UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH EDWARD DUNCAN, III, Defendant.	)	Case No. 2:07-00023-EJL **ORDER ON REMAND**

On July 11, 2011 the Ninth Circuit issued an order in this matter wherein it determined a competency hearing was required before this Court could determine whether the Defendant had competently waived his right to appeal. *See United States v. Duncan*, 643 F.3d 1242 (9th Cir. 2011). The Ninth Circuit remanded the case for this Court to hold a retrospective competency hearing. *Id*. at 1250. The Court did so and, at the conclusion of the hearing, a full transcript was completed and the parties were ordered to file briefing which has now been received. (Dkt. 794.)[1] The matter is ripe for the Court's consideration.

[1] When citing to the transcript from the Retrospective Competency Hearing in this Order, the Court will use "RCHT" followed by the day and page number.

DISCUSSION

I. Retrospective Competency Hearing

Although retrospective competency hearings are disfavored, they are permissible "whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." *McMurtre v. Ryan*, 539 F.3d 1112, 1131 (9th Cir. 2008) (quoting *Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir. 1994)); *see also Clayton v. Gibson*, 199 F.3d 1162, 1169 (10th Cir. 1999) (citing *Drope v. Missouri*, 420 U.S. 162, 180–83 (1975)). "A 'meaningful' determination is possible where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original...proceedings." *Id*. (quoting *Reynolds v. Norris*, 86 F.3d 796, 802 (8th Cir. 1996)).

A retrospective competency determination focuses on "a defendant's psychological state of mind at a specific [antecedent] point in time," *Collins*, 430 F.3d at 1267, which in the Defendant's case would be his mental state as it existed in November of 2008 when he waived his right to appeal and, possibly, in April of 2008 when the Defendant asked he be allowed to go forward *pro se*. "[M]edical reports contemporaneous to the time [of trial] greatly increase the chance for an accurate retrospective evaluation of a defendant's competence." *Clayton*, 199 F.3d at 1169 (quoting *Moran*, 57 F.3d at 696 (citation omitted)). Relevant witnesses might be clinical psychologists, jail staff, trial counsel, and the like. *Id.* at 1171; *see also Pate v. Smith*, 637 F.2d 1068, 1072 (6th Cir. 1981) (noting that "a

retrospective determination [of a defendant's competency] may satisfy the requirements of due process if it is based on evidence related to observations made or knowledge possessed at the time of trial"). From January 8, 2013 through February 14, 2013, the Court heard from numerous such witnesses and viewed many such exhibits. Having done so, the Court finds as follows.

II. The Competency Determination

As the Ninth Circuit stated in the order remanding this case:

> The Constitution provides criminal defendants with the right to be competent during trial. *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), and *Drope v. Missouri*, 420 U.S. 162 (1975)). At all times before his conviction, a defendant must have "a rational as well as factual understanding of the proceedings against him" and "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.* (internal quotation marks and emphasis omitted). If a defendant fails to satisfy either of those requirements, then the proceedings against him may go no further. *Id.* And the competency right does not end at a conviction. In addition, a defendant must have the "'capacity to appreciate his position and make a rational choice'" whether to challenge his conviction or sentence on appeal or in post-conviction proceedings. *Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1250 (9th Cir. 2000) (quoting *Rees v. Peyton*, 384 U.S. 312, 313 (1966) (per curiam)). That standard applies as well when a defendant decides to abandon an appeal after having properly filed it. *Id.*

United States v. Duncan, 643 F.3d 1242, 1248 (9th Cir. 2011). "Competence is defined as the ability to understand the proceedings and to assist counsel in preparing a defense." *Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997) (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)). "Although the level of competency mandated by due process does not vary based on the specific stage of the criminal proceeding,...the defendant's ability to

participate or assist his counsel must be evaluated in light of the type of participation required." *United States v. Dreyer*, 705 F.3d 951, 961 (9th Cir. 2013) (citing *Godinez v. Moran*, 509 U.S. 389, 400–01 (1993)); *see also Chavez v. United States*, 656 F.2d 512, 518-19 (9th Cir. 1981) (citing cases).

As to the particular issue presented on remand in this case, the Defendant's competency to waive his right to appeal, in order "[t]o waive a constitutional right, a defendant must have that degree of competence required to make decisions of very serious import. A defendant is not competent to waive constitutional rights if mental illness has substantially impaired his or her ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of the waiver." *Chavez*, 656 F.2d at 518 (citations omitted). Similarly, in *Rees v. Peyton*, the Supreme Court stated the standard for determining whether a defendant was mentally competent to withdraw his certiorari petition was "whether he has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. 312, 314 (1966).

In analyzing the competency of an individual to waive his or her rights, the Ninth Circuit has approved the use of a three-part inquiry as follows:

> (1) Is the person suffering from a mental disease or defect?
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> (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options

> available to him?
>
> (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does the disease or defect, nevertheless, prevent him from making a rational choice among his options?
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> If the answer to the first question is no, the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second question is answered no, the third question is determinative; if yes, the person is incompetent, and if no, the person is competent.

Comer v. Schriro, 463 F.3d 934, 943 (9th Cir. 2006) (quoting *Comer v. Stewart*, 230 F.Supp.2d 1016, 1036-37 (D. Ariz. Oct. 16, 2002) (quoting *Rumbaugh v. Procunier*, 753 F.2d 395, 398-99 (5th Cir. 1985); *Lonchar v. Zant*, 978 F.2d 637, 641-42 (11th Cir. 1992); *Ford v. Haley*, 195 F.3d 603, 615 (11th Cir.1999)). The Court finds this analysis to be the correct one for the questions presented in this case.[2]

The standard applicable to this analysis is a preponderance of the evidence. *See Mason*, 5 F.3d at 1225; *see also* 18 U.S.C. § 4241 (a defendant is not competent to stand trial if "the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."). Although the circuits appear somewhat split regarding

[2] The parties both cite to *Rees v. Peyton* as the applicable standard. (Dkt. 735, 832.) The three-part analysis utilized in this Order employs the same standard as the one articulated in *Rees* and the Court's determination as to the Defendant's competency in this case is the same under either analysis.

who bears the burden of proof, in this case the Government has conceded and the defense agrees that the Government bears the burden of proof, which is in line with the Ninth Circuit's decisions. *See United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991). The district court's determination as to whether a defendant was competent to waive his or her appeal right is a strictly factual one that is accepted unless clearly erroneous. *Comer*, 463 F.3d at 943 (citations omitted).

Therefore, the Court will employ the above three-part analysis in this Order to the questions presented on this remand beginning with whether, giving full and fair consideration to all of the evidence, the Government has established by a preponderance of the evidence that the Defendant is competent to waive his appeal and further legal review of his conviction and sentences in this matter. *Duncan*, 643 F.3d at 1247; *see also Comer*, 463 F.3d at 943 and *Comer*, 230 F.Supp.2d at 1038. If the Court concludes the Defendant was competent to waive his right to appeal, the Ninth Circuit's remand instructs this Court to reinstate its prior Order. If, however, the Court finds the Defendant did not competently waive that right, then the remand directs this Court to proceed to determine whether the Defendant competently waived his right to counsel before the Penalty Phase hearing. *Duncan supra.* If the right to counsel was not competently waived, the Ninth Circuit directed that this Court vacate the Defendant's sentence and convene a new Penalty Phase hearing with the Defendant properly represented. *Id.*

III. Application of the Competency Determination Test

A. Is the person suffering from a mental disease or defect?

The parties hotly contest whether or not the Defendant suffered from a mental disease or defect in this case. This is a factual question that turns in large part upon the testimony and evidence offered by the experts presented from each side and the credibility of those witnesses. Such determinations are made by the district court, in the first instance, and accepted unless clearly erroneous. *Comer*, 463 F.3d at 943. "The importance of live testimony to a credibility determination is well recognized and longstanding." *Oshodi v. Holder*, 729 F.3d 883, 891-92 (9th Cir. 2013) (review of BIA) (citing cases). This circuit has historically recognized that, as the finder of fact, the district court has the benefit of viewing the live testimony first hand and making credibility determinations of the witnesses:

> It is still true, however, that it is the trial judge who hears the witnesses and who must pass upon their credibility. We sometimes tend to forget that the testimony of a witness, presented to us in a cold record, may make an impression upon us directly contrary to that which we would have received had we seen and heard the witness. It ought not to be assumed that United States District Judges are any less determined to preserve constitutional rights than we are. They, too, are sworn to uphold the Constitution. That they do, in fact, take seriously their obligations to protect the constitutional rights of defendants in cases such as this is demonstrated by the many reported opinions in which they have dealt with such questions....

United States v. Page, 302 F.2d 81, 84 (9th Cir. 1962) (discussing the trial court's finding of fact on the motion to suppress); *see also United States v. Bergera*, 512 F.2d 391, 393 (9th Cir. 1975) ("This court has often recognized the value of observing witnesses in order to determine the truth."). "The longstanding and repeated invocations in caselaw of the need of district courts to hear live testimony so as to further the accuracy and integrity of the

factfinding process are not mere platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system. After all, '[w]here an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility.'" *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012) (district court abused its discretion in not holding a hearing before reversing a magistrate Judge's credibility determination in favor of the government) (citing cases).

Here, the Government presented five expert witnesses. Four of which were court-appointed experts who evaluated the Defendant: Dr. Robert Engle, Dr. Cynthia Low, Dr. Craig Rath, and Dr. Patricia Kirkish. The Government's fifth expert witness was Dr. Ronald Roesch whom the Government had retained. The Defendant presented the testimony of defense-retained experts: Dr. James Merikangas, Dr. Ruben Gur, Dr. Ari Kalechstein, and Dr. George Woods.[3]

On the question of whether the Defendant suffered from a mental disease or defect, the conclusions or diagnosis of the experts were somewhat varied. Much of the testimony and questioning concerning this issue had to do with the Defendant's ideological beliefs and ideas. In particular, the Defendant's statements to various individuals concerning his ideology which related to what the Defendant called the "Truth" and oneness as well as an

[3] The defense has filed a Motion to File Supplemental Brief. (Dkt. 842.) The Motion relates to the Government's citation to cases where other courts have rejected the opinions of certain defense-retained experts who were also retained in this case. The Court has not considered that portion of the Government's brief and, therefore, finds the Defendant's Motion to be moot.

Epiphany that the Defendant stated he experienced on the mountain.[4]

Generally, to the Defendant, the Truth is something that can only be found by silence when one reaches their own epiphany or enlightenment without any interference. The Defendant stated that words and his participation in the court system would impede the path to the Truth. (Dkt. 613.) The Truth was more important to the Defendant than the outcome of this case. The Epiphany is what the Defendant experienced while he was on the mountain with the surviving victim. (Dkt. 613.) While at the campsite, the Defendant intended to kill the lone remaining victim. Mere seconds before he was about to deliver the fatal blow with a large rock, the Defendant stated he had the Epiphany and realized what he was doing was wrong. As a result of this awareness, the Defendant decided to return the victim to her home and turn himself in. The Defendant stated his hope or belief is that everyone, including the jurors, would experience their own epiphany during the trial and, thereby, attain the Truth. At this competency hearing, the witnesses were questioned about whether the Defendant's ideological beliefs and ideas were delusional and/or psychotic.

The witnesses from both sides generally agreed that the definition of a "delusion" is consistent with that found in the DSM-IV-TR.[5] The witnesses generally defined a delusion

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[4] The Defendant discussed his ideology during his interactions with several people including mental health professionals, his attorneys, lay witnesses, law enforcement, and the courts before which he appeared.

[5]The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (abbreviated "DSM-IV-TR") was the manual published by the American Psychiatric Association that existed at the time of this retrospective competency hearing. The DSM-IV-TR provided a standard of diagnostic criteria for mental disorders at the time by organizing psychiatric diagnosis into five Axis. Since then, a revised version (abbreviated "DSM-5") has been issued. The defense called Dr. Michael

as a fixed false belief based on an incorrect inference about external reality that is firmly sustained despite what almost everyone else believes, and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or subculture. (RCHT, Day 2 at 255, 371) (RCHT, Day 3 at 671) (RCHT, Day 4 at 865) (RCHT, Day 12 at 3054, 3112-13, 3162-63, 3189-91) (RCHT, Day 14 at 3699-3700) (RCHT, Day 16 at 4009, 4039, 4042-43) (RCHT, Day 20 at 5077-78, 5098.) The term "psychosis" refers to a thought disorder that generally means an individual is unable to distinguish between the real and the unreal and experiences delusions, hallucinations, and disorganized thinking or behavior. (RCHT, Day 2 at 371-72) (RCHT, Day 3 at 669.)

1. Government's Witnesses

Dr. Engle was the Government's first expert witness at the retrospective competency hearing.[6] Dr. Engle became involved in this matter when the competency question was raised back in April of 2008. At that time, the Defendant had plead guilty to certain charges and when he requested to represent himself, his stand-by counsel filed a Motion to Find the Defendant Incompetent pursuant to 18 U.S.C. § 4241. (Dkt. 415.) To address the issue both sides recommended that the Court contact Dr. Engle to perform an evaluation of the

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First who was editor of the DSM-IV-TR, to testify concerning the manual. Dr. First was qualified as an expert in the field of psychiatry and specifically in the area of delusions and testified on those subjects; in particular as to religious delusions. (RCHT, Day 12 at 3158, 3163, 3176.)

[6] Dr. Engle was certified as an expert in the area of forensic psychology. (RCHT, Day 2 at 225.)

Defendant in regards to whether the Defendant was competent to represent himself in this matter. (Dkt. 398.) Dr. Engle agreed to the appointment and met with the Defendant on April 23, 24, and 28, 2008. During those meetings, Dr. Engle interviewed the Defendant and administered a battery of tests. The meetings lasted a total of three and a half hours. Dr. Engle's report listed his DSM-IV-TR's diagnostic impression of the Defendant as:

Axis I:	302.2	Pedophilia, exclusive type
Axis II:	301.7	Antisocial Personality Disorder (Rule Out)
		Narcissistic Traits
Axis III:		None apparent
Axis IV:		Facing sentencing, possible Life or Death sentence.
		Incarceration.
Axis V:		GAF=65

(Gov. Ex. 22 at 9.)

Prior to completing his report, Dr. Engle reviewed certain materials including the Court's Order for mental evaluation, the applicable statutes, a letter from the Government and accompanying transcript, a letter from Special Agents Michael and Gail Gneckow, a transcript of the April 18, 2008 court proceedings, a report of Dr. Merikangas dated April 30, 2008, the Motion to find the Defendant incompetent, an evaluation by Dr. Gur dated April 30, 2008, and a report by Dr. Woods dated April 29, 2008. (Gov. Ex. 22.) The materials reviewed, the test results, and his clinical observations of the Defendant led Dr. Engle to conclude that the Defendant had no "present (psychological) symptoms" and that the Defendant was not "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the

proceedings against him or to assist properly in his defense." (Gov. Ex. 22 at 9-10.)

The defense's cross examination of the Defendant was critical of the Defendant's high MMPI-II test scores and the apparent inconsistency between the scores and Dr. Engle's conclusions that the Defendant was competent; noting this inconsistency was not addressed nor explained in his report. The defense also questioned the amount of time Dr. Engle spent with the Defendant and whether he had all the relevant materials before him when he reached his conclusion. Having viewed this cross examination in person and having considered the points raised by the defense, the Court finds Dr. Engle's report and testimony to be credible and valuable in resolving the question presented here.

Dr. Engle was appointed by the Court upon the recommendation of both sides to perform an independent evaluation of the Defendant's mental competency. His May 8, 2008 report applied the *Dusky* standard for competency and his examination, evaluation, and observations of the Defendant occurred at the very time period at issue. (Dkt. 420.) "[M]edical reports contemporaneous to the time [of trial] greatly increase the chance for an accurate retrospective evaluation of a defendant's competence." *McMurtre v. Ryan*, 539 F.3d 1112, 1131 (9th Cir. 2008) (quoting *Moran*, 57 F.3d at 696 (citation omitted)).

During cross examination, Dr. Engle acknowledged the existence of the Defendant's high MMPI-II test scores and the fact that his report did not specifically address the inconsistency between the scores and his conclusions that the Defendant was competent. Dr. Engle explained, however, that although the scores were high, the scores are just tools and

he relied more on his clinical observations in arriving at his conclusion. The Court finds Dr. Engle's explanation to be credible and reliable. The experts from both sides acknowledge that the clinical interviews/observations are truly the "gold standard" for diagnosis of mental disease or defects and that the test scores are only tools. Here, as Dr. Engle pointed out in his testimony, the Defendant demonstrated a high level of intelligence, good use of language, was able to carry out assignments and follow direction, completed tasks given to him, and made virtually zero errors on the psychological test. During the interviews the Defendant discussed with Dr. Engle the Epiphany, his ideology, past abuse, head traumas, and substance use. This discussion was consistent with statements on the same topics made by the Defendant to other experts and witnesses. During these discussions and meetings with the Defendant, Dr. Engle testified that he did not observe any evidence of hallucinations, disordered thought process, or delusions. The Court finds Dr. Engle's conclusion that the Defendant had no present psychological symptoms that would affect his competency to be well founded, timely, and correct. (Gov. Ex. 22 at 9.)

After receiving Dr. Engle's report and considering the then pending Motion to find the Defendant incompetent, the Court, on its own, ordered a second mental competency evaluation. (Dkt. 427.) The Defendant was transported to the Federal Detention Center at SeaTac where Dr. Low was assigned to perform the evaluation.

Dr. Low met with the Defendant for 75 minutes on May 23, 2008 before he decided to no longer participate in the evaluation. (Gov. Ex. 24 at 2.) Thereafter, Dr. Low continued

to observe the Defendant at the facility and undertook a comprehensive and thorough investigation of the materials relevant to the Defendant including legal documents, medical and mental health records, letters, transcripts of telephone calls, internet blogs, and numerous contacts with the defense attorney. (Gov. Ex. 24 at 2.)[7] Dr. Low also briefly visited the Defendant six other times to follow up on whether he would resume his cooperation, which he declined. (RCHT, Day 3 at 574-582.)

Similar to Dr. Engle's findings, Dr. Low diagnosed the Defendant according to the DSM-IV-TR as follows:

Axis I:	302.2 Pedophilia, Sexually Attracted to Both Males and Females, Nonexclusive Type
	302.84 Sexual Sadism
Axis II:	301.7 Antisocial Personality Disorder with narcissistic traits
Axis III:	None

(Gov. Ex. 24 at 22) (RCHT, Day 3 at 631-32.) [8] Dr. Low's report concluded there was no evidence of a major mental disorder or defect aside from those listed above. (Gov. Ex. 24 at 24.) Specifically, Dr. Low determined there were no signs or symptoms of a major mood or thought disorder and an absence of a history of psychosis or thought disorder. At this hearing, Dr. Low opined that the Defendant had "a very good ability to understand the nature and the

[7] Dr. Low testified at the retrospective competency hearing that "[t]here was a voluminous amount of mental health and medical records," collateral materials, and that she could only recall one other time in the 300-400 forensic assessments she has done where there was as much documented history on someone she was evaluating. (RCHT, Day 3 at 572-73.)

[8] Furthermore, although she did not rely on his report and made her own independent determination, Dr. Low agreed with Dr. Engle's diagnosis and observations of the Defendant. (RCHT, Day 3 at 619-20.)

consequences of the court proceedings against him, and that it was highly likely that he would be able to represent himself" and that he was competent. (RCHT, Day 3 at 632.)

The Court finds Dr. Low's report to be an exhaustive and extensive evaluation of the Defendant's medical past and mental condition at the time of her evaluation. (Dkt. 484) (Gov. Ex. 24.) Dr. Low considered a voluminous amount of information concerning the Defendant and requested two extensions of time from the Court in order to ensure she had the proper amount of time to review all of the materials and complete her report. These materials included records supplied by both the Government and the defense team at the time. The fact that Dr. Low had reviewed these materials is evident in her written report and was amply demonstrated during her testimony at the retrospective competency hearing. (RCHT, Day 3 at 565-573.) Furthermore, the Court found Dr. Low's testimony at the hearing to be extremely credible.

Dr. Low has conducted anywhere from 300 to 400 forensic psychological assessments involving competency questions as well as insanity determinations. Dr. Low was qualified as an expert in forensic psychology at the hearing. (RCHT, Day 3 at 559.) As with many of the individuals who testified, Dr. Low stated that during her interview with him, the Defendant was helpful in providing information, was able to communicate and both ask and answer questions and understood the conversation. Dr. Low also noted that the Defendant's comments were appropriate and understandable, he was intelligent, and he engaged in the conversation. More importantly, Dr. Low testified that the Defendant understood the purpose

of the evaluation and he disagreed with his defense attorneys request to have him deemed incompetent. (RCHT, Day 3 at 588.)

The defense questioned Dr. Low's conclusions in her report during its cross examination, as well as through the testimony of defense witness Dr. Xavier Amador. Dr. Low confidently and effectively explained her conclusions and report during her cross examination. Further, the Court found the testimony of Dr. Amador to be quite limited. Dr. Amador critiqued Dr. Low's written report by pointing to isolated phrases as evidence of delusions and thought disorders not recognized by Dr. Low as such. This testimony by Dr. Amador, however, was not effective or persuasive to the Court. While Dr. Amador undoubtedly is well educated in the field of psychology, he has never met nor examined the Defendant and his review of the record and materials relevant to the Defendant was not as comprehensive or unbiased as was Dr. Low's review.[9] Although Dr. Amador recognized in his testimony on cross examination that context is important in determining whether something is a delusion, he went on to state that some statements can be self evident as a delusion. (RCHT, Day 16 at 4091-92.) While that may be true, the Court finds that Dr. Amador's testimony concerning the statements critiqued in Dr. Low's report lacked appropriate context and credibility. It was also questionable whether the Defendant was the

[9] The Court recognizes that Dr. Amador reviewed some materials before he issued his short written report and then, prior to his testimony, reviewed additional materials about which he was questioned. (RCHT, Day 16 at 4116-4138.) The Court finds Dr. Amador's testimony concerning his review of these materials to be of little value as his record review was made only for the purpose of discrediting Dr. Low's report. Dr. Amador gave no testimony concerning his review of the materials independent from his critique of Dr. Low's report leaving the Court to find Dr. Amador's review to have been less substantial than that of Dr. Low's and lacking in credibility.

source of the statements isolated by Dr. Amador and relied upon as evidence of delusions or thought disorders. Furthermore, Dr. Low was questioned about whether particular isolated statements were evidence of delusions and she responded repeatedly that more context and/or questioning would be needed to determine whether the statement was a delusion or not. (RCHT, Day 3 at 672-84, 705-17, 730-31.) The Court finds Dr. Low's testimony on this point to have been extremely credible and appropriate. Nearly every expert on the matter from both sides agreed that context and/or background information is necessary in order to determine whether an isolated statement is a delusion or a symptom/evidence of a mental disease. For these reasons, the Court accepts Dr. Low's testimony and finds Dr. Amador's testimony to be of limited value.

The defense was also critical of the fact that the Defendant refused to cooperate further with Dr. Low after the first interview and of a comment in her report regarding the "limited contact" with the Defendant. (RCHT, Day 3 at 633-64.) Dr. Low clarified that when reading the entire report in context the comment about "limited contact" is explained. Dr. Low went on to testify that she had enough time and material upon which to reach a conclusion as to the question before her. (RCHT, Day 3 at 634-37, 700.) The Court finds Dr. Low's responses to this line of questioning to have been appropriate in addressing the issue raised by the defense and that Dr. Low fully explained the issue to the Court's satisfaction.

The Government also called the two court-appointed experts who evaluated the Defendant during the proceedings in Riverside, California in 2009: Dr. Rath and Dr.

Kirkish.[10] Dr. Rath did not give any formal diagnosis in his report but did agree with Dr. Engle's conclusions and found the Defendant to be competent to stand trial and to represent himself in that case. (Gov. Ex. 90.) Likewise, Dr. Kirkish did not give any formal diagnosis in her report but concluded the Defendant was competent to proceed. (Gov. Ex. 86.)[11] Both of these witnesses were heavily cross examined concerning their reports and conclusions. The Court found both witnesses' testimony to be credible, particularly in light of their responses to the cross examination by the defense. Furthermore, Drs. Rath and Kirkish testified concerning the Defendant's competency in the Riverside case where the jury found the Defendant to be competent. While the time period of the Riverside proceeding was some months later than the time the Defendant waived his right to appeal in November of 2008, the mental issue in question at that proceeding encompassed the time period relevant to this case.

Finally, the Government offered the testimony of its retained expert Dr. Roesch who had completed a retrospective competency evaluation of the Defendant. The Government did not, however, rely upon Dr. Roesch's testimony in their post-hearing briefing. The defense effectively cross examined Dr. Roesch concerning his report and the conclusions reached

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[10] Dr. Rath was qualified as an expert in forensic psychology. (RCHT, Day 4 at 838.) and Dr. Kirkish was qualified as an expert in psychology. (RCHT, Day 5 at 1097.)

[11] Similarly, the reports by the defense experts generally did not detail a DSM diagnosis but, instead, provided summary conclusions as to their findings. (RCHT, Day 3 at 609, 611-12, 614) (RCHT, Day 12 at 2964, 3087-88) (RCHT, Day 14 at 3651) (RCHT, Day 20 at 5268.) The Court does not give more or less weight to a "DSM diagnosis" as opposed to a summary conclusion. Both are accepted methods of expressing an expert opinion concerning competency.

therein. In particular, the defense drew into question how Dr. Roesch used the raw score data from testing performed by other practitioners, relied upon other experts' conclusions, and criticized his limited experience in conducting this type of retrospective evaluation. The Court has reviewed Dr. Roesch's report, the video taped interview between Dr. Roesch and the Defendant, and the transcript from the retrospective competency hearing. Having done so, the Court does not find Dr. Roesch's testimony or report to be useful or reliable in addressing the issue presented in this matter. For these reasons the Court has not placed any weight on Dr. Roesch's testimony or report in reaching its decision herein.

2. Defense Witnesses

The defense's first expert witness was Dr. Merikangas who completed a neurological and psychiatric examination of the Defendant.[12] Dr. Merikangas interviewed the Defendant in relation to this case in 2008 on three occasions in February and twice in April.[13] Dr. Merikangas ordered brain-imaging scans be conducted along with additional quantitative psychological testing. In his 2008 report, Dr. Merikangas concluded that the Defendant "demonstrated a number of the symptoms of serious thought disorder including poverty of content of speech, tangential and circumstantial speech, derailment of ideas, perseveration, and pressured speech." (Def. Ex. B73 at 2.) He went on to find that Defendant suffered from

[12] Dr. Merikangas was qualified as an expert in neurology and psychiatry but not brain imaging. (RCHT, Day 11 at 2927) (RCHT, Day 12 at 3043, 3052.) The Court allowed the parties to make proffers regarding Dr. Merikangas' review of the Defendant's brain scans. Even considering those proffers, the Court's ruling in this matter would remain the same.

[13] Dr. Merikangas also interviewed the Defendant in August of 2010 in relation to the Riverside case and again interviewed the Defendant in this case in September of 2012 for three hours.

delusional thinking, psychosis, and hallucinations which motivated the Defendant's decision to proceed *pro se*. (Def. Ex. B73 at 4.) Ultimately, Dr. Merikangas concluded in his report that the Defendant's brain damage is the probable cause of his psychosis, that his brain impairments interfered with his ability to make rational decisions, and that he is incapable of rationally understanding and participating in the proceedings and, therefore, is incompetent. Dr. Merikangas also testified in the Riverside proceeding where the jury found the Defendant competent. (RCHT, Day 12 at 3086, 3095.)

Dr. Merikangas' testimony was not particularly credible to this Court. His conclusions and findings were based in large part upon Dr. Merikangas' review of other individuals' interviews with the Defendant, what the defense attorneys told him, and/or reports by others. *See e.g.* (RCHT, Day 12 at 3133.) When asked on cross examination for specifics about his findings and opinions in this case, Dr. Merikangas was unable to recall particulars and generally offered little that would support his conclusions.[14] Further, the Government effectively cross examined Dr. Merikangas regarding the basis for his conclusions regarding brain trauma by pointing out the lack of any comparative CAT scan or MRI done at the time the Defendant suffered the prior head injuries that would confirm he had brain trauma. (RCHT, Day 12 at 3088-3091.) In addition, the Government's cross examination revealed that nothing in the medical records before Dr. Merikangas' established that the Defendant

[14] Dr. Merikangas' manner in testifying on direct or redirect was 180 degrees different from that on cross examination. The Court questions the weight and credibility of his testimony in this regard because on direct and redirect the particulars or substance of Dr. Merikangas' answers were provided within counsel's questions.

had a brain injury; drawing into question the basis for Dr. Merikangas' conclusion on direct that the Defendant's brain damage is the probable cause of his psychosis and that of his brain impairments. (RCHT, Day 12 at 3091.)

On cross examination the Government also revealed that Dr. Merikangas' work involves a fair amount of lectures to the defense bar since at least 1999, most of his testimony in murder/death penalty proceedings were for the defense, and he has consulted on the subject of prosecutorial misconduct in death penalty cases. (RCHT, Day 12 at 3061-68, 3073-83.) Dr. Merikangas estimated having testified in approximately 100 murder proceedings since 1998, most of which were death penalty cases. In all but two of those cases, Dr. Merikangas testified for the defense. (RCHT, Day 12 at 3066-68.) Dr. Merikangas' evasive manner and tone while testifying, particularly on cross examination, made his bias evident and drew into question the credibility of his testimony and conclusions. More importantly, the Court found Dr. Merikangas' testimony lacked substance to support his conclusions.

The defense then called Dr. Gur, a clinical neuropsychologist, to testify concerning the PET and MRI scans of the Defendant's brain.[15] Dr. Gur interviewed the Defendant in April of 2008. During this interview, the Defendant relayed the same ideology he had

[15] Dr. Gur's field is neuropsychology with a sub-specialty in clinical neuropsychology focusing on integrating neuroimaging into neuropsychology. The parties agreed, and the Court so found, that Dr. Gur was qualified as an expert in neuropsychology but his expert testimony as to neuroimaging was limited to the quantitative analysis of such neuroimaging; he was not qualified as an expert in clinically reading neuroimages. (RCHT, Day 14 at 3516, 3536, 3540, 3542.) The Court did allow Dr. Gur to offer some testimony distinguishing between clinical reads of neuroimages and quantitative analysis of neuroimages but such testimony was limited to a general understanding, not any expertise of Dr. Gur. (RCHT, Day 14 at 3537, 3551.)

consistently spoken of regarding his Epiphany, the Truth, and his belief system. (RCHT, Day 14 at 3608-23.) In his 2008 report, Dr. Gur concluded that the Defendant suffered from hallucinations, delusions and thought disorders. (Def. Ex. B72.) Dr. Gur also testified in the Riverside case in 2009. Dr. Gur interviewed the Defendant again in September of 2012 for the purpose of evaluating whether he was competent to waive his right to appeal. (RCHT, Day 14 at 3624.) During this more recent three hour interview, Dr. Gur testified that the Defendant exhibited symptoms of delusions, dissociations, derailment, and that it was evident the Defendant suffered from psychosis. (RCHT, Day 14 at 3631.)

Dr. Gur testified that his review of materials from the Defendant's history showed the main event from the Defendant's youth was an automobile accident when he was 15 years old in which he hit the steering wheel requiring surgery on his orbital bones. Dr. Gur speculated this accident would "very likely" impact brain integrity. (RCHT, Day 14 at 3523.) Following this accident, Dr. Gur noted the Defendant's school records showed a decline in his school performance, which Dr. Gur attributed to the frontal impact the Defendant suffered in the car accident. The Government effectively cross examined Dr. Gur on this point, showing other reasons existed that could explain the decline in the Defendant's performance at school during this time that were not considered by Dr. Gur. (RCHT, Day 14 at 3688-90.))

MRI and PET scans of the Defendant's brain were conducted in Boise, Idaho on

February 27, 2008 by Dr. Steven V. Marx. (Def. Ex. B68.)[16] Although Dr. Marx read the results of those tests to be normal, Dr. Gur testified it is not uncommon for a brain scan to be clinically read as "normal" in patients who suffer from psychosis or other brain abnormalities. Because the Defendant's neuroimaging was normal, Dr. Gur testified he was able to perform a quantitative analysis using his automated algorithm. (RCHT, Day 14 at 3713-16.)[17] His analysis began with the Defendant's MRI and PET scans being re-read by specialists at Dr. Gur's hospital. Dr. Gur then used the numbers generated from the re-readings as well as the neuropsychological data compiled by Dr. Craig Beaver and entered that data into the behavioral imaging algorithm in order to get an objective assessment of the location and extent of the Defendant's brain damage based on neuropsychological testing. (RCHT, Day 14 at 3560-61.) The results of the algorithm, Dr. Gur testified, show a significant deficit in the Defendant's left frontal orbital lobe area extending to the temporal and parietal lobes.

As to the quantitative analysis of the Defendant's MRI scan, Dr. Gur testified the findings show bilateral impairment of the amygdala as well as some other areas of the brain. (RCHT, Day 14 at 3579-81.) The quantitative analysis of the Defendant's PET scan, Dr. Gur stated, revealed both hypermetabolism and hypometabolism in various areas of his brain

[16] MRI is an abbreviation for a magnetic resonance imaging. PET is an abbreviation for positron emission tomography.

[17] The process for performing the quantitative analysis is to input neurocognitive test data into a computer that then applies the algorithm and produces a topographic display in the form of a behavioral image of the subjects neuropsychological performance based on the test results.

which produces a pattern where when the Defendant is faced with stress, his limbic brain becomes hyperactive, but his rational brain becomes hypoactive resulting in aggressive behavior that can get out of control. (RCHT, Day 14 at 3601-02.)[18] The most significant deficit revealed by the quantitative PET analysis, Dr. Gur testified, is a drastic hypometabolism in the hippocampus and amygdala combined with hyperactivation of cortical regions. (RCHT, Day 14 at 3605-06.)

Dr. Gur's findings were drawn into question when the Government pointed out in cross examination that the algorithm did not use scores from tests the Defendant took where he performed very well, such as tests that measured frontal lobe functioning, executive functioning, problem solving, and mental flexibility. (RCHT, Day 14 at 3661-82.) The Government also questioned Dr. Gur regarding the use of revised tests not in existence at the time the algorithm was developed and the accuracy of the algorithm. On redirect, Dr. Gur testified that some of the tests pointed to by the Government cannot be used because the algorithm is not able to weigh them and the same abnormality would be shown. Dr. Gur stated the methodology is used to locate where an abnormality is but the clinical interview is what the conclusion as to competency is based on. (RCHT, Day 15 at 3820-21.) On this point, the Court finds the Government's questioning raises a viable issue regarding the fact that the algorithm did not have the ability to account for the Defendant's other test scores

[18] While it is true the Defendant's actions when committing the crimes in this case were aggressive in nature, no former counsel or other lay witness testified that the Defendant acted aggressively or out of control in their presence. The Court never observed such behavior either.

showing good cognitive functioning. The fact that the other scores were not used could account for the variance in the Defendant's results and may, at least, reduce the level of severity of any abnormality that was found by the algorithm. In sum, the Court found Dr. Gur's testimony quite interesting, but his conclusions somewhat questionable given the formula did not take into account all of the testing of the Defendant, including a great number of tests where the Defendant scored well.

Dr. Craig Beaver is a licensed psychologist who specializes in clinical neuropsychology and forensic psychology.[19] Dr. Beaver became involved in the Defendant's state case in July of 2005 when he was contacted by the Defendant's state attorney John Adams to assist with possible mitigation. In that capacity, Dr. Beaver completed a neuropsychological work up and psychosocial biography of the Defendant. Notably, Dr. Beaver testified that he was not asked to do a competency evaluation of the Defendant between July of 2005 and 2008 and that his involvement in 2008 was "minimal." (RCHT, Day 13 at 3220, 3245, 3256.) Dr. Beaver met with the Defendant ten times between July of 2005 and February of 2008 during which he interviewed the Defendant and administered tests. (RCHT, Day 13 at 3221-22.)[20] The testing, Dr. Beaver stated, showed the Defendant

[19] Although he did not prepare a written report in this case, Dr. Beaver was qualified as an expert in neuropsychology but his testimony was limited in that he was not allowed to give any opinions about competency, mental disorders, or symptoms of mental disorders. Dr. Beaver was allowed to testify regarding his neuropsychological testing of the Defendant. (RCHT, Day 13 at 3281-3289.) The Court has discussed Dr. Beaver's testimony in this section because it provided background for the other expert's testimony.

[20] Dr. Beaver did clarify than his psychometrician, James Dennison, administered much of the testing on August 19, 2005 and December 29, 2005. (RCHT, Day 13 at 3223.)

performed relatively well in most areas of neurocognitive functioning but that the Defendant has some consistent core areas of difficulty, including high-level language and sense of smell controlled by the left-frontal temporal area of the brain. (RCHT, Day 13 at 3232-35, 3263-70, 3273, 3279, 3291.) Dr. Beaver tested the Defendant's IQ at "significantly above average." (RCHT, Day 13 at 3258.) Dr. Beaver opined that based on his testing the Defendant, at that time, was not malingering. (RCHT, Day 13 at 3262.)

On cross examination, the Government questioned Dr. Beaver regarding various tests on which the Defendant performed either at or above average. (RCHT, Day 13 at 3300-3345.) Dr. Beaver administered approximately fifty tests to the Defendant, producing a total of 140 scores. (RCHT, Day 13 at 3344-45.) Dr. Beaver testified that in most areas the Defendant tested very well, but in other areas he did not. (RCHT, Day 13 at 3349.) Dr. Beaver did clarify that given the Defendant's high IQ he would have expected higher scores on certain of the tests. On re-direct, Dr. Beaver also discussed the importance of using the neuropsychological tests as viewed in the larger context and the pattern of the results as opposed to just a score card.

Dr. Kalechstein is a licensed clinical psychologist with specialty training in the areas of neuropsychology and forensic psychology. (RCHT, Day 20 at 5060.)[21] Dr. Kalechstein was hired by the defense attorneys in the Riverside case in late 2008 to early 2009 and testified in that hearing. (RCHT, Day 20 at 5253, 5274-75.) Dr. Kalechstein was again

[21] Dr. Kalechstein was qualified as an expert in the field of clinical and forensic psychology. (RCHT, Day 20 at 5066-67.)

retained by the defense to testify in this hearing where he testified he has completed around 80-100 competency evaluations and worked on approximately twenty capital cases. Although he stated that he does not limit his work to defense cases, Dr. Kalechstein estimated his appointment rate to be about 15 to 20 percent for prosecution agencies and about 80 to 85 percent for defense attorneys. (RCHT, Day 20 at 5068-69.)[22]

In conducting his evaluation, Dr. Kalechstein interviewed the Defendant twice in February and May of 2009 and prepared a report dated August 18, 2009. (Def. Ex. H02.) He also prepared a PowerPoint presentation for the Riverside hearing that he later updated for this hearing, primarily to include data obtained by Dr. Roesch. (RCHT, Day 20 at 5075-76, 5288.)[23] Dr. Kalechstein's direct testimony here, in large part, walked through his PowerPoint slides which, the Government pointed out, contained conclusions and information not similarly made in his written report. (RCHT, Day 20 5266-68.) During his direct testimony, Dr. Kalechstein extrapolated particular statements by the Defendant from Dr. Low's report as well as statements the Defendant made to Dr. Kalechstein during his own interviews. (RCHT, Day 20 at 5083-5101, 5109-12, 5119-21, 5129, 5199-5201.)

Dr. Kalechstein also testified regarding the reports, findings, and conclusions of the other court appointed experts. (RCHT, Day 20 at 5149-56, 5159-61, 5165-66, 5202-25.) Dr.

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[22] Dr. Kalechstein did testify that he has consulted prosecutors in between six and eight capital cases and has testified in penalty phase capital proceedings on behalf of the prosecution, but stated that those cases were several years ago. (RCHT, Day 20 at 5229-5230.)

[23] Dr. Kalechstein's PowerPoint presentation (Def. Ex. H03) that he prepared for the Riverside case was not admitted. As the Court noted above, it has not considered Dr. Roesch's testimony or report in this matter.

Kalechstein disagreed with the experts who concluded that the Defendant suffered from antisocial personality disorder. (RCHT, Day 20 at 5166- 5170.) He testified that such a diagnosis is incorrect because the condition is inconsistent with the Defendant's change in thinking or paradigm shift. Instead, Dr. Kalechstein concluded that the Defendant suffered from a thought disorder and, as a result of that condition, was unable to represent himself at the time of the 2009 Riverside hearing. (RCHT, Day 20 at 5076-77, 5126-28.)

The symptoms of the Defendant's thought disorder, Dr. Kalechstein opined, included delusions and, in particular, paranoid delusions. Dr. Kalechstein distinguished between religious or deeply held beliefs and delusions. (RCHT, Day 20 at 5077-81, 5193-96.) Dr. Kalechstein identified several statements made by the Defendant which he testified were delusional and concluded, as to his competency in the Riverside case, that the Defendant's thought disorder significantly impaired his ability to make rational decisions and to assist his attorneys. (RCHT, Day 20 at 5124-28.) This thought disorder, Dr. Kalechstein testified, is "chronic and durable" as it existed prior to 2009 and likely as early as 2005. (RCHT, Day 20 at 5130-32, 5144-45.)

During his testimony, Dr. Kalechstein agreed that you cannot base a conclusion regarding whether a statement or person is delusional based on a single data point but "have to look at the data as a whole in their entirety" and "look at the thinking of that person in the aggregate." (RCHT, Day 20 at 5080.) In particular, Dr. Kalechstein stated the best assessment of the Defendant's statements is to read the entire interviews he gave with the

other experts and witnesses. (RCHT, Day 20 at 5361-62.) On cross examination, however, the Government pointed out that many of Dr. Kalechstein's conclusions were without appropriate context and/or not based on accurate statements made by the Defendant himself. (RCHT, Day 20 at 5289-96, 5311-12, 5314-19, 5321-22, 5337-38, 5341-46.) The Government also highlighted several relevant details regarding the crimes in this case that Dr. Kalechstein did not know about or inquire into. In particular, the Defendant did not tell Dr. Kalechstein about his Epiphany on the mountain; instead Dr. Kalechstein used excerpts from mainly Dr. Low's report in reaching his conclusions on that matter. (RCHT, Day 20 at 5314.)

The Court finds Dr. Kalechstein's conclusions that the Defendant was delusional and/or psychotic to be lacking context and substance given the fact that Dr. Kalechstein did not have the factual background of the Defendant's crimes in this case and, specifically, had not himself discussed with the Defendant his ideology and the Epiphany. All of the experts, including Dr. Kalechstein, stated context is important in determining a diagnosis. Dr. Kalechstein, however, had not questioned the Defendant as to the most critical subject matter relating to the Defendant's mental health – his Epiphany. On redirect, the defense read lengthy portions of the record and then asked Dr. Kalechstein his opinions of the readings to which he testified that his conclusions remained the same even considering the record presented to him. (RCHT, Day 20 at 5347-63.) This, the Court finds, did not cure the lack of context for Dr. Kalechstein's conclusions. As such, the Court does not find Dr.

Kalechstein's conclusions to be credible.

The defense also called Dr. Woods as an expert in forensic psychiatry and neuropsychiatry. Dr. Woods was retained in the Idaho state case in 2005 by John Adams, the Defendant's attorney, as a consultant regarding the Defendant's mental health issues. (RCHT, Day 22 at 5664-65.) Dr. Woods has conducted several clinical interviews with the Defendant; two occurred in October of 2005, one in February of 2006, one in April of 2009, and the final interview was on September 14, 2012. Dr. Woods testified in the Riverside case that the Defendant was not competent to represent himself in those proceedings; the jury in Riverside, however, found otherwise. (RCHT, Day 22 at 5673-74.) During his testimony here, Dr. Woods walked through his interview notes describing the symptoms of psychosis that he believed the Defendant had exhibited during their interviews. Dr. Woods also discussed portions of the Riverside proceeding, the transcript in this case, the Defendant's interviews with the FBI Agents and other experts, the results of the psychological testing, and other records. Dr. Woods' formal diagnosis was psychosis secondary to the brain impairment identified by other defense experts and post traumatic stress disorder.

On cross examination, the Government elicited testimony that Dr. Woods was a part of the defense team, or at least a consultant to the team, in 2005 when he was initially hired. (RCHT, Day 22 at 5816-47.) The Government also pointed out other factors showing Dr. Woods' work has been mainly defense-oriented. For instance, he has, on occasion, spoken on behalf of the defense bar since 1993, and he shares office space with the defense counsel

appointed in this retrospective competency hearing. (RCHT, Day 22 at 5819-33.) Dr. Woods estimated that 85-90 percent of his criminal work is on capital cases, but that he has never been retained by the Government in a capital case or in any criminal case. (RCHT, Day 22 at 5820, 5832-33.) The Government questioned the accuracy of Dr. Woods' notes and the fact that various of the Defendant's attorneys were present for his interviews. On redirect, Dr. Woods verified that he was looking for competency symptoms more than assigning diagnostic categories. (RCHT, Day 22 at 5925-27.)

The Court views Dr. Woods' testimony as somewhat skewed and perhaps less reliable than other witnesses. Dr. Woods was clearly a part of the defense team from early on who's mission was to keep the Defendant from receiving a death sentence. The defense's purpose for employing Dr. Woods in this matter evolved over time from a consultant early on, to a role more akin to a competency expert later on in 2008. Dr. Woods' description of his interviews with the Defendant were generally similar to those of other similar witnesses. However, when asked about the specifics of the interviews and his notes, Dr. Woods' testimony was strained and unpersuasive. It is this aspect of Dr. Woods' testimony that gives the Court pause and draws the reliability of the testimony into question.

3. Conclusion

The expert testimony at the hearing demonstrated that there exists a broad spectrum of possible mental diseases or defects ranging from minor personality disorders to more severe and extreme major mental illnesses and brain defects. Individuals may fall anywhere

within that spectrum and experts may disagree as to where on the spectrum a person's mental condition falls. In addition, individuals may be diagnosed as suffering from a single mental disease or as having a multitude of mental illnesses. Based on the totality of the record in this case, the Court concludes that the Defendant was not suffering from a major mental disease or defect. At most, the Court concludes that the evidence in the record supports a finding that the Defendant may suffer from a personality disorder as identified and described by the court-appointed experts. (RCHT, Day 4 at 1011-19.)

On this point, the Court finds the testimony of Dr. Engle, Dr. Low, Dr. Rath, and Dr. Kirkish to have been unbiased and the most credible. Those experts concluded that the Defendant did not suffer from a mental disease or defect aside from a possible personality disorder. (RCHT, Day 2 at 253, 290-94, 446) (RCHT, Day 3 at 631-32) (RCHT, Day 4 at 867-69, 909-10, 966, 1010-19) (RCHT, Day 5 at 1142-44.) Most notable was the compelling testimony of these witnesses' on cross examination where they provided reasoned and sound basis for their analysis and conclusions regarding the Defendant. The testimony and reports of these court-appointed experts demonstrated that they had interviewed the Defendant, considered a voluminous amount of material from both sides, and had sufficient time to complete their evaluations. They were not hired by either party in this case but were instead independent experienced court-appointed competency evaluators. Furthermore, their reports and interactions with the Defendant occurred closest to the time period in question on this retrospective competency hearing.

The Court also finds the conclusions of these experts that the Defendant was not suffering from delusions, hallucinations, telling speech patters, or other symptoms of a major mental disease or illness to be well supported in the record and credible. In particular, the Court agrees with their conclusions as to the Defendant's ideology and beliefs. The Defendant's Epiphany was not a delusion but was instead, as Dr. Rath testified, a "sudden insight" or "realization." (RCHT, Day 4 at 865, 922-24); *see also* (RCHT, Day 2 at 504.)[24] In making this statement, Dr. Rath recognized that "[n]obody who was reasonable would disagree that the Defendant has problems." (RCHT, Day 4 at 865.) The Court finds this statement to be accurate in describing the Defendant in this case. The Defendant's background, history, experiences, actions, and the whole picture of the Defendant portrays an individual who has endured great suffering in his life from an early age and is clearly disturbed by those events. The Court acknowledges that the Defendant made some strange statements at times. But viewed in context, the Defendant's statements to evaluators, counsel, jailers, law enforcement, and the Court generally were coherent and consistent with the Defendant's belief system and theories. The Court finds the statements of the Defendant overall were not delusional or evidence of any hallucinations or telling speech.

What motivated the Defendant's criminal rampage was his desire to get revenge on society for the pain he suffered in his life. (Gov. Ex. 2 at 10) ("I was on this, I was on this

[24] In fact the Defendant himself stated during his interviews with Dr. Rath and in other interviews with the FBI Agents that he did not want to use the term "Epiphany" any longer but rather though it should be called a "realization" or "paradigm shift." (RCHT, Day 4 at 864, 922-27.)

mission, okay, to to hurt society, because society hurt me all my life and I was just gonna get mine before I died. I was going to get my revenge....”), (RCHT, Day 1 at 138-39.) The concept of wanting to seek revenge on society is not delusional. Likewise, the fact that the Defendant experienced an awakening or sudden insight in the midst of his crime spree does not evidence a delusion. (RCHT, Day 2 at 458-59, 510) (RCHT, Day 5 at 1133, 1136-38.) Just the opposite, such an insight was most reasonable and rational – not at all delusional.[25]

The defense experts who offered a diagnosis generally concluded the Defendant suffered from a sever mental disease or defect including psychosis with symptoms including delusions, hallucinations, and circular or broken speech patterns. As stated above, however, the Court was not convinced by their testimony and did not find their conclusions to be credible or as well supported as those of the court-appointed witnesses. The conclusions reached by the defense experts have to be viewed in light of the evident bias they have against the death penalty and/or for the defense. As noted above, the Government elicited testimony from each of the defense experts which, in general, revealed they were a part of the defense team and/or their work has predominately been with/for the defense in other cases. (RCHT, Day 12 at 3061-68, 3078-83), (RCHT, Day 13 at 3210-11, 3214-15, 3286-87), (RCHT, Day 14 at 3495-97, 3640-41, 3693-94), (RCHT, Day 20 at 5067-69, 5232, 5253),

[25] Dr. Gur testified that religious beliefs are different from delusions. (RCHT, Day 14 at 3700.) On cross examination, the Government elicited from Dr. Gur that as a result of the Defendant’s belief system and the Epiphany on the mountain, the Defendant changed his course of conduct and stopped killing, raping, and torturing children which was a rational and good decision. (RCHT, Day 14 at 3702-06.)

(RCHT, Day 22 at 5660, 5665-66, 5819, 5828, 5832-33, 5837, 5840, 5846-47.) The same bias was not evident in the court-appointed experts who testified. *See e.g.* (RCHT, Day 2 at 226, 234, 296), (RCHT, Day 3 at 554-558, 568-69.), (RCHT, Day 4 at 833, 835-38, 853-54, 874-76, 898-900) (RCHT, Day 5 at 1098.)

As to the evidence presented regarding brain damage, the Court found this testimony to be interesting but, in the end, not determinative of the question of whether the Defendant suffered from a mental disease or defect. Evidence of the existence of brain damage would tend to increase the likelihood of the Defendant being found to have a mental disease or defect. In this case, however, the evidence concerning any brain damage the Defendant suffered was not linked to a credible diagnosis of a major mental disease or defect.

Further, those witnesses who the Court found to be the most credible did not, even though they were specifically looking for it, find symptoms or evidence of a major mental illness. Doctors Engle, Low, Rath, and Kirkish all testified that they were aware of the reports from the defense experts and concerns of the defense attorneys and were looking for the symptoms and behavior described in those reports in their own dealings with the Defendant. (RCHT, Day 2 at 238, 458, 460, 477) (RCHT, Day 3 at 610), (RCHT, Day 4 at 848, 853), (RCHT, Day 5 at 1138-41.) None of these neutrally-appointed experts found evidence of the symptoms that were described in the defense team's reports and accounts. As discussed later in this Order, the testimony of the other witnesses who observed the Defendant's behavior were consistent with the findings and conclusions of the court-

appointed experts.

Therefore, the Court finds by a preponderance of the evidence that, at most, the Defendant suffers from a mental disease or defect to the degree of a personality disorder as concluded by the court-appointed experts, but not a major mental disease or defect. Even if the Defendant's mental disease or defect is more severe than determined by the Court here, the next questions in the analysis are determinative of the competency issue raised in this case – does the mental disease or defect prevent the Defendant from understanding his legal position and the options available to him and does it prevent him from making rational choices among his options.

B. If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?

Both sides acknowledge that a person suffering from a mental disease or defect may still be competent. "That a defendant suffers from some degree of mental illness or disorder does not necessarily mean that he is incompetent to assist in his own defense." *United States v. Mitchell*, 706 F.Supp.2d 1148, 1221 (D. Utah 2010) (quoting *United States v. DeShazer*, 554 F.3d 1281, 1286 (10th Cir. 2009) and citing *United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir.1986) ("It is well-established that some degree of mental illness cannot be equated with incompetence to stand trial.")). "A defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." *Mitchell*, 706 F.Supp.2d at 1151

(citation omitted). Many of "the circuits addressing competency after *Dusky* have used a sufficient contact with reality as the touchstone for ascertaining the existence of a rational understanding." *Id.*

On the question of whether the Defendant understands his legal position and the options available to him, the Court finds the record in this case clearly shows the answer to be yes.

1. Defendant's Intelligence

There is no dispute that the Defendant is highly intellectual. The expert and lay witnesses from both sides consistently characterized the Defendant has having a high level of intelligence and testified he demonstrated a high Intelligence Quotient ("IQ"). (RCHT, Day 1 at 73), (RCHT, Day 21 at 5459.) Dr. Low concluded that, in the context of his waiver of his right to counsel, the Defendant's decision was "highly intellectualized, self-important, and somewhat uncommon." (Ex. 24 at 24.). Ms. Garvey described the Defendant as "very intelligent" noting a complex math formula the Defendant had shown her on one occasion. *See e.g.* (RCHT, Day 18 at 4756-57.) The Defendant was just shy of attaining a bachelor degree in computer science, worked as a computer programmer, and had done all sorts of different work, primarily in sales, before his crime spree. (RCHT, Day 2 at 243-44.) The testimony from both experts and lay witnesses who had lengthy discussions with the Defendant reveals he was well read and intellectual in his ability to think, plan, communicate, and write, and that the Defendant generally possessed more than sufficient cognitive capacity

to understand these legal proceedings.

Further, the Defendant was consistent in his discussions about his ideology. Each of the witnesses who had discussions with the Defendant of any length testified consistently as to the Defendant's description of his ideology regarding the Truth, his Epiphany, and oneness. While the witnesses' perception of the Defendant and his mental state differed, what the Defendant told each of the individuals remained substantially the same. *See e.g.* (RCHT, Day 20 at 5130-32.) The Court finds the consistency of the Defendant's themes to be indicative of his deep-seeded belief in what he was saying. While the defense would argue such an imbedded ideology can only mean the Defendant's decisions were driven by the ideology and he, therefore, is incompetent, the Court finds otherwise.

The fact that the Defendant clearly believed in what he repeatedly and consistently told people does not make him incompetent. Moreover, even if his attorneys disagreed with the Defendant's beliefs and considered his views to be unreasonable, that does not render the Defendant to be incompetent. In this instance, the Court finds the fact that the Defendant was remarkably consistent in the ideology he expressed to others to be demonstrative of his intelligence and the amount of thought he gave to the subject. This coupled with the amount of detail and thought the Defendant put into planning and executing his crimes, as evidenced in his interviews with law enforcement, the Court finds, reveals the Defendant's acute ability to prepare, plan, think, react, and reason within at least a normal/average level of rationality.

2. Expert Testimony

(a) Government's Experts

In his evaluation of the Defendant in the context of determining his competency to represent himself, Dr. Engle found the Defendant to be cooperative, had more experience in court than the average person, above average intelligence, and made "literally 'zero' errors on the psychological test designed specifically to measure his competence to stand trial." (Ex. 22 at 9.) Dr. Engle opined that the Defendant's desire to represent himself was done voluntarily, knowingly, and intelligently. (Ex. 22 at 10.) Dr. Rath too noted the Defendant had made zero errors on the competency test given by Dr. Engle, evidencing that there was no question that the Defendant understands the nature and purpose of the proceedings pending against him. (Ex. 90 at 5.)

Dr. Low concluded in her report that the Defendant had a very good ability to understand the nature and consequences of the court proceedings against him; he was highly likely to be able to represent himself; and his decision to waive his right to counsel was not delusional but was instead highly intellectualized, self-important, and somewhat uncommon. (Ex. 24 at 24.) This conclusion was given in July of 2008, only some five months prior to the Defendant expressing his desire to waive his right to appeal in November of 2008. In her testimony, Dr. Low described the Defendant as being "highly articulate, intellectualized" and appearing to be fully oriented. Dr. Low also found the Defendant had above average intellect based on his vocabulary and use of analogies, was fully oriented, and displayed no signs of disorders, psychosis. There were also no reports of unusual behaviors by the Defendant while

he was housed at SeaTac. (Ex. 24 at 21, 23.)

Dr. Kirkish used a competency assessment instrument to determine the Defendant's competency and testified that he answered all of the questions correctly. The defense cross-examined Dr. Kirkish on the lack of structure and scoring in the competency determination used on the Defendant. Dr. Kirkish, however, amply responded to the cross examination demonstrating that her assessment used a structured approach which involved the use of the competency assessment instrument as a guide for her interview of the Defendant. Dr. Kirkish noted that there was no concern that the Defendant's cognitive abilities necessitated further assessment because the Defendant answered all of the questions appropriately. Dr. Kirkish concluded that the Defendant understood what was going on during the proceedings and that he had both a factual and rational understanding of the judicial proceedings against him as well as the repercussions of those proceedings. Additionally, Dr. Kirkish testified that the Defendant was able to rationally cooperate with his attorneys and concluded the Defendant had no mental illness impairing his ability to represent himself. (RCHT, Day 5 at 1141-44.)

As stated earlier in this Order, the Court finds the testimony of these experts to have been extremely credible and consistent with this Court's own view of the record and evidence presented.

(b) Defendant's Experts

Dr. Gur testified that the Defendant's belief system and unique thoughts concerning the Truth and Epiphany were linked to his decisions to fire his attorneys and represent

himself and that the Defendant had no rational understanding of the legal proceedings or his choices. (RCHT, Day 14 at 3608-23.) The Court views this statement carefully and finds it does not take into account the entire context of the Defendant's conduct, behavior, and statements in light of all the circumstances in this case – particularly when the Defendant was in court. Although Dr. Gur later became aware of the Defendant's conduct in this matter, he did not actually observe the Defendant's conduct at the trial and hearings in this case where the Defendant participated in voir dire, openings, cross examination, voiced objections to evidence, and conferred with his standby counsel. (RCHT, Day 14 at 3641-43, 3695, 3706-3707) (RCHT, Day 15 at 3810-3813.) The Court finds Dr. Gur's testimony to lack the necessary context in this regard. As to the other defense experts who testified on this question, for the reasons stated previously, the Court finds they were not credible in their conclusions. The Court has specifically discussed Dr. Gur's testimony in this section because he gave particular testimony concerning the Defendant's ability to understand his legal position which the Court felt needed to be addressed.

3. Lay Witness Testimony

Both sides offered the testimony of several lay witnesses who described their interactions with the Defendant. *Mitchell*, 706 F.Supp.2d at 1151 ("[T]he Court may rely on, in addition to expert testimony, lay witness testimony concerning the [defendant's] rational behavior, and cross examination of [defendant's] expert.").

The Government's lay witnesses were law enforcement officers, jail deputies, prison

intake personnel, and mental health clinicians. These witnesses, the Court finds, were credible in their testimony and generally described the Defendant during the relevant time period consistently as polite, communicative, intelligent, and understanding of his circumstances. All of these witnesses testified that the Defendant acted and spoke appropriately for the specific situation of their encounter with him. These witnesses viewed the Defendant for consecutive days and interacted with him during the course of those days. While some had only brief conversations with the Defendant, other of these lay witnesses - in particular the law enforcement officers - had extensive and lengthy discussions with the Defendant. These interviews, some of which are recorded and occurred at the time in question, are perhaps the most accurate and unbiased view of the Defendant.

The lay witnesses called by the defense included the Defendant's former attorneys, mitigation specialists, and defense investigators. During much of the testimony of these witnesses, defense counsel went to great lengths in this retrospective competency hearing to read the defense team's notes into the record, focusing on particular statements and/or themes that they allege the Defendant said or discussed. As the expert witnesses for both sides made clear, however, isolated statements do not, in and of themselves, show a person's mental state. The experts agreed that context is important when determining whether a particular statement by an individual may be a delusion or other evidence of a mental disease or defect. Here, isolated comments in the notes about dreams, aliens, religion and the like, as relayed by the mitigation investigators, are not overly compelling because the drafters of the notes

and their recollections are somewhat biased, incomplete, and without context.

Moreover, many of the witnesses who testified concerning the defense team notes lacked independent recall of the events. In making this observation, the Court has considered the obvious length of time that has passed since the witnesses drafted the notes, but the fact remains that many of the witnesses' memories were not reliable. The notes did seem to assist the witnesses' ability to recall the events of the meetings but, for the most part, there was little, if any, testimony about these meetings that was made independent of the notes. It is also important to note that the former defense attorneys did not testify that the Defendant did not understand the legal proceedings or options, only that it was difficult to get the Defendant to focus on discussing those matters.

The defense team's mitigation investigators who testified were consistent in describing their impressions of the themes conveyed by the Defendant during their interviews and meetings with him. Although consistent, these witnesses were not as compelling to the Court as other neutral lay witnesses who had interacted with the Defendant such as prison staff and law enforcement who interviewed him. The staff where the Defendant was housed in 2008 all consistently described the Defendant as behaving rationally, being cooperative, and able to respond appropriately to their questions. Although brief, the prison staff interacted with the Defendant face to face and on a regular basis. The law enforcement officers who spent a great deal of time interviewing the Defendant describe him similarly.

Moreover, unlike the defense team and mitigation investigators, the Government's lay

witnesses had no motivation one way or another in regards to their interactions with and observations of the Defendant. The Court does not doubt the sincerity of the mitigation investigators or any of the defense team but it was obvious during their testimony, when viewed in person, that the defense team and mitigation investigators in this case worked to detail and record anything that would weigh in favor of mitigation and avoid the death penalty. As such, the Court found their testimony to be biased and less persuasive.[26]

Further, the notes relied upon by the mitigation experts and other members of the defense team were not a full record of all that transpired of their meetings with the Defendant. As was brought out on cross examination, the notes were made, at least in part, for the purpose of developing mental health evidence and documenting the Defendant's mental health symptoms. (RCHT, Day 18 at 4546, 4556-57.)[27] Thus, while the notes may be accurate portrayals of the mitigation investigators' own impressions of the Defendant and his comments made in those meetings, the notes are certainly not a full and complete record of what was said both by the Defendant as well as others present at the meetings. (RCHT, Day

[26] One member of the defense team testified that when she went to visit the Defendant in November of 2008 and tried to convince him into signing the notice of appeal, she went so far as to poke herself in the eye so that she would cry and the Defendant would know that she cared about him. (RCHT, Day 20 at 5382, 5413-14.) Other members of the defense team testified similarly that they had personal feelings for the Defendant.

[27] During this testimony, Therese Scarlet Nerad clarified that the notes were not made for the purpose of making the Defendant seem mentally ill or with the thought that they would later be evidence of any mental illness. The Court's view of this testimony is that the notes were taken for legitimate use by the defense attorneys but the individuals taking many of the notes were bias and their perceptions/impressions of the discussions with the Defendant, and as a result their notes, were impacted by that bias. (RCHT, Day 13 at 3376.)

18 at 4576, 4582-83.)[28] The Court has reviewed the notes but does not find them to be overly compelling as they were made for litigation purposes and are the impressions of the person who penned the notes, not necessarily a complete or accurate depiction of all that was said in a given meeting.

4. The Court's Observations of the Defendant

The Court itself has observed the Defendant throughout these proceedings and finds his behavior evidences his understanding and ability to assist and confer with counsel. The Defendant was attentive and participated throughout the proceedings. For instance, stand-by counsel testified that the Defendant asked them and made decisions regarding how and when he should request to go *pro se*, the filing of motions, the appeal process, the death penalty process, his opening and closing statements, how to take the stand during the proceedings, his jury selection strategy, and whether to present mitigation evidence. (RCHT, Day 21 at 5501-07, 5531-32, 5540-42, 5587-89.) Stand-by counsel clearly did not agree with the Defendant's choices and testified that many of his actions during the proceeding were not helpful to him. This may very well be true. (RCHT, Day 21 at 5475-78, 5528-38.) However,

[28] On redirect, Ms. Nerad testified that the notes were "a memorialization" and her best recording of the interview of what the Defendant told her, not just her "impressions." (RCHT, Day 18 at 4608-09.) The Court's own view of this testimony is that the notes taken by Ms. Nerad as well as the other defense team members were written through bias eyes. While not entirely inaccurate or false, the Court finds the statements and conversations with the Defendant as contained in these notes are skewed and must be considered carefully and within the context in which they were made. *See e.g.* (RCHT, Day 13 at 3394-95, 3414), (RCHT, Day 20 at 5398, 5421) (RCHT, Day 21 at 5472-73.) The Court does not believe the notes were taken primarily in anticipation of them becoming evidence in the case but, instead, were written as summaries of the defense team's discussions with the Defendant as they perceived them to be. (RCHT, Day 13 at 3421.) They are not neutral, complete, or unbiased accounts, recordings, or memorials of their discussions with the Defendant.

whether the Defendant made wise choices or choices that were in his best interests is irrelevant. The Defendant's competency does not hinge on whether counsel agrees with his choice but, rather, it turns on whether the Defendant understands his choice, his legal position, and the options available to him. (RCHT, Day 21 at 5587.)

Further, the testimony of the defense attorneys and other members of the defense team regarding their discussions with the Defendant and his decision to file an appeal make clear that the Defendant did not want to file an appeal. *See e.g.* (RCHT, Day 20 at 5413-14) (RCHT, Day 21 at 5546, 5548-49, 5552.)[29] Stand-by counsel testified that they had even clarified their understanding of any "mandatory appeal" with the Defendant. The record here demonstrates the Defendant understood his legal position and the options available to him. Defendant knew he could participate and how to participate even though, for the most part, he chose to not participate. The Defendant consistently maintained this position even though all of the defense team members testified that they tried to change his mind and persuade him to file an appeal.

In his discussions with the Court, the Defendant demonstrated he fully understood and was aware of the charges against him, the facts making up the basis for the charges, and the potential penalties. The Defendant understood he could and did negotiate a stipulation with the Government that would eliminate the need for the surviving victim in this case to

[29] The witnesses also testified that although the Defendant did not want to initiate an appeal, he would not interfere with stand-by counsel "doing what they felt like they should do" or any mandatory appeal. (RCHT, Day 21 at 5552-56, 5637, 5652.)

testify.[30] Moreover, the Defendant clearly understood the sentences that were imposed against him including the death sentence. His attorneys all testified that they discussed the death penalty with the Defendant and even asked whether he was a "volunteer" for the death penalty, which the Defendant has repeatedly denied and stated that he does not want to die.

Although some of the defense attorneys testified that the Defendant did not ask for their assistance during trial, other defense attorneys and defense team members testified about instances where the Defendant did inquire of counsel concerning his case and proceedings, demonstrating he understood his role and that of his counsel and/or stand-by counsel. (RCHT, Day 11 at 2703 (cooperated with defense team)) (RCHT, Day 13 at 3415-17, 3420, 3421 (understood the roles)) (RCHT, Day 21 at 5517-18 (working with counsel), 5610 (roles of the players)).[31] The Defendant knew he could consult with his counsel and he did so throughout these proceedings, sometimes on his own and sometimes at the direction of this Court. (RCHT, Day 21 at 5535-36, 5540-41.)

It is undisputed that the Defendant has experience in the criminal justice system. Prior to this federal case, the Defendant had completed the criminal justice process on the related

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[30]The defense argues this stipulation shows the Defendant's lack of rational thought as they believed he should not have agreed to all of the contents of the stipulation. The Court views the Defendant's agreement to the stipulation differently. The Defendant's agreement to the stipulation demonstrates his willingness to protect the victim from testifying, which is consistent with the Epiphany he experienced on the mountain and his realization that he should not kill the victim. That the defense team did not agree with the Defendant's reasons for agreeing to the stipulation does not, in and of itself, make the Defendant's reasoning irrational or the product of any delusional/psychotic thinking.

[31] Various witnesses from the defense team testified regarding the Defendant's analogy of the legal system being like a toy car with all of the participants, attorneys, court, etc., all being akin to kids playing in a sandbox. (RCHT, Day 21 at 5479-82.)

state charges in Idaho as well as other unrelated criminal proceedings in his past. The record shows that the Defendant understands the legal process involved in charging a person with a crime, the Government's burden of proof, and his constitutional rights in the process - including his right to counsel, his right to represent himself, and his right to appeal. The Defendant demonstrated time and time again in this case that he had a firm understanding of his legal options and the impact of waiving his appeal.

The Defendant's trial notes further reflect that he understood his legal options and had a rational and factual understandings of the proceedings. (Def. Ex. K.) In his notes, the Defendant made observations regarding witnesses' testimony, the evidence being presented, and the points he wanted to make in his own cross examinations of certain witnesses.

5. Conclusion

One may argue that a person who would do the sadistic things the Defendant did must have a mental illness. While the experts' offered varying diagnoses, with each testifying that the Defendant may very well have had a mental disease or defect, the evidence is quite clear that any mental disease or defect the Defendant may have suffered from in 2008 in no way affected his ability to understand his waiver of appeal. One would have to be a little naive to not understand that when medical experts, attorneys, and mitigation experts are all trying to find something to support their theory of mental disease or defect, eventually a defendant will say or do something that can be used to support their argument. The problem in this case, however, is that the totality of the evidence before the Court at the time in question weighs

heavily against the defense's position. Further, the defense experts' testimony, while interesting, when viewed in light of all the evidence in the record before the Court simply is not credible, particularly given their bias against the death penalty.

This Court has observed first-hand the Defendant's demeanor and conduct and has itself interacted with the Defendant for quite some time throughout these entire proceedings; including the particular time period in question. During this time, the Court personally engaged the Defendant in regards to his decision to waive his appeal as well as other matters and viewed his responses to the same. Having this first-hand, in-person view of the Defendant, the Court found him to be competent at the time and is now even more firmly convinced that the Defendant understood his legal options. This Court's own impressions of the Defendant are that he was clear in his thoughts, intelligent, had a complete understanding and knowledge of the proceedings and his options, and that he understood his legal position and the options available to him. Based on the foregoing, the Court concludes that any mental diseases and/or defects suffered by the Defendant did not prevent him from understanding his legal position and the options available to him in 2008 when he waived his right to appeal. The Defendant had both a factual and rational understanding of the legal proceedings against him as well as the options available to him.

C. If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does the disease or defect, nevertheless, prevent him from making a rational choice among his options?

1. Defendant Has Consistently Been Found to be Competent

All of the courts who have considered the question of this Defendant's competency have uniformly concluded that he is, in fact, competent. Moreover, in the Riverside case against the Defendant, both a jury and a judge found him to be competent after hearing the medical and factual evidence. That case began approximately five months after the sentence was imposed in this case. In the Idaho state first degree murder case, approximately three months before this case, the defense attorneys who are trained to look for mental health issues in such cases, particularly when it was as heinous and aggravated as this one, the issue was not even formally raised.

It is similarly notable that the Defendant's attorneys in the Idaho state case, this case, and the Riverside case all testified that they would not have allowed the Defendant to plead guilty if they thought he was not mentally competent. *See e.g.* (RCHT, Day 11 at 2893-98.)[32] The American Bar Association's guidelines for entry of a guilty plea states that "Prior to the entry of the plea, counsel should: (a) make certain that the right to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent...." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.9.2(B)(1)(a) (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1044 (2003); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (The Supreme Court

[32] The order remanding this case did not question the validity of the Defendant's guilty plea. *Duncan*, 643 F.3d at 1250. Even if this Court were to have concluded the Defendant was neither competent to waive his appeal nor to represent himself, based on the record and, in particular the plea hearing transcript, the Court would still find the Defendant was competent to plead guilty and that the plea was knowingly and voluntarily entered.

has approved using the ABA Guidelines on attorney performance in effect at the time of a defendant's trial as "guides to determining what is reasonable" performance by counsel.); *Wiggens v. Smith*, 539 U.S. 510, 524 (2003) (applying the ABA Standards as "guides to determining what is reasonable") (citation omitted).[33] Although some of the defense attorneys quibbled a bit in their testimony here, each and every one of them ultimately agreed that the Defendant was competent to enter his guilty pleas. (RCHT, Day 21 at 5450.)[34] The Court finds the entry of these pleas by the Defendant are further evidence of the Defendant's ability to make a rational choice from his legal options.

2. Defendant's Conduct, Notes, and Statements

The Court finds some of the best evidence of the Defendant's ability to make a

[33] The Court recognizes its own duty in this regard to assure itself of the Defendant's competency if there is reasonable cause to believe and/or a genuine doubt as to the Defendant's competency. *See* 18 U.S.C. § 4241(a); *Dreyer*, 705 F.3d at960-62. In this case, there was no indication in the record that the Defendant's competency was in question until it was raised by stand-by counsel well after the plea hearing. The initial filings by the defense that made reference to mental health experts and possible mental health issues was presented to the Court as relating to the need to compile mitigation evidence, social histories, and background. *See e.g.* (Dkt. 193, 194, 218, 239.) Such filings made general reference to the need for mental health experts, investigators, and additional time so that the defense could investigate, compile, and prepare the mitigation materials for this case. There were no competency issues raised to the Court until April of 2008, when voir dire had begun and the Defendant made his oral request to go forward *pro se*. Although the defense has maintained throughout this retrospective competency hearing that the Defendant exhibited obvious symptoms of a serious mental disease or disorder since well before this case began, in all of the proceedings before this Court the Defendant himself did not exhibit any signs that raised a genuine doubt in this Court's mind that the Defendant was anything but competent.

[34] Defense counsel did testify that the Defendant was not competent to waive his appellate rights, right to counsel, or go to trial but they did not also conclude that he was incompetent to enter his guilty plea. (RCHT, Day 21 at 5562.) Stand-by counsel each carefully testified that in so much as they knew at the time of his plea, the Defendant was competent. (RCHT, Day 21 at 5448.) Counsel also testified that the Defendant understood the rights he was surrendering when he plead guilty. (RCHT, Day 21 at 5579-85.)

rational choice among his options are his own words concerning his purpose, state of mind, and detailed/thorough planning of his actions; all of which he was able to skillfully carry out in committing these grizzly crimes. The Defendant himself stated his motivation for choosing to commit these crimes was the abuse he received in prison and his desire to seek revenge against society for his having suffered that abuse. (RCHT, Day 1 at 73.) He carefully planned in intricate detail the crimes he would commit to seek his revenge so as to avoid detection by law enforcement and not be apprehended. (RCHT, Day 1 at 94-102, 136-138, 143-144.)

As the Defendant explained to law enforcement in their interviews, he traveled from North Dakota across the country in April of 2005 marking waypoints along the way and evaluating each potential target before deciding who would be his victims. He sought out homes with small children, drove through areas only once so his car could not be identified, camped in areas with quick access to freeways, had equipment to operate in the dark and the weapons he needed to deal with dogs or the man of the house, and parked in such a manner as to disguise his license plates. The Defendant told the agents how he had selected a particular area in Montana and set up a camp in a remote area there but later abandoned that camp because he had decided the risks were too great. In July of 2005, the Defendant eventually selected the Groene-McKenzie house, which he surveilled before committing the crimes. The Defendant used his computer experience to plot out his actions and log his activities and still, to this day, has encrypted files that law enforcement has been unable to access. The fact that the Defendant was able to carry out his revenge on society killing nearly

an entire household of people and kidnaping, abusing, and killing the victims, all without being discovered until he chose to return, demonstrates his ability and skill in planning, rationalizing, and choosing among his options.[35]

Dr. Low testified that in a phone call to his mother three years prior, the Defendant told her that his crimes were planned and his reason for committing the crimes was to get revenge. (RCHT, Day 3 at 622.) The Defendant went on to state that he stopped his crime spree because "I realized how wrong it was, and so I brought her home." (RCHT, Day 3 at 623.) As Dr. Low testified, and the Court agrees, the Epiphany that the Defendant has repeatedly stated resulted in his decision to stop himself from killing the surviving victim was actually a very rational decision and demonstrates his ability to make rational choices. (RCHT, Day 3 at 625.) On cross examination, the Government even elicited testimony from the defense expert, Dr. Gur, that as a result of the Defendant's belief system and his Epiphany on the mountain, the Defendant changed his course of conduct and stopped killing, raping, and torturing children, which was a rational and good decision. (RCHT, Day 14 at 3702-06.)

Further evidence of his ability to rationally choose, is the Defendant's Affidavit filed

[35]The detail, planning, and heinousness of the underlying crimes committed by the Defendant in this case cannot be understated and should not be overlooked. Those facts are contained the record in various formats including, but not limited to, the Government's description of the charges as detailed at the plea hearing (Dkt. 191), the photos and videos of the crimes taken by the Defendant (Dkt. 323) (Gov. Exs. 73, 74, 75, 76-78), the surviving victim's description of the crimes as evidenced in the exhibits admitted in this matter and reflected in the Stipulation regarding the same (Dkt. 550, 585), and the Defendant's own descriptions of his crimes made during his interviews with law enforcement and as testified to by Sargent Brad Maskell. (Sentencing Hearing Transcript, Dkt. 640 at 1600-37.)

on November 24, 2008 which reflects his views concerning the legal system and the Truth. (Dkt. 613.) The Defendant's Affidavit clearly demonstrates his ability to make choices and the realization that we are responsible for the choices we make. (Dkt. 613.) The Defendant states he was on a rampage which he knew, even at the time, was vengeance and that the most important fact was that he voluntarily brought the victim home. The Affidavit goes on to describe the Defendant's view now is that the system is far worse than any crime he committed because it impedes society's ability to find the Truth. This belief demonstrates the Defendant's rationale for choosing not to participate in the system.

Interviews with the FBI Special Agents Michael and Gail Gneckow, which occurred at or very near the time frame in question, reveal the Defendant was extremely detailed in his thinking and speech. During these interviews, the Defendant had perfect recall of places, persons, and events. He was detailed in his descriptions of the preparations, thought, and planning that he did before committing the crimes in this case. The Defendant was careful to correct the agents and officers who interviewed him when they were mistaken as to particular details including way points from the GPS, the reasons he chose or did not choose particular camp sites, etc. (RCHT, Day 1 at 94-102, 136-138, 143-44.)

Furthermore, from his interviews with the FBI Agents it is clear that the Defendant was acutely aware of what he was doing and that he was making reasoned judgments and choices while he engaged in his crime spree. The Defendant conveyed to the FBI Agents an amazing amount of detail regarding his crimes. Most notable are the details the Defendant

told them concerning how and why he made many of the decisions he did along the way. Whether anyone agrees with the choices he made, these interviews evidence the Defendant was clearly able to employ reasoning when he made such choices. This, the Court finds, when taken in the context of all of the evidence in this case, shows the Defendant was able to make a rational choice among the options available to him. The Defendant gave vivid descriptions of the crimes and how he had planned on carrying them out. Stand-by counsel also recognized the Defendant's ability to organize and attention to detail such as when he made an Excel spreadsheet of the Government's discovery. (RCHT, Day 21 at 5620-21.)

The Defendant's ability to make a rational choice was further evidenced during his many mental evaluations. In many, the Defendant chose to cooperate. (RCHT, Day 2 at 238-39), (RCHT, Day 4 at 855-56), (RCHT, Day 12 at 3116-17.) However, during his time at SeaTac the Defendant changed his initial position and chose to refuse further cooperation with Dr. Low, only some five months prior to the time at issue in this hearing. This decision to stop cooperating with Dr. Low was a rational choice by the Defendant motivated and/or based on his disagreement with defense counsel who wanted him to be found incompetent.

3. Defendant's Conduct in Court in November 2008

The issue on this limited remand goes specifically to the question of the Defendant's competency to waive his right to appeal in November of 2008. In answering that question it seems particularly fitting to review the record from that time. The sentence was imposed on November 3, 2008, and the final Judgment entered on November 10, 2008. (Dkt. 599, 602.)

Stand-by counsel, on their own, filed a Notice of Appeal on November 17, 2008. (Dkt. 605.) In response to the Notice of Appeal having been filed, the Defendant filed a letter to the Court stating:

> This is to inform the court that if any appeal is initiated on my behalf it is done contrary to my wishes.

(Dkt. 607.) The Government then filed a Motion to Strike the Notice of Appeal and each side made additional filings. (Dkt. 606, 610, 611.) The Court held a hearing on the matter on November 24, 2008, where the Court inquired of the Defendant concerning his decision to waive his appeal. (Dkt. 612, 637.) During this exchange, the Court explained to the Defendant that he in fact had a constitutional right to appeal. (Dkt. 637.) The Defendant discussed his understanding of that right and ultimately stated:

> And my answer is in that context my answer is I certainly understand my right, my right in quotes, and I have no desire, as I mentioned in the letter I wrote to you, to invoke it.

(Dkt. 637 at 11.) The Court went on to inform the Defendant that if he does not file an appeal there would be no review of any kind and that the sentence of death would very likely be carried out. The Defendant acknowledged his right to file an appeal and that there would be no review if he chose to not appeal. The Defendant then stated: "My choice is to not appeal." (Dkt. 637 at 12.) That decision, the Defendant agreed, was made voluntarily and of his own free will after having conferred with stand-by counsel and having been advised of the ramifications of not filing an appeal. After further discussion between the Court and the Defendant and then conferring with his stand-by counsel, the Defendant stated:

> To answer your question directly, my answers are very clear: I do not have any intention of appealing. I understand the process, I understand the law, I understand the history of the law, where it comes from going all the way back to Rome and before that, the beginning of mankind. I'm not saying my understanding is perfect, but in other words, I have an extensive understanding of the whole process.
>
> But the reason I chose to represent myself, the reason why I asked my counsel to step down and allow me to make some decisions in this case is not because I wanted to participate, but because I didn't want to participate.
>
> I want you, I want the Court, I want society, I want the prosecutors, I want my attorneys, I want everyone to do this without me. I want you to make your choices. I don't want to be a party of that decision-making process.
>
> That is why I defended myself the way I defended myself, by not defending myself. My answer to the Court was my argument is no argument, Your Honor. I don't want to argue. I don't want to get involved in the rationalization process of killing again. And so it becomes philosophical and I apologize for that.
>
> My position is that the system has a choice to make. I've made my choices and now you have to make yours as a system, as society or whatever you want to call it. And I want to allow and I want to accept that choice, but I don't want to participate in it.

(Dkt. 637 at 16-17.) The Defendant then stated that he did not give his stand-by counsel permission to file the Notice of Appeal and again confirmed to the Court that he did not want to appeal. (Dkt. 637 at 18-19.) The Court then made a record stating:

> The Court previously on this competency issue ordered two separate competency evaluations and considered several other opinions of experts submitted by the defense in making its initial determination that you were competent in this matter. There is nothing in my judgment to indicate that your competency status has changed from the last time the Court visited with you on this question. The Court is intimately familiar with the background in this case and is confident in its initial decision that there has been no intervening change in your competency. In addition to the reasons given as to your

competency, the evidence clearly shows that your crimes were committed with deliberation and premeditation.

Based upon the answers you have given today and the record, the Court believes, after giving full and fair consideration to all the evidence, that you are competent to proceed as your own counsel and to waive further legal review in this matter.

Specifically, the Court finds that you have the capacity to appreciate your position and make a rational choice with respect to continuing or abandoning further litigation.

Further, there is nothing to indicate that you are suffering from a mental disease, disorder or defect which would substantially affect your capacity in making your own decision in this case.

As far as voluntariness is concerned, Mr. Duncan, you have been informed by the Court of your right of not only to have counsel to represent you, but also to file an appeal in this matter and that continues up through November 28. You have expressed your knowledge and understanding of those rights and in my judgment, separate and apart from the philosophical arguments that you have been making, you have been unequivocal in your position that you do not desire to pursue an appeal in this matter.

There is nothing to indicate that your decision has been improperly induced or coerced. You have had standby counsel available, they are sitting with you today at counsel table. As far as whether it is knowing and intelligent, Mr. Duncan, the Court has informed you of the serious ramifications of your decision. In addition, you acknowledge that your standby counsel have also counseled you regarding your choice to waive your right to appeal.

So based upon the totality of the circumstances in the record and the statements made here today, the Court finds your choice to forego your right to file an appeal is the product of a free and deliberate choice. It is made knowingly and intelligently. You have clearly expressed your understanding of the significance and consequences of your decision to waive appeal and, nevertheless, desire to do so.

The right to appeal is possessed by you and you alone to exercise or forego. And that, again, Mr. Duncan, so that there is no coercion or pressure on you

> of any kind, I am telling you again that you have a right to change your mind and advise this Court to the contrary up through November 28.
>
> The Government has no objection to your filing an appeal. Your counsel is telling you to file an appeal. I have received this document that you asked to have filed and it suggests that you -- it doesn't suggest, it indicates to the Court that your present state of mind is that you do not desire to appeal and that is the ruling of the Court.

(Dkt. 637 at 19-22.)[36] Following the hearing, a Post Conviction Affidavit and Corrected Affidavit were filed by the Defendant wherein the Defendant set forth his position in this matter. (Dkt. 613, 615.) In those documents the Defendant again demonstrates his knowledge and understanding of the legal process, his role in the process, and clearly states his intention to not appeal. (Dkt. 613 at 2) ("I have no intention of prolonging the process by appealing....".) The Defendant goes on to discuss his view of the system, the Truth, and his decision to not participate.

The Court has again reviewed this document in light of the testimony from all of the witnesses at the retrospective competency hearing. Having done so, the Court's conclusion remains the same. The Defendant understood his legal position and the options available to him and he was not prevented by any mental disease or defect from making a rational choice among his options. The Defendant's ideology and choice to not participate in the system as expressed in his Post Conviction Affidavits is consistent with the discussions he had with his counsel, mitigation investigators, FBI agents, and the various mental health experts who

[36] From this transcript as well as the entire record, the Court finds it is clear that the Defendant knowingly and voluntarily waived his right to appeal.

interviewed him. At the end of the day, the Defendant's ideology has remained the same. Though some may not agree with his beliefs or choices, the fact remains that in November of 2008 the Defendant was cognizant and aware of these proceedings and his role in the proceedings and chose to not participate. Whether that choice is viewed by others as wise or irrational is irrelevant. The Defendant stated to the Court that he realized and understood the decision not to appeal was not in his best interests. That dose not mean the decision was not a rational choice. It was the Defendant's choice and one that he has demonstrated time and time again that he was competent to make.[37]

4. Expert Witnesses

The defense experts testified that the Defendant's belief system and delusional thoughts concerning the Truth and his Epiphany were the reason for his decisions in this case and that he had no rational understanding of the legal proceedings or his choices. (RCHT, Day 14 at 3608-23), (RCHT, Day 12 at 3024-25, 3139), (RCHT, Day 22 at 5904-05, 5945-46, 5949-51.) Again, and for the reasons previously stated, the Court does not find the testimony of these experts to be as credible as the court-appointed experts and views their testimony with great caution given their bias, particularly in regards to their testimony on this question.

5. Conclusion

[37] The Defendant's December 8, 2010 letter to the Ninth Circuit indicating his desire to change his mind about waiving his federal appeal appears to be prompted by the wishes of his mother, not any change in his own position. (Def. Ex. JJ.)

The Court finds the Defendant is not prevented by any mental disease or defect from making a rational choice among his options. All of the courts and juries who have considered the competency of the Defendant have uniformly concluded that he is in fact competent. His own defense attorneys testified that they all believed he was competent to enter his guilty pleas. The Defendant's own conduct, trial notes, and statements are indicative of his ability to make rational choices. He carefully planned and executed his crime spree in 2005; all along the way weighing the risks involved before carefully choosing his victims. During the hearings throughout this matter, the Defendant has demonstrated his understanding of and ability to exercise his right to choose when, for example, deciding which of the potential jurors to voir dire, which witnesses to cross examine, whether to go forward *pro se*, whether to take the stand, and what he would offer in his closing statement. The Defendant's trial notes evidence further that he was attentive during the proceedings and actively listening to the evidence that was presented.

The Defendant also displayed his ability to make rational legal decisions in 2008 when he sought advice from his defense attorneys as to when to request going *pro se* in this case and in his acknowledgments and statements made on the record to this Court concerning his desire to waive his right to file an appeal. The testimony by stand-by counsel was that the Defendant's position on their representation vacillated, sometimes allowing counsel to file motions and other times prohibiting a motion from being filed. Such a client would undoubtedly be frustrating to represent but, in this Court's view, this testimony showed that

the Defendant was able to weigh and make rational choices. That he clearly struggled with many of his choices and those decisions likely caused him a great deal of stress is understandable and rational in a capital case. On the same note, there were certain other positions upon which the Defendant clearly demonstrated his choice was firmly set, such as his desire to plead guilty and to avoid the victim having to testify. The fact that he rationally exercised his choice in these matters, even though contrary to the advice of his counsel, further demonstrates the Defendant's ability to make a rational choice among his options.

The Defendant's decisions in this case to represent himself and to waive his appeal may not be in his own best interests and likely were made against the advice of his legal team. That, however, is not the standard upon which we measure whether an individual can competently or rationally decide whether to waive his or her legal rights. Again, the competency required to waive a constitutional right demands that the Defendant have that degree of competence required to make decisions of very serious import and that his ability to understand the nature and consequences of the waiver and make a reasoned choice among his alternatives is not substantially impaired by any mental illness. *Chavez*, 656 F.2d at 518; *Rees*, 384 U.S. at 314.

Waiving one's right to appeal in a case where multiple death sentences and life sentences were imposed is of the utmost "serious import." *Chavez*, 656 F.2d at 518. There is no question here that the Defendant knew full well the choices available to him, as he had been advised of such not only by this Court but also by all of the defense teams and his stand-

by counsel of the appellate process. The record further shows that the Defendant understood his options on appeal and weighed those options before making a knowing, voluntary, and rational choice to waive his right to appeal in this case. The Defendant was advised by multiple people on multiple occasions concerning his rights and the ramifications of his choice and he held steadfastly to his position that he would waive his right to appeal.

Based on the foregoing, the Court finds that in 2008 the Defendant clearly and unequivocally waived his right to file an appeal having been fully advised of the consequences of that decision and knowing full well the ramifications of doing so. The decision was not motivated, driven, or caused as a result of any mental disease or defect on the part of the Defendant. The decision was a rational choice based on his acknowledgment of his guilt for the crimes charged and his decision to no longer participate in the process.

CONCLUSION

This Court has viewed the Defendant in person extensively at the time of the events in question in 2008 and throughout these entire proceedings, which has now spanned nearly seven years. The Sentencing Phase of these proceedings lasted eleven days, after the jury selection had been suspended on April 22, 2008.[38] In contrast, this retrospective competency proceeding took twenty-three days.[39]

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[38] Jury selection began in April of 2008 and commenced for five days before the Court suspended jury selection until a ruling was made on the Defendant's request to represent himself which the Court found the Defendant competent to make and granted. (Dkt. 404, 407, 493, 499, 500, 502.)

[39] During the retrospective competency hearing, the Government filed a Motion for a Continuance. Much was made by the defense of the efforts it had made to reschedule its witnesses. This representation by defense counsel was inconsistent with the record in this case. The defense had twice

This Court has been in the presence of and made direct inquires of the Defendant in this case on more than one occasion. This Court has not only viewed the evidence and witnesses live and in person but has also reviewed the entire voluminous record in this case. Having done so, the Court concludes without question that the Defendant's decision to waive his right to appeal was competently made. Answering this question within the framework of the three-part analysis used here, the Court finds by a preponderance of the evidence that:

(1) The Defendant is likely suffering from a mental disease or defect to the extent discussed in this Order;

(2) The mental disease or defect did not prevent him from understanding his legal position and the options available to him; and

(3) The mental disease or defect did not prevent him from making a rational choice among his options.

Having so concluded, the Court is compelled to state that if decisions such as that stated in this Order are to mean anything, they must not be made in a vacuum where isolated statements are taken out of context and twisted so as to appear delusional, irrational, unreasonable, and thus form an argument for incompetency. Nothing in this case has been simple nor has the Court taken lightly the weight of these proceedings at any time in this case. As has been done throughout this matter, the Court has carefully considered the remanded questions as to the Defendant's competency to waive his appeal. When one

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asked that it be allowed to call its witnesses out of order, with one witness being called in the middle of the Government's case-in-chief. The Government agreed to accommodate both of these requests and the Court granted the requests. The Court also described this shuffling of witnesses by the defense counsel in its Order granting the Defendant's *Ex Parte* Motion for Travel Funds for Scarlet Nerad. (Dkt. 722.) Defense counsel's requests were accommodated for both David Freedman and Scarlet Nerad.

examines the entire record the only conclusion is that the Defendant was competent to waive his appeal. Any symptoms of a mental disease or defect that were exhibited by the Defendant did not impact his ability to understand his legal position and the options available to him or prevent him from making a rational choice among his options.

Given the sheer volume of the record that has amassed in this case it is undoubtedly possible for one to comb through the record and pick and choose from it facts and evidence to thread together a different result. The long and the short of this case remains that the Ninth Circuit remanded to this Court to hold a retrospective competency hearing for the purpose of determining the competency question in the first instance. The undersigned has presided over numerous competency hearings in my 50 years on the bench. While these decisions many times are difficult and hard to make because of the consequences that follow, the Court is firmly convinced that the conclusions stated in this Order are correct.

For all of the reasons stated herein, the Court concludes that the Defendant was competent in 2008 to waive his right to appeal in this matter. Specifically, the Court finds the Defendant had a sufficient ability to consult with his lawyers with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him and make a rational choice about whether he wanted to file an appeal. Thus, giving full and fair consideration to all of the evidence, the Court finds that it has been established by a preponderance of the evidence that the Defendant is competent to waive his appeal and further legal review of his conviction and sentences in this matter. *Duncan*, 643

F.3d at 1247. Having so concluded, the Court will, as instructed by the Ninth Circuit's remand, reinstate its prior Order. As such, the Court need not go on to determine whether the Defendant competently waived his right to counsel before the Penalty Phase hearing.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that the Defendant is **DEEMED COMPETENT** to waive his right to appeal in this matter. The Court's previous Order (Dkt. 612) is **REINSTATED**.

IT IS FURTHER ORDERED that the Motion to File Supplemental Briefing (Dkt. 842) is **DEEMED MOOT**.

DATED: **December 6, 2013**

Honorable Edward J. Lodge
U. S. District Judge