

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

TARIQ MANSON,

Respondent.

No. 82038

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BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE
NEVADA DISTRICT ATTORNEY'S ASSOCIATION

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I. INTRODUCTION

This Court has invited the Nevada District Attorney's Association, hereafter "NDAA," to participate in this matter. The NDAA is an organization composed of 17 elected district attorneys of Nevada.

In this case, the district court found that Tariq Manson (hereafter "Manson") is incompetent without the probability of restoration. While the applicable standard of review is deferential, here, it is apparent from the record that the district court's conclusion was premised upon an erroneous application of a heightened standard of competency that departed from *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788 (1960) and NRS 178.400. Because substantial evidence from multiple experts established that Manson

was competent under the *Dusky* standard, this Court should reverse the district court's order.

Additionally, Manson and other *amicus curiae* urge this Court to create a new rule that places the burden on the prosecution to demonstrate competency, and requires that such demonstration be made by clear and convincing evidence. This Court should decline to do so because their urged interpretation ignores the compelling public interests of community safety, as well as the rights of victims as established by the Nevada Constitution.

II. ARGUMENT

NDAA hereby incorporates by reference the procedural history and factual recitation contained in pages 2-49 of the State's Opening Brief.

Four issues are currently before this Court: 1) the burden of proof applicable to a finding of incompetence without a probability of restoration 2) who bears that burden of proof; 3) whether this Court should depart from the competency standard applied in *Dusky*; and 4) what standard was actually applied by the district court.

A. Finding of Incompetence Without a Probability of Restoration Must Be Supported by Substantial Evidence.

The district court found that Manson is incompetent without a probability of restoration. Where a person is in custody because of his incapacity to proceed to trial, he cannot be held longer than is reasonably

necessary to determine whether there is a substantial probability that he can be restored to competency in the foreseeable future. If a court finds that restoration to competency is not possible, the State must either pursue civil commitment or release the defendant. *Jackson v. Indiana*, 406 U.S. 715 (1972). Because the *Jackson* decision articulated that a substantial probability of restoration applies where the government seeks to proceed to trial, it follows that criminal charges may not be dismissed against a defendant absent a demonstration that there is a substantial probability the defendant's competence cannot be restored. This approach is supported by NRS 178.425 (5):

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

NRS 178.425 (5).

At a competency hearing, the defendant must demonstrate, by a preponderance of the evidence, that he is incompetent to stand trial. At issue here, however, is not merely the defendant's competency at a discreet point in time. Instead, it is whether he can ever be legally competent in the future. The implications on public safety, victims, and the interests of justice following a decision to dismiss criminal charges due to

incompetence cannot be overstated. With the charges against him dismissed, Manson can move freely about the community, with no ability of law enforcement to monitor him or otherwise protect the victim and other potential victims. Regardless of his current competency status, he presents an ongoing threat. Although the State may theoretically refile in the event of a subsequent finding that Manson has regained competence, there is no guarantee for re-evaluation at all, let alone re-evaluation within a reasonable time frame. The State is indefinitely prevented from pursuing justice on behalf of Nevadans.

The United States Supreme Court has made clear that the government has a legitimate and compelling interest in protecting society from those charged with crimes. *United States v. Salerno*, 481 U.S. 739, 749, 107 S. Ct. 2095 (1987). Moreover, in Nevada, victims have enhanced constitutional rights under our state constitution. As a result of the district court's finding, the victim cannot enjoy her constitutional rights to be reasonably protected from the defendant, and to timely disposition of the case. Nevada Constitution, Article I, Section 8A (1)(b) and (i). Such an infringement may at times be inevitable where a defendant is genuinely incompetent with no hope of restoration. However, the gravity of its implications militates that a district court's finding of incompetence

without hope of restoration, and the ensuing dismissal, should not be upheld absent substantial evidence that a defendant can be restored to competence. To do otherwise would render the constitutional rights bestowed upon victims by Nevada voters nugatory.

B. Manson Bears the Burden of Demonstrating He Is Incompetent and Incapable of Being Restored to Competence.

A defendant is presumptively competent. *Melcor-Gloria v. State*, 99 Nev. 174, 660 P.2d 109 (1983). It follows, then, that a party seeking a finding of incompetence without the possibility of restoration should bear the burden of proof. As the State observes in its supplemental brief, due process does not mandate imposing upon the government the burden of proving that a defendant is competent to stand trial. *Medina v. California*, 505 U.S. 438 (1992). Nevada statutes are silent as to which party should bear the burden of proof. And as the State suggests, where statutes do not provide guidance as to which party should bear the proof in a competency hearing, the general practice is to assign the burden to the moving party. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2006).

Apparently recognizing that the district court's finding regarding incompetency is not supported by substantial evidence, Manson invites this Court to establish a new rule that it should be the State's burden to demonstrate competency by clear and convincing evidence. Respondent's

Supplemental Brief, 4. This Court should decline that invitation, because Manson's proposed departure is not supported by the United States Supreme Court. In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the Court made clear that a defendant may appropriately bear the burden to demonstrate incompetence, and that the applicable quantum of proof must not exceed a preponderance of the evidence.

Moreover, dismissal without prejudice inures to Manson's benefit, and compromises the victim's state constitutional rights, as discussed in Section A above. Therefore, the only reasonable approach is that Manson, as the party seeking to halt the trial process and either indefinitely delay or deprive the victim of her constitutional rights altogether, should bear the burden of proof.

C. The District Court's Decision Should Be Reversed Because It Departed from the *Dusky* Standard.

In 1960, the United States Supreme Court articulated the standard of incompetence to stand trial in *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788 (1960). A defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, as well as a rational and factual understanding of the proceedings against him. *Id.* Every state has adopted a version of *Dusky* in the context of competency proceedings. Thomas Grisso, *Pretrial Clinical Evaluations in Criminal*

Cases: Past Trends and Future Directions, 23 Crim. Just. & Behav. 90, 91 (1996). NRS 178.400 is consistent with the *Dusky* standard, defining an “incompetent” defendant as one who does not have the *present* ability to understand the nature of the charges, the nature and purpose of the court proceedings, or assist counsel in their defense. *Calvin v. State*, 122 Nev. 1178, 147 P.3d 1097, 1098 (2006). The use of the word “present” in Nevada’s statute recognizes that competency can be a fluid condition.

If a district court’s determination regarding competency is not supported by substantial evidence, it must be reversed. *Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1099 (2006) (citations omitted). “The court’s discretion in this area, however, is not unbridled.” *Melcor-Gloria* at 180.

“Competence [is] measured by the defendant’s ability to understand the nature of the criminal charges and the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.” *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 122, 206 P.3d 975, 977 (2009); *see* NRS 178.400 (setting forth Nevada’s competency standard); *Calvin v. State*, 122 Nev. 1178, 1182, 147 P.3d 1097, 1100 (2006) (holding that Nevada’s competency standard conforms to the standard announced in *Dusky*, 362 U.S. at 402). “When

there is conflicting psychiatric testimony at a competency hearing, the trier of fact resolves the conflicting testimony of the witnesses.” *Ogden v. State*, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980) (citation omitted).

The applicable test regarding competency “must be 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.” *Dusky, supra*.

Here, testimony at the challenge hearing amply established that Manson has the ability to rationally consult with his lawyers, and the ability to understand the facts attendant to the criminal proceedings. Dr. Mohammed Khan and Dr. Patrick Bennet found that there was a substantial probability of competency restoration and Dr. Bradley found that Manson would need further competency restoration and treatment. I AA 30, 38, 43. Subsequent to that additional treatment, two licensed psychiatrists, Dr. Eric Bossi and Dr. Daniel Sussman, as well as one licensed psychologist, Dr. Sarah Damas, found that Manson’s competency had been restored. I AA 50-68.

Dr. Bossi found that Manson provided a rational account of his charges, understood that he could be sentenced to life in prison, could explain the concept of plea bargaining, and understood the roles of the jury,

public defender, and prosecutor. I AA 61-62. He also found that Manson was able to assist his attorney with a reasonable degree of rational understanding, based on the following findings:

1. Based on my interview, he demonstrated the capability to adequately relate to and communicate with others. He did not exhibit any gross or substantial deficits in his thought process or communication abilities.
2. He is able to plan a legal strategy with the assistance of his attorney, and he stated he would follow his attorney's advice and felt his attorney was trustworthy.
3. He has learned the content presented in competency groups as evidenced by improvement in his written test score from 30% to 83%. This demonstrates that he has the capacity to comprehend and follow instruction as well as learn and retain material.
4. He has no self-defeating motivations.
5. He understands proper courtroom decorum.

I AA 63.

Similarly, Dr. Damas applied the *Dusky* standard in evaluating Manson. Dr. Damas found that Manson demonstrated an understanding of the severity of his charges, but was further educated on the definition of "consensual." I AA 55-57. Further, Manson accurately listed the potential pleas he could enter as well as the possible verdicts of guilty or not guilty if he were to proceed to trial. *Id.*

Dr. Sussman also found that Manson was competent under the *Dusky* standard. His report reflected the following findings:

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

I AA 67-68.

Additionally, Dr. Sussman found that Manson could assist in his own defense. He was willing to cooperate with defense counsel, knew how many times he had met with counsel, and could assist counsel. *Id.* These experts evaluated Manson based on the standard articulated in *Dusky*. The very language of Dr. Jones-Forrester's evaluation made clear that her conclusions were premised upon considerations outside the scope of the *Dusky* competence standard:

...[i]t should be stated that neuropsychological evaluation examines intellectual, neurocognitive, and psychological functioning comprehensively, and thus includes neurocognitive testing over and above what would typically be included in competency evaluation alone.

I AA 72.

Although the Decision and Order acknowledged *Dusky* as the appropriate standard, it did not *apply* that standard. Instead, the Decision and Order reveals that the district court failed to analyze the progress made by Manson at Stein Forensic Facility Outpatient Restoration Services, focusing exclusively on Dr. Jones-Forrester's analysis, despite her clear articulation that she was considering factors outside those of a competency evaluation. Moreover, the Decision and Order fails to articulate what consideration, if any, the district court gave to the opinions of three qualified mental health professionals whose evaluations were conducted consistent with *Dusky*. The district court erroneously and exclusively focused on Dr. Jones-Forrester's emphasis on raw intelligence, education, and attorney-client interaction. It premised its finding on Manson's intellectual deficiencies, rather than his progress at Stein Forensic Facility Outpatient Restoration Services or the factors mandated by *Dusky*.

III. CONCLUSION

Where a district court finds that a defendant is incompetent without a reasonable probability of restoration, its findings should be supported by substantial evidence. Moreover, the defendant should bear the burden of demonstrating his competency cannot be restored. To do otherwise unjustifiably compromises the State's interest in protecting the community,

as well as the constitutional rights of victims in Nevada. In this case, the district court appears to have focused exclusively on a single expert's opinion rendered after application of a standard that exceeds the one articulated in *Dusky*. In contrast, the experts who applied the appropriate standard found that Manson was competent to stand trial. Because the district court erroneously applied a heightened standard and failed to articulate why the findings of the other experts are invalid, its Decision and Order should be reversed.

DATED: May 12, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. This brief exceeds the page- or type-volume limitations of NRAP 29(e), because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it exceeds the page-volume limitation by one-and-a-half pages, and it contains 2,361 words. The undersigned has filed a Motion to Exceed Page Limitation concurrent with the brief.

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

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

DATED: May 12, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 12, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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