

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 27 2015

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH EDWARD DUNCAN, III,

Defendant - Appellant.

No. 13-99011

D.C. No. 2:07-cr-00023-EJL-1

MEMORANDUM and ORDER*

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted March 17, 2015
San Francisco, California

Before: GRABER, FISHER, and M. SMITH, Circuit Judges.

Defendant Joseph Edward Duncan appeals the district court's order reinstating its prior order granting the government's motion to strike standby counsel's November 2008 notice of appeal. Defendant also filed a renewed motion in this court, seeking to withdraw his earlier waiver of appeal and to reinstate the

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

November 2008 notice of appeal. We affirm the district court's order and deny Defendant's untimely motion to reinstate his appeal.

We review for clear error the district court's factual determination on remand that Defendant was competent to waive his right to appeal. Massie ex rel. Kroll v. Woodford, 244 F.3d 1192, 1194 (9th Cir. 2001) (per curiam); see also Demosthenes v. Baal, 495 U.S. 731, 735 (1990) (per curiam) (noting that a competency determination is entitled to a presumption of correctness). A district court's factual finding is clearly erroneous if it lacks evidentiary support or "if it was induced by an erroneous view of the law." Ritter v. Morton, 513 F.2d 942, 949 (9th Cir. 1975) (per curiam). A factual finding lacks evidentiary support if, after reviewing the record, we are "left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

None of the district court's factual findings concerning Defendant's competency is clearly erroneous. To the contrary, the district court provided several valid reasons for reaching its ultimate conclusion and provided valid reasons for rejecting certain defense witness testimony pertaining to Defendant's mental state. Each of the district court's reasons is supported by evidence in the record. The court also cited testimony supporting its conclusion that Defendant's

"epiphany" was neither a delusion nor a hallucination. And nothing in the record suggests that the district court's competency findings were predetermined.

The district court also applied the correct legal standard. Even if the test established in Rumbaugh v. Procnier, 753 F.2d 395 (5th Cir. 1985), does not apply in this Circuit—a question that we need not decide here—the court's factual findings went beyond the question whether Defendant's mental disease or defect "prevented" him from understanding the options available to him or from choosing rationally among them. The district court went on, for example, to conclude more broadly that Defendant had the capacity to make a rational choice about whether to continue or abandon further litigation. The court also found that any disease or defect that Defendant suffered did not "motivate[], drive[], or cause[]" him to waive his right to file an appeal; that any such disease or defect "did not impact" his ability to understand his legal options; and that he had the ability to make rational choices with respect to his criminal proceedings. Thus, whether applying Rumbaugh or only the standard established in Rees v. Peyton, 384 U.S. 312 (1966) (per curiam), the district court did not err.

Because Defendant was competent in November 2008, the notice of appeal that standby counsel filed on November 17, 2008, was a nullity. At that time, Defendant had validly and affirmatively waived his right to file an appeal. His

decision to withdraw that waiver, which he made more than two years later, came too late. See 18 U.S.C. § 3595(a) (requiring the notice of appeal to be filed "within the time specified for the filing of a notice of appeal"); Fed. R. App. P. 4(b)(1)(A) (requiring a notice of appeal in a criminal case to be filed "within 14 days after . . . the entry of . . . the order being appealed").

The district court's order is **AFFIRMED**. Defendant's motion to reinstate his appeal, filed initially in this court on December 24, 2010, and renewed on November 24, 2014, is **DENIED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>				
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	
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TOTAL:				\$ <input type="text"/>	TOTAL:				\$ <input type="text"/>

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk