

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4 Electronically Filed
 Apr 22 2013 09:22 a.m.
 Tracie K. Lindeman
 Clerk of Supreme Court

5 DIPAK KANTILAL DESAI,)

6 Petitioner,)

7 vs)

8 THE EIGHTH JUDICIAL DISTRICT)
9 COURT OF THE STATE OF NEVADA,)
 COUNTY OF CLARK, DEPARTMENT 21,)

10 Respondent,)

11 and)

12 THE STATE OF NEVADA,)
 Real Party In Interest.)

No. 63046

District Court No.
10C265107

13
14 **PETITION FOR WRIT OF MANDAMUS**
15 **TO COMPEL COMPETENCY DETERMINATION OR,**
16 **ALTERNATIVELY, AN EVIDENTIARY HEARING ON THE**
 EXISTENCE OF DOUBT AS TO COMPETENCY

17 DIPAK KANTILAL DESAI, by and through his attorneys, Richard A.
18
19 Wright, and Margaret M. Stanish, WRIGHT STANISH & WINCKLER,
20 petitions this Honorable Supreme Court to issue a writ of mandamus to compel
21 the district court to stay the trial set to begin on April 22, 2013, in order to
22 initiate competency evaluation proceedings. Filed simultaneously with this
23 Petition is a NRAP 27(e) Emergency Motion to Stay Proceedings in District
24 Court for Trial Commencing on April 22, 2013.
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1 Doubt of competency has been raised by the observations and opinions of
2 defense counsel, a court-appointed independent medical evaluator, and a board
3 certified forensic psychiatrist. As a lesser alternative, Petitioner seeks a writ of
4 mandate to compel the district court to hold an evidentiary hearing to determine
5 whether these observations and opinions raise a reasonable doubt as to
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7 Petitioner's ability to assist counsel in the defense of a complex and lengthy trial.
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9 On April 16, 2013, the district court orally ruled that there was insufficient
10 doubt raised to trigger the competency provisions of NRS 178.405. It, therefore,
11 denied Petitioner's verbal motion for a competency evaluation, as well as his
12 verbal motion for an evidentiary hearing pertaining to the issue of doubt as to his
13 present competency. The district court's ignorance of the doubt raised by the
14 independent medical evaluator, competency evaluator, and counsel constitutes an
15 abuse of discretion meriting the intervention of this Court to protect the
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17 fundamental right to trial.
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21 The district court also denied Petitioner's motion to stay the proceedings
22 pending review by this Court. Filed simultaneously with this petition, therefore,
23 is a motion to stay the trial. Petitioner has also filed simultaneously a motion for
24 leave to submit the confidential report of the independent medical evaluator
25 (Exhibit 3) under seal, as well as an unfiled copy of the transcript of hearing held
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1 on March 7, 2013 (Exhibit 8).

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3 Petitioner has satisfied the requirements of a verification and proof of
4 service. See Attachments A and B.

5 Counsel respectfully requests a one-hour oral argument.


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7 This petition is based upon the Due Process clauses of the Fifth and
8 Fourteenth Amendments and the Right to Counsel clause in the Sixth
9 Amendment to the United States Constitution and the corresponding clauses in
10 Article 1, Section 8, of the Nevada Constitution; NRS 178.405 and 178.415;
11 Order in Desai v. Eighth Jud. Distr. Ct., No. 60038 (Nev. Sup. Ct., Jan. 24,
12 2012); and the following Points and Authorities.
13
14

15 DATED this 22d day of April 2013.

16 Respectfully Submitted,

17
18 WRIGHT STANISH & WINCKLER

19 By:

20 
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1 **POINTS AND AUTHORITIES**

2 **I. ISSUE**

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4 **Did the district court arbitrarily and capriciously rule that Petitioner must**
5 **proceed to trial after an independent medical evaluator, a forensic**
6 **psychiatrist, and defense counsel raised sufficient doubt as to his present**
7 **competency to assist counsel after suffering a stroke resulting in expressive**
8 **and receptive aphasia¹ and coupled with the neurologic deficiencies caused**
9 **by a previous stroke?**

10 **II. JURISDICTION**

11 This petition for extraordinary relief is properly before this Court pursuant
12 to NRS 34.320 and 34.160. Writ of mandamus is the appropriate procedure to
13 compel compliance with constitutional and statutory protections pertaining to
14 competency determinations. *See, Sims v. Eighth Judicial District Court*, 125
15 Nev. 126, 129-30, 206 P.3d 980, 982 (2009).
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17 Extraordinary relief is sought because the district court abused its
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19 ¹ Generally speaking, “aphasia” is either the partial or complete loss of
20 language. David C. Tanner, Forensic Aspects of Communications Sciences and
21 Disorders, 22-23, (Lawyers & Judges Publishing Comp. 2003). Most types of
22 aphasia are classified between two types of communication disorders: “The
23 expressive disorders affect speaking, writing, and using expressive gestures. The
24 receptive disorders affect reading and understanding the speech and gestures of
25 others.” *Id.* at 23. “Receptive language impairment can significantly impede the
26 patient’s comprehension of legal and medical issues.” *Id.* at 57. “Verbal
27 paraphasias are common word-retrieval behaviors in aphasic patients.” This
28 means that the aphasic patient may use a different word that desired, such as
saying “yes” when the desired word is “no,” or saying “up” instead of “down.” *Id.*
at 56-57.

1 discretion by failing to provide adequate procedural safeguards to determine
2 Petitioner's current ability to assist counsel in the trial of a complex prosecution
3 in disregard of the doubt raised by a court-appointed IME, a forensic
4 psychiatrist, and defense counsel. Without extraordinary relief, Petitioner will be
5 forced to proceed to trial when he suffers from receptive and expressive aphasia.
6 Moreover, he will lose the opportunity to have his current mental capacity
7 established at this point in time for appellate review.
8

9 10 11 **III. SUMMARY OF PETITION**

12 The district court abused its discretion in refusing to suspend trial and
13 initiate competency proceedings in disregard of reliable evidence of doubt as to
14 competency under NRS 178.405. Therefore, Petitioner seeks a writ of mandate
15 to compel the district court to suspend all proceedings and order a competency
16 evaluation under NRS 178.415.
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18 The district court arbitrarily and capriciously found that no doubt as to
19 competency existed despite the following substantial evidence. First, a court-
20 appointed independent medical evaluator ("IME"), David Palestrant, M.D.,
21 raised doubt as to Petitioner's competency by confirming that Petitioner suffered
22 a series of small strokes on February 24, 2013, which resulted in both receptive
23 and expressive aphasia. The IME opined that he should recover his neurologic
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1 functioning within the first nine months following the stroke, with full recovery
2 taking up to 18 months. The IME further opined that an earlier stroke occurring
3 on July 13, 2008, likely resulted in some degree of retrograde amnesia and
4 anterograde amnesia and difficulties with comprehending and contextualizing
5 speech. Exhibit 3 (60-61, 66). (The IME's explanation of retrograde and
6 anterograde amnesia are discussed below on pages 26-27.)
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9 Second, a forensic psychiatrist, Thomas E. Bittker, M.D., raised doubt as to
10 Petitioner's competency based on a neuropsychiatric assessment conducted in
11 October to December 2012, which determined that Petitioner was then
12 incompetent to assist counsel under the constitutional standard established in
13 Dusky v. United States, 362 U.S. 402 (1960). Exhibit 6 (88-90).
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16 Third, defense counsel, as an officer of the court for over 41 years, raised
17 doubt as to Petitioner's competency because Petitioner's present ability to
18 receive, process, and express speech and recall pertinent facts is impaired to such
19 a degree that he cannot sufficiently function during trial. Exhibit 10 (11, 16-17,
20 28, 170-71, 178, 182).
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23 Because the above evidence meets and exceeds the threshold of doubt
24 sufficient to raise a concern about Petitioner's competency to assist counsel, he
25 implores this Court to exercise its authority to provide extraordinary relief to
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1 protect his fair trial rights.

2 IV. STATEMENT OF PROCEDURAL FACTS

3 A. Indictment and Prior Petitions for Extraordinary Relief

4 On June 4, 2010, the Grand Jury sitting in Clark County returned an
5 indictment against Petitioner and two co-defendants stemming from the medical
6 procedures and billing practices at gastroenterology clinics operated by
7 Petitioner and other doctors. The case focuses on seven patients who were
8 treated at one of the clinics in July and September 2007, and subsequently tested
9 positive for Hepatitis C.
10

11 The Fourth Amended Indictment charges Petitioner and co-defendant
12 Ronald Lakeman with one count of Second-Degree Murder; seven counts of
13 Performance of Act in Reckless Disregard of Person (NRS 202.595); seven
14 counts of Criminal Neglect of Patients (NRS 200.495); 10 counts of insurance
15 fraud; one count of Theft; and two counts of Obtaining Money Under False
16 Pretenses. Exhibit 1 (#1-36).
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18 This matter is set for April 22, 2013, and is expected to last approximately
19 six to eight weeks. It will involve novel issues of law and complex medical
20 evidence.
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22 This Supreme Court had reviewed three prior petitions for extraordinary
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1 relief filed by Petitioner in this matter. On January 24, 2012, this Court denied
2 Petitioner's Writ of Mandamus in Case No. 60038, which raised due process
3 challenges to the evidentiary limitations the judge imposed on the post-Lake's
4 Crossing hearing held pursuant to NRS 178.460(1). Exhibit 2 (37-39). This
5 order will be discussed more fully below.
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8 On December 12, 2012, this Court granted, in part, a petition for habeas
9 relief in Case No. 61230, which ordered the dismissal of a facially defective
10 racketeering count and directed that the State amend the various criminal neglect
11 counts which were deemed insufficiently precise and ambiguous. On January
12 31, 2013, this Court summarily denied Petitioner's request for rehearing on the
13 issue of whether dismissal of the facially defective criminal neglect counts was
14 the appropriate remedy as opposed to permitting the State to amend the counts.
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18 On March 13, 2013, this Court denied a petition for habeas relief in Case
19 No. 62641, which challenged the second-degree murder charge based on
20 substantive and procedural due process grounds.
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22 **B. 2011 Competency Determinations**

23 About two years before the first indictment, Petitioner suffered an acute
24 stroke on July 13, 2008, which resulted in his hospitalization and rehabilitative
25 treatment at UCLA. He previously suffered a stroke in 2007 and has a history of
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1 heart problems. Exhibit 3 (41-43). Petitioner's pertinent medical history and
2 competency evaluations are summarized in the Independent Medical Evaluation
3 prepared by David Palestrant, M.D., which is appended in its entirety as Exhibit
4 3 (40-67).

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6
7 Soon after the original indictment, on July 21, 2010, the district court
8 granted the State's unopposed motion to refer Petitioner to competency court for
9 evaluation pursuant to NRS 178.415. Exhibit 4, Excerpts of Minutes, 7/21/10
10 (68-69). Two court-appointed experts, Michael Krelstien, M.D., a forensic
11 psychiatrist, and Shera Bradley, Ph.D., a psychologist, evaluated Petitioner.
12 Both determined that Petitioner was incompetent and recommended admission to
13 Lake's Crossing for aggressive treatment and comprehensive cognitive testing.
14 On February 8, 2011, competency court found that Petitioner was presently
15 incompetent and ordered him to be transported to Lake's Crossing for evaluation
16 and restoration under NRS 178.425. Exhibit 4 (70-71); Exhibit 3 (47-48).

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21 Petitioner was transferred to Lake's Crossing in or about March 24, 2011,
22 and remained there for approximately six months. On or about September 20,
23 2011, Lake's Crossing reported that Petitioner was competent. The competency
24 determination was based in large part upon his ability to adequately function in
25 the institutional setting and the perceived exaggeration of his cognitive
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1 deficiencies during psychological testing. Exhibit 3 (48-50).

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3 **C. Petition for Writ of Mandamus and Post-Lake's Crossing Hearing**

4 Petitioner requested a competency hearing to afford the defense a full
5 opportunity to examine and challenge the conclusions of the Lake's Crossing
6 evaluators pursuant to NRS 178.460(1). On December 13, 2011, the competency
7 court limited Petitioner's ability to present evidence during the hearing to cross-
8 examining the Lake's Crossing doctors and presenting only one expert whose
9 testimony would be restricted to evaluations, if any, occurring after his return
10 from Lake's Crossing.
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14 Petitioner immediately sought extraordinary relief from the this Court
15 challenging the restricted scope of the Section 178.460 hearing in Case No.
16 60038. By order dated January 24, 2012, this Court denied the petition, holding
17 that the lower court did not abuse its discretion in limiting the scope of a hearing
18 pursuant to NRS 178.460. This Court noted, however, that Petitioner could
19 obtain a broader inquiry into his present competency if a new motion showed
20 sufficient doubt as to his competency based on subsequent interactions and
21 evaluations pursuant to NRS 178.405 and 178.415. Exhibit 2 (37-38).
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25 On January 27, 2012, a hearing on the conclusions of the Lake's Crossing
26 doctors was held. By order dated February 2, 2012, the Honorable Kathleen
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1 Delaney ruled that Petitioner had the present ability to assist counsel. More
2 particularly, she found that the Lake's Crossing witnesses did not dispute that
3 Petitioner suffered cognitive deficiencies secondary to two strokes. However,
4 their observations and certain tests showed that he was exaggerating his
5 deficiencies. Exhibit 5 (72-75).
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8 **D. Petitioner's December 2012 Motion for Competency Evaluation**

9 On December 21, 2012, Petitioner filed a Motion for Competency
10 Evaluation, which requested transfer to competency court for assessment of his
11 present ability to assist counsel. Exhibit 6 (76-92). The State did not file an
12 opposition to the motion.
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15 The motion was based upon a psychiatric evaluation that was performed
16 approximately 13 months after the Lake's Crossing determination in September
17 2011. Additionally, the motion was based on the undersigned counsel's periodic
18 interactions with Petitioner following his return from Lake's Crossing.
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21 Attached to the motion were the independent neuropsychiatric evaluations
22 of Thomas E. Bittker, M.D., dated November 1, 2012 and December 5, 2012.
23 Dr. Bittker is a forensic psychiatrist. Dr. Bittker conducted a neuropsychiatric
24 examination; reviewed enumerated medical records, competency and
25 neurological assessments, and a recent aphasia evaluation performed at UCLA;
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1 interviewed Petitioner's wife; and consulted with neuroradiologist, Joseph Wu,
2 M.D. Dr. Bittker concluded that Petitioner was presently incompetent under the
3 *Dusky* standard. Additionally, undersigned counsel stated that he continued to
4 express a bona fide doubt as to Petitioner's competency. Exhibit 6 (76, 86 &
5 89)

8 **E. Hearing on Motion for Competency Evaluation, January 8, 2012**

9 On January 8, 2013, a hearing on the competency motion was held before
10 District Court Judge Valerie Adair, Department XX1. Exhibit 7 (93-111). The
11 district court ruled that the motion did not raise sufficient doubt to support a
12 further competency evaluation because the motion did not show anything new or
13 different from what was previously considered by Lake's Crossing. Exhibit 7
14 (107-08).

18 During the hearing, defense counsel emphasized that the motion was based
19 on NRS 178.405, raising a doubt as to Petitioner's current competency based on
20 post-Lake Crossing evaluation by Dr. Bittker. Counsel described his interactions
21 with his client that showed his continued inability to assist counsel. Although
22 the district court found that counsel's representations and Dr. Bittker's
23 evaluation were made in good faith, it noted that their conclusions were
24 dependant on Petitioner's responses. Since he was found to be malingering by
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1 Lake's Crossing over a year ago, the district court not want to give Petitioner a
2 "second bite of the apple" or return to "square one" on matters that were litigated
3 at the post-Lake's Crossing hearing. Exhibit 7 (98-103).

4
5 Ultimately, the district court ruled that it would not consider a doubt as to
6 competency to arise under NRS 178.405, unless there was objective medical
7 evidence showing a change in Petitioner's condition. In denying Petitioner's
8 motion for a competency evaluation, the district court explained:
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11 The way I read NRS 178.40[5], if doubt arises, that means
12 there has to be at least some threshold finding that there is doubt,
13 and who has to find doubt. . . There has to be a finding, and I find
14 that there is no evidence that anything has changed. There's no
15 new, you know, objective diagnostics as Mr. Staudaher has pointed
16 out.

17 You know, if there had been a new stroke, if there had even
18 been a major medical event, open-heart surgery or something like
19 that where you could say, well, maybe that's something that could
20 have, you know, a diabetic emergency where we had something
21 linking some kind of, you know, extreme medical event to cognitive
22 decline, I would say, well, okay, we need to visit this. We need to
23 evaluate this. There's something here. But there's no evidence of
24 that. There's no evidence of any change. There's no evidence that
25 there's anything different than what led Dr. Desai to be in front of
26 Judge Glass, however long ago that was, and then to be sent to
27 Lake's Crossing.

28 Exhibit 7 (107).

29 Counsel was in the process of drafting a petition for writ of mandamus on
30 this ruling when he received notice that Petitioner suffered a stroke on February

1 24, 2013.

2 **F. New Strokes Resulting in Expressive and Receptive Aphasia**

3
4 On Sunday, February 24, 2013, Petitioner suffered a stroke in the early
5 morning hours and was transported by ambulance to Summerlin Hospital. From
6 Sunday to Wednesday, he was in the Intensive Care Unit, where undersigned
7 counsel visited him on three separate occasions. On Wednesday, he was
8 transferred to the Intermediate Care Unit and ultimately discharged in the
9 afternoon of Friday, March 1, 2013. Exhibit 8 (115, 134-35).
10

11
12 By letter, dated March 1, 2013, counsel informed the district court and
13 district attorney's office of the stroke. (The district court placed this letter into
14 evidence at the hearing held on March 7, 2013. Exhibit 8 (134-35)) Counsel
15 related that neurological imaging and testing confirmed that Dr. Desai suffered
16 acute multi-focal infarction. While in the hospital, counsel could not converse
17 with Petitioner who was unable to form recognizable words. Counsel opined in
18 the letter that Petitioner did not have the current ability to assist in his defense
19 and it would be necessary to stay the proceedings and appoint competency
20 evaluators pursuant to NRS 178.405 and 178.416. Counsel offered to meet with
21 the district court and prosecutor to discuss the matter. Exhibit 8 (134-35).
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26 On March 4, 2013, the parties met in chambers with the district court
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1 judge. Counsel furnished the court and prosecutors with copies of two radiology
2 reports to confirm the occurrence of the stroke. A discussion ensued. The
3 district court determined that it would appoint an IME to review the medical
4 records of the new stroke in comparison with past medical and competency
5 records. Exhibit 8 (113-14, 118, 133).
6
7

8 At a status hearing held on March 7, 2013, the district court announced
9 that she was informed by letter from defense counsel that Petitioner had suffered
10 a stroke and counsel requested a stay of proceedings pending a competency
11 evaluation. The district court stated that, given the past findings that Petitioner
12 exaggerated his symptoms, it did not want to take the representations at face
13 value. Instead, the district court decided that, before initiating competency
14 proceedings, it was appropriate to appoint an IME who could establish whether
15 Petitioner suffered a stroke and determine the extent of additional brain
16 impairment. The parties concurred and the district court directed them to submit
17 the name of an IME the following day. Exhibit 8 (112-15)
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22 The district court also placed into a evidence a letter submitted by defense
23 counsel to the district court on March 6, 2013, requesting that Petitioner's
24 presence at the status hearing be waived based on his treating neurologist's
25 written opinion that Petitioner was in a weakened state and vulnerable to
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1 reoccurrence of stroke so soon after suffering a multifocal ischemic stroke. The
2 neurologist described the effects of the stroke: "The multifocal ischemic stroke
3 in the left cerebral hemisphere . . . had caused him to be confused, disoriented,
4 and has expressive language problems, with left arm and leg weakness." Exhibit
5 8 (115, 136-37)
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7
8 The district court explained its reasoning for denying the waiver of the
9 Petitioner. Given the past finding by Lake's Crossing that he malingered, the
10 district court did not believe that he was unable to appear in court. It noted that
11 he did not suffer a massive stroke requiring release to a subacute facility. The
12 district court also stated, "You know, frankly, weakness and language problems
13 and confusion to me does not suggest that someone cannot be brought to court."
14 Exhibit 8 (115). A dialogue ensued between the district court and counsel about
15 the district court's concerns of potential malingering and defense counsel's
16 concern's for his client's well-being and his current medical condition. Exhibit 8
17 (115-18)
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19
20 By order dated March 13, 2013, the district court issued an order
21 appointing Dr. Palestrant as the IME and setting forth the scope of his
22 evaluation. Exhibit 9 (138). The order defined the primary objective of the
23 evaluation as
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1 follows:

2 The primary objective of the independent medical evaluation is to
3 determine the nature and extent of any changes to Desai's brain
4 from the date of his release from Lake's Crossing on or about
5 October 7, 2011, to the date upon which he was released from
6 Summerlin Hospital on March 1, 2013.

7 Order, 3/13/13, Exhibit 9 (138).

8 The order further directed the IME to evaluate and comment upon the medical
9 records of Petitioner's previous strokes, competency evaluations, and past
10 treatment and therapy. Exhibit 9 (138-40)

12 **G. Denial of Competency Evaluation and Evidentiary Hearing**

13 Late in the afternoon on Monday, April 15, 2013, the district court caused
14 a copy of the IME's report to be distributed to the parties. The report
15 summarized the medical records and the doctor's impressions of what type of
16 symptoms would be expected to be manifested given the location and extent of
17 the stroke in 2008 and the new stroke in 2013. Exhibit 3 (40-66).
18 Exhibit 3 (40-66).

19 The IME confirmed that on February 24, 2013, Petitioner suffered
20 "multiple small left hemispheric stroke involving the frontal, partial, occipital
21 and temporal regions." Exhibit 3 (58). The new strokes resulted in both
22 expressive and receptive aphasia. Exhibit 3 (66). The IME defined "aphasia as
23 the term used to describe a neurologic disturbance of speech, and encompasses
24 the term used to describe a neurologic disturbance of speech, and encompasses
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28 the term used to describe a neurologic disturbance of speech, and encompasses

1 both the ability to produce and understand speech.” Receptive aphasia involves
2 “difficulty with comprehension.” Exhibit 3 (59); *see also* Tanner, *supra*, n. 1, for
3 general description of aphasia.
4

5 The IME opined that, after a period of time, he expected Petitioner to
6 return close to his level functioning prior to February 2013.² He stated, “Most of
7 his gains in neurologic function will be seen in the first 9 months, but full
8 recovery can take up to 18 months.” Exhibit 3 (66).
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11 At the beginning of calendar call, the district court stated that it reviewed
12 the report and concluded that Petitioner had “a minor stroke” and, therefore,
13 postponement of the trial for a competency evaluation was unwarranted. It
14 interpreted the IME report to mean that the Petitioner may have difficulty
15 expressing himself and, therefore, it would make reasonable accommodations for
16 counsel to communicate with Petitioner. It suggested that Petitioner could
17 communicate by handwriting, texting, or typing on a laptop. Exhibit 10 (143-
18 44).
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22 Defense counsel strongly and passionately disagreed with the district
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25 ² Based upon the objective confirmation of the existence, description and
26 location of the February 24, 2013 strokes, Dr. Palestrant expects improvement
27 over time, but also notes that whether Petitioner will return to his premorbid
28 functional status is unclear at this point. Exhibit 3 (64)

1 court's interpretation of the IME report, especially as it pertained to Petitioner's
2 ability to accurately receive and relate information. A lengthy debate ensued
3 between the district court and parties about their differing interpretations of the
4 IME report. Much of the debate concerned the meaning and weight to assigned
5 to the IME's comments about Petitioner's past malingering versus his finding
6 that Petitioner's strokes resulted in expressive and receptive aphasia and required
7 time to regain his post-morbid neurologic functioning. Defense counsel
8 emphasized that the IME's ultimate conclusion and counsel's inability to
9 communicate with his client given the aphasia problem raised a reasonable doubt
10 as to competency. The district court and State, on the other hand, emphasized
11 Petitioner's past malingering and overall impression that the new stroke was
12 minor. Exhibit 10 (5-71, 178-80).

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18 The district court permitted defense counsel to renew his previous motion
19 for competency evaluation filed on December 21, 2012 (Exhibit 6), and denied
20 upon hearing held on January 11, 2013 (Exhibit 7). In the alternative, defense
21 counsel also moved for an evidentiary hearing in which the IME could explain
22 disputed matters and ambiguities in the report, as well as explain what it means
23 to suffer from expressive and receptive aphasia. Exhibit 10 (151-52, 162-63).

24
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26 In support of his oral motions, defense counsel argued that the IME report
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1 itself raised sufficient doubt as to competency when it concluded that Petitioner
2 suffered a series of small strokes that effected his ability to not merely speak, but
3 to comprehend speech. Defense counsel proffered that the IME would likely
4 testify that aphasia is more than the inability to speak words. Rather, it is the
5 inability to comprehend speech that is received and the inability to express words
6 that are trapped in the brain. Exhibit 10 (157-58, 169).
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8
9 Additionally, defense counsel described his interactions with Petitioner
10 following the new stroke. While visiting him in the hospital, Petitioner made
11 only indiscernible sounds. He explained that Petitioner continued to participate
12 in speech therapy, as directed by his doctor, and his speech has improved.
13
14 However, Petitioner's receptive and expressive aphasia still presented a
15 significant barrier to attorney-client communications. Counsel explained that he
16 had prior experience interacting with people who suffered strokes, such as his
17 former law partner, who struggled with aphasia. Counsel perceived that
18 Petitioner genuinely agonized and struggled to communicate with him. Exhibit
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21
22 10 (152).

23 To demonstrate the difficulty in attorney-client communications, counsel
24 described his attempts to interact with client on the morning of the calender call.
25
26 Since Petitioner's speech is significantly impaired, he attempted to communicate
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1 by handwriting. Counsel questioned Petitioner about simple facts concerning the
2 date, his age, the name of his therapist, and the names of doctors with whom he
3 worked. It took 20 minutes for the Petitioner to produce answers to these
4 questions and the answers were incorrect and simplistic. Counsel introduced
5 into evidence the Petitioner's handwritten answers. Counsel also was unable to
6 communicate effectively with the Petitioner regarding three witnesses that the
7 State identified in its motion to admit prior bad acts. Counsel offered to take the
8 witness stand to be subjected to cross-examination, but the State declined the
9 offer. Exhibit 10 (170-71, 178, 182).

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14 The district court ultimately denied Petitioner's renewed motion for a
15 competency evaluation and the motion for an evidentiary hearing. Lastly, the
16 district court verbally denied counsel's motion to stay the proceeding so that he
17 could seek relief from this Court. Exhibit 10 (169 & 171).

18
19 Petitioner now seeks a writ of mandamus to obtain a stay of the trial and
20 competency evaluation.
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IV. ARGUMENT

The district court arbitrarily and capriciously ruled that Petitioner must proceed to trial after an independent medical evaluator, a forensic psychiatrist, and defense counsel raised sufficient doubt as to his present competency to assist counsel after suffering a stroke resulting in expressive and receptive aphasia and coupled with the neurologic deficiencies caused by a previous stroke.

A. Introduction

Where reasonable doubt arises about a defendant's competency, a district court's failure to order a competency evaluation constitutes an abuse of discretion and a denial of due process. *See Ford v. State*, 102 Nev. 126, 133, 717 P.2d 27, 31-32 (1986); *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983). The IME's ultimate conclusion that Petitioner suffered small strokes resulting in expressive and receptive aphasia and counsel's interactions with Petitioner cast substantial doubt upon his competency sufficient to trigger the due process protections of NRS 178.405 and 178.415. In keeping with this Court's observations in the instant case, these doubts about competency merit a broader inquiry:

We note that any motion challenging petitioner's present competency (based on interactions and evaluations since his return from Lake's Crossing) would require a broader inquiry should the motion create sufficient doubt as to petitioner's competency to stand trial to warrant such an inquiry. *See [State v. Ferguson*, 124 Nev. 795, 805, 192 P.3d 712, 719 (2008)], *Morales v. State*, 116 Nev. 19, 22, 922 P.2d 252, 254 (2000); NRS 178.405; NRS 178.415. But

1 that inquiry is not part of the proceedings under NRS 178.460.
2
3 Order in Desai, No. 60038, *2, n. 1. Exhibit 2 (38).

4 The district court abused its discretion in finding that there was no doubt
5 as to Petitioner's competency in disregard of the following evidence: (1) the
6 IME's confirmation that Petitioner suffered new strokes in February 2013,
7 resulting in both expressive and receptive aphasia; (2) the IME opinion that
8 Petitioner should be able to return close to his level of neurologic functioning
9 prior to February 2013, within the first nine months and full recovery expected
10 within 18 months; (3) the IME's conclusion that the 2008 stroke likely caused
11 retrograde amnesia for a period of up to two years prior to that stroke; (4) Dr.
12 Bittker's finding that Petitioner is incompetent under the *Dusky* standard; and (5)
13 counsel's representation describing the inability to effectively communicate with
14 Petitioner due to the effects of the strokes.

15 **B. The Law: Doubt as to Competency**

16 Under Nevada's competency procedures, if any "doubt arises as to the
17 competence of the defendant, the court shall suspend the proceedings, the trial or
18 the pronouncing of the judgment, as the case may be, until the question of
19 competence is determined." NRS 178.405(1). The court must fully consider the
20 doubt in light of "all available information, including any prior competency
21 competence of the defendant, the court shall suspend the proceedings, the trial or
22 the pronouncing of the judgment, as the case may be, until the question of
23 competence is determined." NRS 178.405(1). The court must fully consider the
24 doubt in light of "all available information, including any prior competency
25 competence of the defendant, the court shall suspend the proceedings, the trial or
26 the pronouncing of the judgment, as the case may be, until the question of
27 competence is determined." NRS 178.405(1). The court must fully consider the
28 doubt in light of "all available information, including any prior competency

1 reports and any new information calling the defendant's competency into
2 question." State v. Olivares, 124 Nev. 1442, 1149, 195 P.3d 864, 868 (2008).

3
4 Although the district court has discretion in considering the sufficiency of
5 doubt, its discretion is restrained. This Court addressed the reasonable doubt
6 standard applicable to the decision to more fully evaluate a defendant's ability to
7 assist counsel:
8

9
10 A hearing to determine a defendant's competency is
11 constitutionally and statutorily required where a reasonable doubt
12 exists on the issue. Whether such a doubt is raised is within the
13 discretion of the trial court. The court's discretion in this area,
14 however, is not unbridled. A formal competency hearing is
15 constitutionally compelled any time there is "substantial evidence"
16 that the defendant may be mentally incompetent to stand trial. *In*
17 *this context, evidence is "substantial" if it "raises a reasonable*
18 *doubt about the defendant's competency to stand trial. Once there*
19 *is such evidence from any source, there is a doubt that cannot be*
20 *dispelled by resort to conflicting evidence."* *The trial court's sole*
21 *function in such circumstances is to decide whether there is any*
22 *evidence which, assuming its truth, raises a reasonable doubt*
23 *about the defendant's competency.* If such evidence exists, the
24 failure of the court to order a formal competency hearing is an abuse
25 of discretion and a denial of due process.

26
27 Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113, *quoting in part*, Moore v.
28 United States, 464 F.2d 663, 666 (9th Cir. 1972). [Citations omitted and emphasis
added.]

29
30 The above-quoted rule was derived from federal precedent in Moore and
31 Pate v. Robinson, 383 U.S. 375 (1966). In discerning the existence of reasonable
32 doubt about competency, the trial court is merely making a threshold finding

1 rather than determining the ultimate issue of competency. The Ninth Circuit
2 explained:
3

4 The function of the trial court in applying *Pate*'s substantial
5 evidence test is not to determine the ultimate issue: Is the defendant
6 competent to stand trial? *[It's] sole function is to decide whether*
7 *there is any evidence which, assuming its truth, raises a reasonable*
8 *doubt about the defendant's competency. . . . It is only after the*
9 *evidentiary hearing, applying the usual rules appropriate to trial,*
10 *that the court decides the issue of competency of the defendant to*
11 *stand trial.*

12 Moore, 464 F.2d at 666. [Emphasis added.]

13 **C. Doubt Raised by the Independent Medical Evaluator**

14 The IME report, standing on its own, presents reliable evidence of doubt
15 as to Petitioner's competency following the February 2013 strokes. The ultimate
16 conclusion of the IME fulfilled the district court's primary objective to determine
17 the nature and extent of any changes in Petitioner's brain since his release from
18 Lake's Crossing. Order, 3/13/13/, Exhibit 9 (138). The IME's conclusion
19 summarized the differences in neurological functioning resulting from the July
20 2008 stroke, which lead to Petitioner's Lake's Crossing evaluation and the recent
21 February 2013, which raises doubt as to Petitioner's present competency. It
22 reads:
23
24

25 Dr. Desai has suffered a series of ischemic strokes since 2007, the
26 most significant in 2008, effected his mesial temporal lobe which
27 left him with expressive speech difficulties, and mild difficulties
28

1 with comprehension, integration and contextualizing of speech. He
2 had some degree of anterograde amnesia and mild retrograde
3 amnesia. The extent of his cognitive deficits including his claimed
4 profound selective memory loss, is unexplained by his strokes, and
5 is more likely related to malingering and to a lesser extent
6 depression. *His new strokes in February 2013 involve the speech*
7 *cortex, with a resultant expressive and receptive aphasia. Again*
8 *questions of some degree of embellishment of the symptoms have*
9 *been raised. Memory should not be further compromised by the*
10 *new strokes. However these strokes are small and it's my*
11 *expectation that he will make significant gains and return close to*
12 *his level of function prior to February 2013. Most of his gains in*
13 *neurologic function will be seen in the first 9 months, but full*
14 *recovery can take up to 18 months.*

15 Exhibit 3 (66)(Emphasis added).

16 Quite simply, the February 2013 stroke effected the area of the brain
17 controlling comprehension of speech (receptive aphasia), as well his ability to
18 express himself through speech (expressive aphasia). The IME opined that it
19 would take Petitioner up to several months to regain his level of neurologic
20 function that existed prior to February 2013. Exhibit 3 (66).

21 Secondly and significantly, the IME also confirmed that the July 2008
22 stroke caused Petitioner to experience "some degree of anterograde amnesia and
23 mild retrograde amnesia," as well as difficulties processing and comprehending
24 speech inputs and following complex commands. Exhibit 3 (60-61, 66). In
25 reviewing Petitioner's medical history prior to February 2013, the IME opined
26

1 that Petitioner's claimed degree of dysfunction during formal neuropsychiatric
2 testing between 2009 and 2013 were embellished given the extent of and
3 anatomic location of the strokes. He stated that the embellishment was due to
4 malingering and depression. Exhibit 3 (60-61, 66).

5
6 The IME, however, viewed the speech and language evaluation performed
7 at UCLA in April 2009, as more accurately reflecting Petitioner's baseline
8 deficits consistent with the location and extent of the strokes:
9

10
11 Based on the location of the strokes, testing done with what appears
12 to be better efforts such as the Speech and Language evaluation in
13 April 2009, and observations of his behavior when not being
14 formally tested his baseline deficits likely included: some trouble
15 with verbal expression and word finding, some mild difficulty with
16 association tasks like contextualizing, integrating and processing
17 speech inputs and following complex commands, and possibly some
18 visual spatial difficulties as well. Ability to read, including complex
19 paragraphs and write, was intact. *At worst he would have had*
20 *partial verbal memory disturbances more involved with forming*
21 *new long-term memories and some degree of retrograde amnesia*
for events up to 2 years before the 2008 stroke, but beyond this he
should have been able to recall most past events with not much
disturbance. Logical thinking would remain intact as well as many
higher order executive functions.

22 Exhibit 3 (60-61)(emphasis added).

23 The IME defined "retrograde amnesia" as "[v]ariable deficits in recall of
24 memory within certain interval before the onset of the amnestic state" while
25 "anterograde amnesia" is the [i]mpaired registration of new information."
26
27
28

1 Exhibit 3 (60). He opined that the new strokes did not further compromise
2 Petitioner's memory. Exhibit 3 (66).
3

4 The IME was not provided information regarding the criminal charges.
5 Hence, he was unaware that the alleged criminal negligence and billing fraud
6 occurred in July and September 2007 – well within the two-year interval of time
7 that the IME opined that Petitioner suffered “*some degree of retrograde amnesia*
8 *for events up to 2 years before the 2008 stroke.*” Exhibit 3 (61). Nor, did the
9 IME receive information that the trial would last several weeks and involve
10 numerous witnesses testifying about the events occurring within 10 to 12 months
11 prior to the July 2008 stroke. Nor, did the IME receive information that the trial
12 will involve complex medical and scientific evidence when he found that the
13 2008 stroke caused “*some trouble with verbal expression and word finding,*
14 *some mild difficulty with association tasks like contextualizing, integrating and*
15 *processing speech inputs and following complex commands.*” Exhibit 3 (61-60).
16
17
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19
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21 The IME's description of the neurologic functioning effected by the 2008
22 and 2013 stroke raise a doubt as to Petitioner's present competency to provide
23 meaningful assistance in the defense of this complex and lengthy trial.
24

25 Seventeen months after his return from Lake's Crossing, the effects of
26 Petitioner's February 2013 stroke raise substantial doubt sufficient to trigger the
27
28

provisions of NRS 178.405 and 178.415.

D. Doubt Raised by Dr. Bittker's October 2012 Competency Evaluation

The IME's observations regarding the retrograde amnesia and various speech and comprehension deficiencies further supports Dr. Bittker's conclusion that Petitioner was incompetent under the *Dusky* standard when he was evaluated in October 2012, nearly 13 months after his return from Lake's Crossing.

Dr. Bittker concluded that Petitioner was incompetent under the *Dusky* standard:

Employing the Dusky criteria, the defendant demonstrated an incapacity to fully understand the nature of the criminal charges with which he is confronted, moderate impairment in his ability to understand the nature and purposes of court proceedings, and severely impaired in his ability to aid and assist counsel. . . .

. . . .
Dr. Desai unfortunately falls short of a number of key abilities necessary to be competent to stand trial. Specifically, he has only the most superficial awareness of the players in the courtroom process, he cannot recall events sufficient to aid in his defense, he lacks sufficient cognitive flexibility to fully integrate the trial proceedings, and his speech-impairments are sufficient to cause him great challenge in expressing his thought to his attorney. All of these deficits conspire to undermine his ability to aid and assist counsel sufficiently to allow him to participate effectively in his own defense.

There are a number of complex charges arrayed against Dr. Desai. Because of the complexity of the charges, even with the provision of his historical information by other sources, his ability to appreciate his reasoning at the time of the alleged offenses and to attempt to justify his behavior have been profoundly impaired by his

1 strokes.

2 Bittker's Independent Neuropsychiatric Assessment appended to Exhibit 6 (86 &
3 89).

4 **E. Doubt Raised by Defense Counsel**

5
6 A defense attorney's expressed bona fide doubt as to his client's
7 competency is a significant factor in determining whether competency
8 proceedings are necessary. *See, Nevada v. Calvin*, 122 Nev. 1178, 1184, 147
9 P.3d 1097, 1100 (2006), *citing, Drope v. Missouri*, 420 U.S. 162, 177 n. 13
10 (1975)(counsel's doubts as to client's competency are especially relevant given
11 close contact).
12

13
14 Defense counsel, as an officer of the court for over 41 years, described for
15 the district court his interaction with Petitioner following the February 2013
16 stroke. In counsel's view, Petitioner is capable of listening to people and
17 reacting. He has improved his speech from the time when counsel visited him in
18 the hospital to the present. Currently, he can respond to simple question with a
19 few words. Due to his expressive and receptive aphasia, he exhibits confusion
20 and frustration when trying to express himself. In counsel's view, Petitioner is
21 unable to accurately express his thoughts due to the aphasia and other effects of
22 the strokes.
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27 In counsel's opinion, there is substantial doubt that Petitioner lacks the
28

1 present ability to sufficiently function during the upcoming trial. Petitioner
2 cannot sufficiently recall or communicate pertinent facts necessary to present a
3 defense; Petitioner cannot sufficiently follow the anticipated testimony at trial in
4 order to assist counsel confront the witnesses against him; and Petitioner cannot
5 sufficiently testify in his defense. Counsel personally observed that Petitioner
6 cannot communicate effectively by handwriting, as discussed above. See, *supra*,
7 *p. 20-21*.

8
9
10
11 The 2012 competency evaluation by Dr. Bittker and the IME report
12 support counsel's bona fide doubt of his client's competency. Doubt exists as to
13 Petitioner's current neurologic functioning and ability to assist counsel in this
14 complex case. Based on counsel's prior experience in working with people
15 effected by aphasia, including his former law partner, counsel recognizes that
16 Petitioner is likewise genuinely struggling to communicate his thoughts.
17
18 Counsel opines that Petitioner cannot respond to counsel's basic questions and
19 more complex questions concerning the medical procedures and practices in
20
21 2007.

22
23 Unlike the district court's interpretation of the IME report, defense
24 counsel's interactions with Petitioner demonstrate more than mere difficulty in
25 articulating understandable words. Rather, counsel has a bona fide doubt that
26
27
28

1 Petitioner is able to process or comprehend counsel's questions and accurately
2 express his responses to the recent strokes. Exhibit 10 (11, 16-17, 28, 170-71,
3 178, 182).

4
5 **F. The District Court's Refusal to Find Doubt as to Competency**

6
7 The district court abused its discretion in ruling that it would not stay the
8 proceedings and appoint competency evaluators pursuant to NRS 178.405 and
9 178.415. The district court may properly consider the prior finding of
10 malingering in determining whether doubt of competency exists. However,
11 when there is conflicting evidence as to the issue of doubt, it must initiate
12 competency proceedings. This Court's ruling in Melchor-Gloria bears
13 reiteration:
14
15

16 *Once there is such evidence [of reasonable doubt] from any source,*
17 *there is a doubt that cannot be dispelled by resort to conflicting*
18 *evidence.''' The trial court's sole function in such circumstances is*
19 *to decide whether there is any evidence which, assuming its truth,*
20 *raises a reasonable doubt about the defendant's competency. If*
21 *such evidence exists, the failure of the court to order a formal*
22 *competency hearing is an abuse of discretion and a denial of due*
23 *process.*

24 Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113, *quoting in part, Moore v.*
25 *United States*, 464 F.2d 663, 666 (9th Cir. 1972). [Citations omitted and emphasis
26 added.]

27 The district court's ruling arbitrarily and capriciously ignores the
28 reasonable doubt raised by multiple sources: Dr. Palestrant, Dr. Bittker, and

undersigned counsel. The evidence provided by these sources is reliable and truthful in that it is based on both objective and subjective medical analysis, as well as defense counsel's observations of the Petitioner. To the extent that there is evidence of past malingering, it conflicts with the more recent evidence of doubt presented by defense counsel and Drs. Palestrant and Bittker. Given the new stroke and resulting aphasia, formal competency evaluation is essential to discerning whether Petitioner's current neurologic functioning permits him to effectively assist in his defense.

In the hearing on Petitioner's motion for competency evaluation based on Dr. Bittker's finding of incompetency, the district court refused to consider psychiatric evidence and counsel's bona fide doubts as to competency without new objective evidence of a medical episode, such as a new stroke, heart attack or diabetic emergency, that would account for a cognitive decline. Exhibit 7 (107). Yet, when Petitioner suffers a new stroke resulting in receptive and expressive aphasia – and the court-appointed IME opines that it will take several months for Petitioner to regain his neurologic functioning -- the district court finds no doubt as to competency. This finding constitutes an abuse of discretion.

The district court is concerned about the previous findings of Petitioner exaggerating the symptoms of his 2008 stroke. Assuming, *arguendo*, that

1 Petitioner embellished his past stroke symptoms because he was malingering and
2 depressed, as suggested by the IME, it does not mean that there is not a
3 legitimate doubt as to his present competency resulting from his new stroke.
4 Moreover, the IME's report reveals that, despite any subconscious or conscious
5 effort to malingering, Petitioner indeed had neurologic deficiencies that raise doubt
6 as to competency. In addition to the IME's conclusions that the new stroke
7 resulted in aphasia, he also found that previous acute stroke impacted speech,
8 ability to comprehend, and follow complex commands and caused retrograde
9 amnesia of events two years prior to his July 2008 stroke. Exhibit 3 (60-61).
10 There is, therefore, substantial doubt as to whether Petitioner is competent to
11 assist in the defense of this complex case involving events in 2007, despite the
12 past observations of malingering.
13
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18 In previously denying Petitioner's motion for competency evaluation in on
19 January 8, 2012, the district stated that it did not want to give him a "second bite
20 of the apple" or return to "square one" on matters that were litigated at the post-
21 Lake's Crossing hearing. Exhibit 7 (98-103). It must be emphasized that
22 Petitioner did not have a "first bite of the apple" or occupy a position on "square
23 one." That is to say, he was never afforded an opportunity to fully litigate his
24 past or present competency. Upon the unopposed motion of the State, Petitioner
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1 was sent to Lake's Crossing where he was deemed competent in September 2011.
2 Thereafter, Petitioner was only permitted to cross-examine the Lake's Crossing
3 doctors and refused his request to present his own witnesses pursuant to NRS
4 178.460.
5

6
7 Now that substantial doubt as to competency is raised by the defense, the
8 district court has deprived Petitioner of the opportunity to have his competency
9 fully and accurately evaluated. Given the substantial evidence of doubt as to
10 competency, the reluctance to permit an accurate evaluation of Petitioner's
11 present competency is arbitrary and capricious and contrary to this Court's
12 insistence on accurate assessment of competency:
13
14

15 "The conviction of an accused while he is incompetent violates due
16 process." An accurate competency evaluation is therefore critical to
17 avoiding a violation of the defendant's constitutional rights.
18 Accuracy is best served when the district court and any appointed
19 experts consider a wide scope of relevant evidence at every stage in
20 the competency proceeding, including the initial doubts as to the
21 defendant's competency, the experts' evaluation and the hearing
22 after the evaluation.

23 Nevada v. Calvin, 122 Nev. 1178, 1183, 147 P.3d 1097, 1100 (2006), *quoting in*
24 *part*, Krause v. Fogliani, 82 Nev. 844, 847, 421 P.2d 949, 950-51 (1966).

25 The IME report, Dr. Bittker's finding of incompetency, and counsel's
26 interactions with Petitioner raise a "reasonable doubt" about competency which
27 warrants initiation of competency proceedings. *See, Moore*, 464 F.2d at 666;
28

1 Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113. Compliance with the due
2 process protections of NRS 178.405 and 178.415, will best ensure an accurate
3 competency evaluation in this complex prosecution.
4

5 Petitioner, therefore, urges this Court to mandate the suspension of
6 proceedings and appointment of two court-appointed competency evaluators
7 pursuant to NRS 178.405 and 178.415. If there is a disputes as to competency
8 thereafter, a full and fair competency hearing should be conducted pursuant to
9 NRS 178.415.
10
11

12
13 DATED this 22d day of April 2013.

14 Respectfully Submitted,

15
16 WRIGHT STANISH & WINCKLER

17
18
19 By: 

20 RICHARD A. WRIGHT

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23 Nevada Bar No. 4057

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28 Attorneys for Dipak Desai

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2. I am an attorney licensed to practice law in the State of Nevada. I am retained to represent Petitioner Dipak Desai in State v. Dipak Kantilal Desai, Case Nos. 10C265107 (8th Jud. Dist. Ct., Clark Cty. Nev.).

4. I further attest and verify that I am authorized to file this Petition to protect the interest of my client.


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Attachment A

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<p>The Honorable Valerie Adair District Court, Department 21 200 Lewis Avenue Las Vegas, NV 89101</p>	<p>Michael V. Staudaher/ Pamela Weckerly Clark County District Attorney's Office 200 Lewis Avenue, 3d Floor Las Vegas, NV 89155</p>
<p>Catherine Cortez Masto Nevada Attorney General's Office Criminal Justice Division 100 North Carson Street Carson City, NV 89701-4717</p>	<p>Frederick Santacroce Fasatty@yahoo.com</p>

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 22d day of April 2013.

Debra K. Caroselli
DEBRA K. CAROSELLI

Attachment B