish a defendant's competency." *Id.*

Given Ninth Circuit precedent, Nevada's statutory scheme, and to promote consistency with existing constitutional safeguards assigning the State the burden of establishing certain trial prerequisites, the

burden of proof should be on the State to establish that a defendant is competent to stand trial.

II. The standard of proof should be clear and convincing evidence (Question One).

Considering the State is assigned the burden of proof of establishing a defendant is competent to stand trial, NACJ submits the standard of proof should be clear and convincing evidence. A clear and convincing standard would further safeguard against potential wrongful convictions of incompetent defendants.

The State must prove guilt beyond a reasonable doubt to convict a defendant. See *Crawford*, 121 Nev. at 750. While clear and convincing evidence does not require as much certainty as beyond a reasonable doubt, it still ensures that the fact finder is substantially satisfied that the evidence proves a defendant is competent to stand trial. When treatment is unsuccessful in restoring a defendant's competence, NRS 178.461 requires the State to prove "by clear and convincing evidence" that an incompetent defendant "is a danger to himself or herself or others and that the [defendant's] dangerousness is such that the person requires placement at a forensic facility." NRS 178.461(3). Thus, the

application of clear and convincing evidence in matters relating to competency proceedings already exists.

Application of the clear and convincing standard is further consistent with the standard applied in reviewing other trial-related matters. For example, the State must prove prior bad acts by clear and convincing evidence before they are admissible at trial. *See Randolph v. State*, 136 Nev. 659, 662 (2020); *see also Petrocelli v. State*, 101 Nev. 46, 52 (1985). Courts have accepted that "fundamental fairness demands this standard in order to preclude verdicts which might otherwise rest on false assumptions." *Tucker v. State*, 82 Nev. 127, 131 (1966). Similarly, fundamental fairness here demands the application clear and convincing evidence to preclude verdicts resting on a false assumption, *i.e.*, that defendant is competent to stand trial. Competency can be fluid and the evidence to be considered in determining a defendant's competency can be complicated and conflicting. Only clear and convincing evidence will promote the thorough examination of all evidence presented to ensure that no incompetent defendant is forced to stand trial.

III. Nevada Attorneys for Criminal Justice agrees with Manson and Adams that the district court applied the *Dusky* standard (Question Three).

NACJ agrees with Manson and Adams that the district court applied the *Dusky* standard. *See State v. Manson*, Case No. 82038, Resp. Supp. Br. at 17; *State v. Adams*, Case No. 81782, Resp. Supp. Ans. Br. at 17. Disagreement about the *types* of evidence that may be used to satisfy the *Dusky* standard should not be construed as an indication that the *Dusky* standard wasn't applied.

IV. District courts should apply the *Dusky* standard (Question Four).

Nevada district courts should apply the *Dusky* standard, as Nevada law already requires.

In *Dusky v. United States*, 362 U.S. 402, 402 (1960), the United States Supreme Court held that the standard for competency was whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id.*

The Nevada Legislature has codified the *Dusky* standard in NRS 178.400, which states that:

> 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.

In 2006, this Court held that a previous version of NRS 178.400 complies with the *Dusky* standard. *See Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1100 (2006) ("We therefore now specifically hold that our statutory competency standard conforms to that of *Dusky* and thus satisfies constitutional requirements."). Although the statute was amended the following year, the changes simply delineated the ways a defendant may be incompetent into subsections to "tighten[] up the

language to make the law consistent with the U.S. Supreme Court decision regarding [*Dusky*]" and "deal with recent court decisions . . . ." *See* Nev. S. Comm. Minutes, S. Comm. on Jud., 74th Session (April 27, 2007) (Statements of Hon. Jackie Glass and R. Ben Graham).

Thus, Nevada courts must apply the *Dusky* standard.

And there are good reasons to apply the *Dusky* standard. First, the *Dusky* standard has been repeatedly reaffirmed over the past 62 years. *See*, *e.g.*, *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (referring to Dusky as the setting forth the United States Constitution's standard for mental competence); *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (favorably citing *Dusky*); *accord Drope v. Missouri*, 420 U.S. 162, 171 (1975). Thus, the *Dusky* standard is well-established and courts across the country—and indeed in this State—are familiar with applying it.

Second, *Dusky* presents a flexible standard, which is important for a fact-specific inquiry. Not only does the flexible standard tolerate many divergent factual scenarios, but this flexibility allows for experts in psychology to unearth the facts relevant to answering the *Dusky* inquiry. In other words, the *Dusky* standard is broad enough to allow experts in the field of psychology to apply ever-developing best clinical

practices to the assessments tasked to them. *See Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (reversing an appellate court for, among other things, "rejecting the habeas court's application of medical guidance" and "fail[ing] adequately to inform itself of the 'medical community's diagnostic framework[.]'" (quoting *Hall v. Fla.*, 572 U.S. 701, 721 (2014)).

Notably, the *Dusky* standard does not address the issue of whether accommodations can render someone who is incompetent, competent. And the plain language of NRS 178.400 suggests that accommodations are not an appropriate field of inquiry under *Dusky* because it uses the phrase "present ability"—not *future* ability based on the possible presence of accommodations. However, even to the extent that this was a proper inquiry under *Dusky*, such matters are necessarily fact-specific and best left in the sound discretion of the district judge. After all, the district judge is in the best position to weigh the evidence and consider the efficacy of any proposed accommodations.

CONCLUSION

NACJ appreciates this Court's invitation to comment on the four issues discussed throughout this brief. NACJ respectfully requests this

Court conclude that the burden to show competency rests on the State, the standard of proof is clear and convincing evidence, that the district court in both *Manson* and *Adams* applied the *Dusky* standard, and that the *Dusky* standard should continue to be used.

Dated this 12th day of May, 2022.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Stacy Newman
Stacy Newman
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

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

2. The brief exceeds the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,466 words. Concurrently with the instant Brief, undersigned counsel has filed a motion to exceed the page limit.

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

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

Dated this 12th day of May, 2022.

/s/ Stacy Newman
Stacy Newman
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022, I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

Aaron D. Ford
Attorney General, State of Nevada

Alexander Chen
Clark County District Attorney's Office

Deborah L. Westbrook
Clark County Public Defender's Office

Melinda E. Simpkins
Clark County Special Public Defender's Office

Jennifer P. Noble
Washoe County District Attorney's Office

John Reese Petty
Washoe County Public Defender's Office

/s/ Celina Moore
An Employee of the
Federal Public Defender, District of Nevada