

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NOLAN LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT APPEALS FOR THE NINTH
CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BRESNEHAN
Law Offices of Michael J. Bresnehan, P.C.
1761 East McNair Drive, Suite 101
Tempe, AZ 85283-5002
Telephone: (480) 345-7032
mbresnehan@hotmail.com
Attorney for Petitioner

DATE SENT VIA UPS Overnight Delivery: January 28, 2019

QUESTIONS PRESENTED

- A. Whether the Ninth Circuit Court of Appeals applied the proper legal standard for determining whether the district court abused its discretion in failing to *sua sponte* order a competency evaluation of the defendant before accepting his guilty plea.**

- B. Whether the Ninth Circuit Court of Appeals applied the proper legal standard for determining whether the district court abused its discretion in denying defense counsel's request for a competency evaluation of the defendant prior to the court conducting a restitution hearing.**

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	i
TABLE OF CONTENTS.....	ii-iii
TABLE OF AUTHORITIES	iii
OPINION BELOW	iv
JURISDICTION	iv
STATUTORY AND CONSTITUTIONAL PROVISIONS	iv-vii
STATEMENT OF THE CASE	1
CASE HISTORY	1-9
REASONS FOR GRANTING THE WRIT	9-10
ARGUMENT	10-19
CONCLUSION.....	19-20
CERTIFICATE OF MAILING – PROOF OF SERVICE	21-22
APPENDIX A—Court of Appeals Memorandum Decision	23-26
APPENDIX B—Court of Appeals Order Denying Petitioner’s Petition For Panel Rehearing/En Banc Hearing	27-28
APPENDIX C—Dr. Walter’s Neuropsychological Evaluation and the Defendant’s Motion For Same.....	29-35
APPENDIX D—Partial Transcript of Restitution Hearing.....	36-43

APPENDIX E—Defendant’s Motion For Determination of Competency,	
Government’s Response and Defendant’s Reply	44-54

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Drope v. State of Missouri</i> , 420 U.S. 162 (1975)	9, 11, 14, 15, 16, 17, 18, 19
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	10
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966)	10, 11, 16
<i>Reynolds v. Norris</i> , 86 F.3d 796 (8th Cir. 1996)	18
<i>United States v. Garza</i> , 751 F.3d 1130 (9th Cir. 2014).....	11, 14
<i>United States v. Hill</i> , 526 F.2d 1019 (10th Cir. 1975).....	16
<i>United States v. Ramirez</i> , 304 F.3d 1033 (9th Cir. 2002)	16
<i>United States v. Rickert</i> , 685 F.3d 760 (8th Cir. 2012)	10

<u>STATUTES</u>	<u>PAGE</u>
18 U.S.C. §1111	1
18 U.S.C. §1112	1
18 U.S.C. §1153	1
18 U.S.C. §1201(a)	1
18 U.S.C. §1201(2)	1
18 U.S.C. §3553	5
18 U.S.C. §4241	v, 2, 7, 8, 10, 11, 16, 17, 18, 19

18 U.S.C. §4247(b) v

18 U.S.C. §4247(c) v

18 U.S.C. §4247(d) vi, vii

28 U.S.C. §1254(1) iv

28 U.S.C. §1291 iv

RULES **PAGE**

Sup.Ct.R. 13.1 21

Sup.Ct.R. 29.2 21

Sup.Ct.R. 29.5 21

OTHER AUTHORITIES **PAGE**

Fifth Amendment to the United States Constitution iv, 10, 16

The Petitioner, NOLAN LEWIS (“Lewis”), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner’s positions asserted in this brief.

OPINION BELOW

The Ninth Circuit Court of Appeals denied relief in its Memorandum decision dated November 13, 2018. (Appendix A, hereto) The Court of Appeals denied Petitioner’s Petition for Panel Rehearing/En Banc Hearing in its order dated January 3, 2019. (Appendix B, hereto) The district court’s minutes and orders are unreported.

JURISDICTION

The Memorandum decision of the United States Court of Appeals for the Ninth Circuit denying relief was entered on November 13, 2018, and its Order denying Petitioner’s Petition for Panel Rehearing/En Banc Hearing was entered on January 3, 2019. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §4241:

Determination of mental competency to stand trial to undergo postrelease proceedings

(a) Motion to determine competency of defendant. – At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be 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.

(b) Psychiatric or psychological examination and report. – Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing. – The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition. – If, after the hearing, 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, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility –

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until -

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law; whichever is earlier. If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) Discharge. – When the director of the facility in which a defendant is hospitalized

pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) Admissibility of findings and competency.
– A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

STATEMENT OF THE CASE

On August 12, 2015, an indictment was filed in the United States District Court, District of Arizona, charging Lewis with one count of CIR-Second Degree Murder and Aid and Abet, in violation of 18 U.S.C. §§1153, 1111 and 2, and one count of CIR-Kidnapping and Aid and Abet, in violation of 18 U.S.C. §§1153, 1201(a) and 2.

CASE HISTORY

On August 12, 2015, the aforementioned indictment was filed. (CR 1, ER VOL. II, pp. 178-179)¹ An arrest warrant was issued on August 13, 2015, and defendant was arrested on January 20, 2016. (CR 21) Lewis had his initial appearance and arraignment on January 21, 2016. He entered pleas of not guilty on both counts of the indictment. CJA attorney, Dana Carpenter, was appointed by the court to represent Lewis. Lewis submitted the issue of pretrial detention on the record then before the court, and was ordered detained pending trial as a flight risk and danger. (CR 17, CR 20) The trial was set for April 5, 2016. (CR 165)

On February 12, 2016, Lewis moved to continue the April 5, 2016 trial date.

¹ The abbreviation “CR” refers to the (District Court) Clerk’s Record, and will be followed by the event number designated in the Clerk’s file. The abbreviation “ER” refers to the Excerpts of the Record, and will be followed by the relevant page number referenced in Appellant’s Excerpts of Record. The abbreviation “PSR” refers to the Presentence Investigation Report and will be followed by the relevant page and paragraph numbers of that report. “R.T.” refers to the Court Reporter’s Transcript, and will be followed by the relevant date and page number of the transcript.

(CR 25) That motion was granted, and the trial was re-set for July 5, 2016. (CR 28)

On June 7, 2016, Lewis filed an ex-parte motion for a neuropsychological evaluation and approval of funds. (CR 42, 42-1, 42-2) (Appendix C, hereto) That motion was granted on June 8, 2016. (CR 43) The report generated from that evaluation was later filed under seal as an addendum to Lewis's sentencing memorandum². (CR 104) (Appendix C, hereto) At no point prior to his initial sentencing proceeding did Lewis or his attorney request a hearing, pursuant to 18 U.S.C. §4241, to determine whether Lewis was competent to proceed with his case.

The trial date was continued again, at the request of the co-defendant, Vaughn Paul James, to September 6, 2016. (CR 41) Later, Lewis filed another motion to continue the trial. (CR 45).

On August 22, 2016, the court held a status conference where the parties discussed the status of the neuropsychological evaluations performed on both defendants, and the pending motion to continue the trial. At that status conference, Lewis's counsel revealed that Lewis would be accepting the government's plea offer *subject to the yet-to-be-received report (Appendix C, hereto)*³ by Dr. Marc Walter, who performed the neuropsychological evaluation of Lewis. (CR 152; R.T. 8/22/16, pp. 1-6; ER VOL. II, pp. 172-177) The court granted Lewis's aforementioned motion to continue the trial, and re-set the trial for October 4, 2016. (CR 49)

² Report was unsealed by the Court of Appeals.

³ Dr. Walter's report is dated 9/12/16.

On September 6, 2016, six days before Dr. Walter's report was completed, Lewis pled guilty to Count 1 of the indictment (Second Degree Murder and Aid and Abet) pursuant to a plea agreement. (CR 53; ER VOL. II, pp. 162-171) The agreement contained a stipulation that Lewis would be sentenced to a term of imprisonment of between 17 and 22 years. There were no other agreements except that Lewis would pay full restitution to the victim(s) in an amount not to exceed \$500,000.

The change of plea proceeding was conducted by Magistrate Judge David K. Duncan. During the change of plea colloquy, Lewis's counsel avowed that he was unaware of any reason Lewis should not be permitted to plead guilty. (CR 166; R.T. 9/6/16, p. 18; ER VOL. II, p. 157)

Magistrate Judge Duncan submitted his written findings and recommendations to the assigned district court judge ⁴ (CR 55; ER VOL. I, pp. 100-102), who, in turn, adopted those findings, accepted Lewis's guilty plea, and deferred acceptance of Lewis's plea agreement. (CR 62; ER VOL. I, p. 99)

On October 27, 2016, the Probation Department filed its initial Presentence Investigation Report ("PSR"). (CR 85) (under seal) The Probation Department calculated Lewis's Guidelines prison sentencing range to be 235-293 months, based

⁴ Among those findings was an express finding that Lewis was competent to plead guilty. Lewis's counsel did not object to that finding, or any of the other findings of Magistrate Judge Duncan.

on Lewis having a Total Offense Level of 35, and falling within Criminal History Category IV. The PSR writer recommended 264 months in prison, to be followed by five years of supervised release, and a \$100.00 assessment. (CR 85; Draft PSR, pp. 6, 17) (under seal)

On January 25, 2017, the government filed a sentencing memorandum, requesting that the district court impose a 264 month (22 year) prison sentence. (CR 96; ER VOL. II, pp. 136-139)

Lewis filed no objections to the PSR, and on January 30, 2017, the Probation Department filed a “final draft” PSR. (CR 98; PSR) (under seal)

Also on January 30, 2017, Lewis filed a sentencing memorandum. (CR 99; ER VOL. II, pp. 131-135) Filed with Lewis’s sentencing memorandum was Dr. Walter’s report. (CR 104) (Appendix C, hereto)

On March 3, 2017, yet another (and final) PSR was filed which included a victim impact statement. (CR 107, 107-1) (under seal)

On February 6, 2017, the defendant appeared before district court judge, Susan R. Bolton, for sentencing. Neither party objected to the PSR writer’s Sentencing Guidelines calculations. (CR 154; R.T. 2/06/17, pp. 9-20; ER VOL. I, pp. 76-87)

The Court determined that Lewis’s Sentencing Guidelines matrix was 35/IV, with a Guidelines prison sentencing range of 235 to 293 months. The district court then rejected the plea agreement as being too lenient, and set the matter for a March

7, 2017 status conference/possible sentencing. (CR 154; R.T. 2/06/17, pp. 27-28; ER VOL. I, pp. 94-95)

At the March 7, 2017 hearing, the district court reminded the parties that it had rejected the plea agreement at the previous sentencing proceeding. (CR 167; R.T. 3/07/17, p. 2; ER VOL. I, p. 54) At that time, the parties presented to the court a copy of the original plea agreement with a hand-written modification (from 22 years to 25 years) of the maximum sentence allowed. The hand-written modification of the written plea agreement was initialed by Lewis, his attorney and the prosecutor. (CR 111; ER VOL. II, pp. 121-130)

The district court then accepted the earlier plea agreement, as amended, and entered it of record. (CR 167; R.T. 3/07/17, p. 4; ER VOL. I, p. 56)

During that proceeding, Lewis agreed to an initial restitution amount of \$1,280.00, with the understanding that a restitution hearing would be necessary to resolve other as-yet-undocumented requests for restitution. (CR 167; R.T. 3/07/17, pp. 4-5; ER VOL. I, pp. 56-57) At that proceeding, the court confirmed that neither party objected to the court's Guidelines calculations resulting in a Guidelines matrix of 35/IV, and that Lewis had reviewed the final PSR with his attorney and had no objections. (CR 167; R.T. 3/07/17, pp. 6-7; ER VOL. I, pp. 58-59) The court, after briefly discussing the 18 U.S.C. §3553 sentencing factors, imposed an above-Guidelines prison sentence of 300 months based on those factors. The court also

ordered \$1,280.00 in restitution, and a \$100.00 special assessment. The court then dismissed Count 2 of the indictment. (CR 109; ER VOL. I, pp. 48-52) (CR 110) (under seal)

On March 8, 2017, Lewis, through counsel, filed a timely notice of appeal from Lewis's judgment of guilt and sentence. (CR 112; ER VOL. II, pp. 119-120)

After filing the notice of appeal, Lewis's attorney was withdrawn as counsel and replaced by new counsel. (CR 129, 131)

On May 4, 2017, the government filed a motion for a restitution hearing. (CR 136; ER VOL. II, pp. 117-118)

On May 31, 2017, the district court held a restitution hearing. (CR 169; R.T. 5/31/17, pp. 1-39; ER VOL. I, pp. 9-47) At the beginning of that hearing, Lewis's new counsel informed the district court judge that he had met with Lewis several times, and developed concerns about Lewis's competency to proceed with his case. (Appendix D, hereto) With that in mind, and because the victim/witnesses had traveled great distances to appear and testify at the restitution hearing, Lewis's counsel proposed that the court proceed provisionally with the restitution hearing, subject to a later determination regarding Lewis's competency to proceed. (CR 169; R.T. 5/31/17, pp. 3-8; ER VOL. I, pp. 11-16) The district court proceeded with the hearing, and took the matter of restitution under advisement. The court also granted Lewis's counsel leave to file a motion for determination of competency pursuant to

18 U.S.C. §§4241, and handed counsel a copy of Dr. Walter's sealed neuropsychological evaluation. (CR 169; R.T. 5/31/17, pp. 36-38; ER VOL. I, pp. 44-46) (CR 104)

On June 1, 2017, Lewis's attorney filed a motion to determine competency, alleging that, based on his own observations, and Dr. Walter's evaluation, counsel believed that Lewis may be 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 in his defense. (CR 149; ER VOL. II, pp. 114-116) The government filed a response opposing Lewis's motion. (CR 157; ER VOL. II, pp. 110-113) Lewis filed a reply to that response. (CR 158; ER VOL. II, pp. 107-109) (Appendix E, hereto)

On June 15, 2017, and prior to ruling on Lewis's aforementioned motion to determine competency, the district court ordered additional restitution in the amount of \$3,594.00 (CR 157; ER VOL. I, p. 8), and entered an amended Judgment containing a total restitution amount of \$4,874.00. (CR 161; ER VOL. I, pp. 3-7) Lewis filed another notice of appeal that was treated by the district court as an amendment to the earlier notice of appeal. (CA 17-10109) (CR 136; ER VOL. II, pp. 105-106)

On July 27, 2017, the district court entered an order denying Lewis's motion for determination of competency, finding, in pertinent part: "Defendant presents

nothing that would change the opinion rendered by the psychologist who performed a neuropsychological examination of Defendant in August, 2016. Counsel's observations of Defendant are consistent with the psychologist's observations in 2016". (CR 168; ER VOL. I, pp. 2)

On August 8, 2017, Lewis filed a notice of appeal from that order. (CR 170; ER VOL. I, pp. 103-104)

The Ninth Circuit Court of Appeals assigned case number CA 17-10331 to that appeal, and later, *sua sponte*, joined the two appeals.

As mentioned, *supra*, Lewis was sentenced to 300 months at the Bureau of Prisons, to be followed by a five-year term of supervised release. He was ordered to pay \$4,874.00 in restitution, and a \$100.00 special assessment. (CR 161; ER VOL. I, pp. 3-7)

On appeal, Lewis argued that the district court erred in not *sua sponte* ordering a hearing to determine Lewis's competency to plead guilty and be sentenced, and, thereby, abused its discretion. He argued the evidence available to the court regarding Lewis's level of cognitive functioning was objectively sufficient to give the district court reasonable cause to believe Lewis might be incompetent, thus triggering an obligation, under 18 U.S.C. §4241, to *sua sponte* order a competency evaluation. Lewis requested that the case be remanded with instructions to conduct §4241 proceedings to determine, retrospectively, whether Lewis was competent to plead

guilty, or if that were not possible, that his guilty plea and sentence be vacated, and the case be remanded for further proceedings.

Lewis also claimed that the district court erred in denying Lewis's post-plea motion for a determination of competency, and, thereby, abused its discretion. He argued that there was ample evidence before the district court to trigger its obligation to order a competency evaluation prior to the restitution hearing. Lewis requested that the case be remanded with instructions to conduct a retrospective competency evaluation, or, if that were not possible, that the restitution order be vacated, and the case remanded for further proceedings.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals failed to apply the proper legal standard for determining whether the district court abused its discretion in failing to *sua sponte* order a competency evaluation of the defendant before accepting his guilty plea, thus denying him due process. In doing so, it established a troubling legal precedent suggesting that the district court need not consider and weigh evidence of incompetency when deciding whether to, *sua sponte*, order a competency evaluation – a precedent that is inconsistent with this Court's decision in *Drope v. State of Missouri*, 420 U.S. 162 (1975).

Additionally, the Ninth Circuit Court of Appeals failed to apply the proper legal standard for determining whether the district court abused its discretion in

denying defense counsel's request for a competency evaluation of the defendant prior to the court conducting a restitution hearing, thus denying him due process, and establishing an unworkable standard for obtaining a §4241(b) examination. In doing so, it has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, to wit: what is the legal/factual threshold for ordering a competency evaluation?

ARGUMENT

A. The Ninth Circuit Court of Appeals failed to apply the proper legal standard for determining whether the district court abused its discretion in failing to *sua sponte* order a competency evaluation of the defendant before accepting his guilty plea, thus denying defendant due process under the Fifth Amendment to the United States Constitution.

The conviction of an incompetent person is a violation of due process, *Pate v. Robinson*, 383 U.S. 375, 378 (1966), and a defendant must be competent at all stages of prosecution, including sentencing. *United States v. Rickert*, 685 F.3d 760, 765 (8th Cir. 2012) (citing *Pate v. Robinson*, 383 U.S. at 378). A defendant is competent if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “has a rational as well as factual understanding of the proceedings against him”. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (internal quotation omitted).

A statute directs the district court to grant a motion for a competency hearing when “there is reasonable cause to believe that the defendant may presently be

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". 18 U.S.C. §4241(a). The Constitution also requires an adequate hearing if there is sufficient doubt about the accused's competence. *Robinson*, 383 U.S. at 385-86. “[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required”, and “even one of these factors standing alone may, in some circumstances, be sufficient”. *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

In denying relief, the Ninth Circuit Court of Appeals, citing *United States v. Garza*, 751 F.3d 1130, 1134 (9th Cir. 2014), listed the defendant's medical history, his behavior in and out of court, and defense counsel's statements about the defendant's competence, as factors the district court should consider when deciding whether to *sua sponte* order a competency evaluation. However, the Ninth Circuit failed to acknowledge any obligation to acknowledge and weigh evidence of incompetency, thereby implying the district court had no such obligation either.

Dr. Walter's report, which was not made available to the parties or the court until *after* the change-of-plea proceeding, was replete with historical information and test results that pointed to severe cognitive impairment arguably bearing on

Lewis's ability to understand and effectively participate in his legal proceedings, including the following:

1. Lewis was in special education/learning disability classes in both elementary and high school. He was presently reading at the third grade level;
2. Lewis was declared 100% mentally disabled by the Social Security Administration, and began receiving disability payments at age sixteen;
3. During his birth, Lewis's cord was wrapped around his neck causing distress. Later, as a young adult, he sustained a number of head injuries while fighting;
4. Lewis's attention and concentration were especially poor for short-term auditory "working memory" as reflected in a digit span of four forward, four backward, and four in sequence. He also displayed impaired mental arithmetic problem-solving ability. On the WAIS-IV, his Working Memory Index of 69 was in the very low range;
5. Lewis's memory and learning were severely impaired for verbal information. He was essentially unable to remember *any* details from two short-stories, immediately and at a delay. When given a twelve-item wordlist to learn, he recalled *no* words at a delay. He had difficulty recognizing the words from the list, as well, at a delay;

6. Lewis's immediate recall of several simple designs was average, but he had no free recall of these designs at a delay, and did relatively poorly in recognizing the designs, choosing only three correct out of seven. His delayed recall of a complex visual figure was borderline impaired (11/36 details recalled from the Rey Complex Figure);

7. Lewis's intellectual functioning was at the bottom of the borderline impaired range as reflected in a WAIS-IV Full Scale IQ of 70. However, there was a significant discrepancy between his verbal and nonverbal abilities. His Verbal Comprehension Index of 63 was very low, while his Perceptual Reasoning Index of 84 was low average. His verbal abilities were lower than, but consistent with, his single word reading standard score of 73 on the TOPF. Among the verbal subtests, the defendant was impaired in Similarities and Vocabulary, and borderline impaired in Information. Among the visuospatial subtests, he ranged from borderline in Visual Puzzles and Matrix Reasoning to upper average in Block Design;

8. Lewis's performance on tests sensitive to deficits in adaptive reasoning and/or frontal lobe/executive function was variably impaired. He was moderately impaired on tests of verbal fluency, low average on the Stroop Interference subtest, and average on Trails B, a visually-based test of cognitive flexibility; and

9. When asked by Dr. Walter what day it was, Lewis said "July 7" rather than the actual date of August 11.

Subsequent to Lewis's initial sentencing proceeding, new counsel was appointed to represent Lewis. Just prior to Lewis's restitution hearing, counsel expressed his own grave concerns about Lewis's competency to proceed with his case. (CR 169; R.T. 5/31/17, pp. 3-7; ER VOL. II, pp. 11-15) Shortly thereafter, he filed a motion for a competency determination (CR 149, 158; ER VOL. II, pp. 114-116) alleging, *inter alia*, that during meetings between counsel and Lewis, Lewis had trouble answering basic questions about his case, and seemed to have trouble understanding the issues and concepts discussed regarding restitution, and that counsel believed that Lewis may be suffering from a mental disease or defect rendering him mentally incompetent to proceed with his case. Counsel alluded to Dr. Walter's neuropsychological evaluation as further evidence of Lewis's incompetence. More than a year separated the change of plea proceeding from the restitution hearing. Counsel expressed his concerns about Lewis's mental status to the court *prior* to seeing Dr. Walter's report, as the record makes clear. (CR 169; R.T. 5/31/17, pp. 5-6; ER VOL. I, pp. 13-14) Dr. Walter's report merely affirmed counsel's concerns. Nevertheless, the district court denied relief.

On appeal, the Ninth Circuit relied on the apparent absence of the aforementioned *Garza* factors in denying relief, without any mention of the compelling evidence of incompetency.

In *Drope*, this Court held that a necessary part of the district court's analysis as

to whether to order a competency evaluation is the proper weighing of information suggesting incompetency. *Drop v. Missouri*, 420 U.S. at 179. There is little, if any, evidence that that occurred here, or, perhaps more importantly, that either court believed it had an obligation to acknowledge and weigh such evidence. The district court took no action, *sua sponte*, to explore the issue of Lewis's competency, even after reviewing Dr. Walter's report, and the Ninth Circuit declared "Dr. Walter's report did not raise *any* concerns about his [Lewis's] competency".

While the appellate court's conclusion might be viewed by this Court as little more than a disputed factual finding by the district and appellate courts, and, therefore, not sufficiently compelling to merit a Writ, it might also be viewed as a clear departure from the requirement implicit in *Drop* that the district court do or say something in the face of objectively *compelling* evidence of incompetency to signal that it considered and weighed that evidence, and found that it did not meet the "reasonable cause" standard for requiring a competency evaluation.

On this record, Lewis was entitled to have his case remanded to determine whether a retroactive competency evaluation could be performed, and, if not, have his guilty plea, conviction and sentence vacated.

Thus, the petitioner respectfully moves this Court to grant his petition for a writ of certiorari, vacate the judgment of the Ninth Circuit Court of Appeals, and order the Ninth Circuit Court of Appeals to remand to the district court for a

determination of whether a retrospective competency evaluation can be performed, and, if not, to vacate Lewis's guilty plea, judgment and sentence.

B. The Ninth Circuit Court of Appeals failed to apply the proper legal standard for determining whether the district court abused its discretion in denying defense counsel's request for a competency evaluation of the defendant prior to the district court conducting a restitution hearing, thus denying defendant due process under the Fifth Amendment to the United States Constitution.

Absent findings of an insufficient factual basis for a §4241(a) motion, or a lack of good faith in making the motion, a competency evaluation is required.

United States v. Ramirez, 304 F.3d 1033, 1035 (9th Cir. 2002); *United States v. Hill*, 526 F.2d 1019, 1023 (10th Cir. 1975).

Counsel's request for a determination of Lewis's competency was made both as an advocate for his client, and as a seasoned officer of the court. The request was not, on its face, frivolous – indeed, it echoed previous counsel's concerns about Lewis's competency (Appendix C, hereto), and was supported by a plethora of troubling test results and observations found in Dr. Walter's report. Counsel's observations clearly met the "substantial evidence" standard set forth in *Robinson, supra*. On these facts, the district court could not possibly have been applying the *Drope* legal standard in denying Lewis's motion, and therefore, abused its discretion in denying Lewis's motion for a determination of competency.

On appeal, Lewis requested that the Ninth Circuit remand the case to the district court so that it could determine whether Lewis's competency could be evaluated, *nunc pro tunc*, and, if so, for an assessment of his competency at the time of his restitution hearing. Lewis requested that if he were determined to have been incompetent, or if a *nunc pro tunc* evaluation could not be made, the restitution order be vacated, and the case remanded for further proceedings.

In denying relief, the Court of Appeals did not articulate the legal test or standard it applied, did not acknowledge any of the troubling aspects of Dr. Walter's report, and, apparently gave no weight, whatsoever, to Lewis's attorney's voiced concerns about Lewis's competency.

Unfortunately, 18 U.S.C. §4241(a) (2009) does not provide judges much guidance about when to order a competency evaluation, simply stating that it should occur when there is "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent...." This Court has not provided an exact definition of "reasonable cause", but case law seems to encourage an inclusive interpretation. For example, in *Drope*, this Court noted, "[a]lthough we do not [...] suggest that courts must accept without question a lawyer's representations concerning the competence of his client...an expressed doubt in that regard by one with 'the closest contact with the defendant', is unquestionably a factor which should be considered" (*Drope*, FN 13, p. 177). The

Drope Court added that “evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competent to stand trial are all relevant in determining whether further inquiry is required, but...even one of these factors alone may, in some circumstances, be sufficient” (p. 180).

The Eighth Circuit, in *Reynolds v. Norris*, 86 F.3d 796, 800 (8th Cir. 1996), has held that a defense attorney’s articulated concerns regarding is client’s competency, without more, is not enough to trigger the district court’s obligation to order a competency evaluation, thus (at least in some circumstances) putting the onus on the defense attorney to undertake (and, in many cases, finance) a psychological work-up of the client prior to making a request for a §4241 evaluation and/or competency hearing. The Ninth Circuit has now implicitly joined the Eighth Circuit in that regard. This rule is utterly unworkable, and, arguably unconstitutional, and requires this Court’s supervision.

Applying the principles set forth in *Drope*, the district court erred in denying Lewis’s motion for a §4241 hearing. There was ample evidence before the district court to trigger its obligation to order a competency evaluation prior to the entry of the restitution order. Lewis was, thereby, denied constitutional due process. The Ninth Circuit similarly erred in denying relief.

Thus, Lewis respectfully moves this Court to grant his petition for a writ of certiorari, vacate the judgment of the Ninth Circuit Court of Appeals, and order the

Ninth Circuit Court of Appeals to remand to the district court for a determination of whether Lewis's competency can be evaluated *nunc pro tunc* to the time of his restitution hearing, and, if not, to vacate the restitution order.

CONCLUSION

The Ninth Circuit Court of Appeals applied an improper legal standard for determining whether the district court abused its discretion in failing, *sua sponte*, to order a competency evaluation of Lewis before he entered his guilty plea, thereby denying Lewis of constitutional due process. In denying relief, the Ninth Circuit failed to properly consider and weigh evidence of incompetency, as required under *Drole*. This Court should grant this petition for a writ of certiorari, vacate the judgment of the Ninth Circuit Court of Appeals, and order the case remanded to the district court for a determination of whether a retrospective competency evaluation can be performed, and, if not, to vacate Lewis's guilty plea, judgment and sentence.

The Ninth Circuit Court of Appeals failed to apply the proper legal standard for determining whether the district court abused its discretion in denying defense counsel's request for a competency evaluation of Lewis prior to the district court conducting a restitution hearing, thus depriving Lewis of constitutional due process, and establishing an unworkable standard for obtaining a §4241 examination. This Court should grant this petition for a writ of certiorari, vacate the judgment of the

Ninth Circuit Court of Appeals, and order the case be remanded to the district court for a determination of whether Lewis's competency can be evaluated *nunc pro tunc* to the time of his restitution hearing, and, if not, to vacate the restitution order.

RESPECTFULLY SUBMITTED this 28th day of January, 2019 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING—PROOF OF SERVICE

Michael J. Bresnahan, Attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

In accordance with Sup.Ct.R. 29.2, I have on this 28th day of January, 2019, caused to be delivered by UPS overnight delivery the original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Clerk, Supreme Court of the United States, One 1st St. NE, Washington, D.C. 20543, within the period prescribed in Sup.Ct.R. 13.1; and

In accordance with Sup.Ct.R. 29.5, I have on this 28th day of January , 2019, caused two copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to Peter Kozinets, Assistant United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Petitioner, Nolan Lewis, USP Hazelton, United States Penitentiary, Post Office Box 2000, Bruceton

Mills, West Virginia, 26525.

EXECUTED this 28th day of January, 2019.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Michael J. Bresnehan
Attorney for Petitioner