

## **Appendix E**

1 **LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.**  
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5 Attorney for Defendant

6  
7 **IN THE UNITED STATES DISTRICT COURT**  
8  
9 **DISTRICT OF ARIZONA**

10 United States of America,

11 Plaintiff,

12 Case No.: 3:15-cr-08178-SRB

13 vs.

14 Nolan Lewis,

15 Defendant.

16 DEFENDANT'S MOTION FOR  
DETERMINATION OF COMPETENCY

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28 COMES NOW the defendant, Nolan Lewis, by and through the undersigned attorney, and pursuant to 18 U.S.C. §§ 4241 and 4247, hereby moves this Court to conduct a hearing to determine whether the defendant was competent to proceed with his restitution hearing, and is competent to proceed with his appeal, and to order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the Court prior to said hearing, pursuant to the provisions of § 4247(b) and (c), all for the reasons set forth in the accompanying memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 1st day of June, 2017, by

***MICHAEL J. BRESNEHAN, P.C.***

26 s/ Michael J. Bresnehan  
27 Attorney for Defendant  
28 Nolan Lewis

## **MEMORANDUM OF POINTS AND AUTHORITIES**

On April 20, 2017, the undersigned attorney was appointed to represent the defendant as counsel, ostensibly to prosecute his appeal in CA 17-10109. The defendant's previous attorney, Dana Carpenter, was granted leave by the Court of Appeals to withdraw as counsel.

Still pending at the time of counsel's appointment was defendant's restitution hearing. Counsel met with the defendant on three occasions between May 24 and May 30, 2017, for an aggregate 2 1/2 hours or so, to discuss defendant's case, and his then-pending restitution hearing.

Upon initially meeting the defendant, it was immediately apparent to counsel that defendant was having trouble answering basic questions about his case, and understanding the issues and concepts discussed regarding restitution. The subsequent two meetings reinforced those concerns. By the end of the third meeting, counsel had concluded that the defendant 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 properly in his defense.

Counsel brought these concerns to the attention of this Court on May 31, 2017, just before the defendant's restitution hearing was to begin. Counsel proposed that the restitution hearing proceed, provisionally, in light of the distance traveled by the victims (family of the deceased victim) to attend and participate in that proceeding. Counsel requested, however, that he be granted leave to request a competency hearing should he conclude, after further investigation, that there is reasonable cause to believe defendant is not presently competent to proceed with his case. At the conclusion of the restitution hearing, the Court provided counsel with a copy of defendant's sealed Neuropsychological Evaluation (Dkt. 104), which he has since read. After reviewing that report, counsel is even more convinced that defendant should undergo an evaluation for mental competency, and, therefore, requests same.

Defendant further moves this Court to delay any ruling on the issue of restitution until such time as this Court has determined whether the defendant was competent to proceed in that matter.

Counsel will seek a stay of the defendant's appeal, and a limited remand, if necessary, to allow the issue of defendant's competency to be resolved.

RESPECTFULLY SUBMITTED this 1st day of June, 2017, by

***MICHAEL J. BRESNEHAN, P.C.***

s/ Michael J. Bresnahan

**Attorney for Defendant**

Nolan Lewis

## CERTIFICATE OF SERVICE

X I hereby certify that on June 1, 2017, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Hon. Susan R. Bolton  
United States District Court

Kiyoko Elizabeth Patterson, Esq.  
Assistant United States Attorney

s/Michael J. Bresnahan

ELIZABETH A. STRANGE  
Acting United States Attorney  
District of Arizona

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,

CR-15-08178-02-PCT-SRB

**Plaintiff,**

vs.

Nolan Lewis,

# GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR DETERMINATION OF COMPETENCY

**Defendant.**

The United States of America, through undersigned counsel, hereby responds to Defendant's Motion for Competency Determination and request that the Court deny Defendant's motion. (CR ¶149).

## L      Facts

On September 6, 2016, Defendant pleaded guilty to Second Degree Murder-Aid and Abet. (CR ¶52). On March 7, 2017, Defendant was sentenced to three hundred months of imprisonment followed by five years of supervised release. (CR ¶109). Defendant timely filed his notice of appeal. (CR ¶112). The Court ordered Defendant pay an undisputed amount of restitution for \$1,280.00 to the victim's family and advised the parties that any remaining amounts of restitution be submitted by a stipulation or by requesting a restitution hearing. (CR ¶108). On March 31, 2017, at the restitution hearing, witnesses testified and evidence was admitted supporting the additional restitution for \$3,500.94. Prior to the

1 commencement of the restitution hearing, Defense Counsel raised concerns regarding  
2 Defendant's competency and requested that the Court postpone a restitution order until the  
3 matter was resolved. (CR ¶146). Defense filed a Motion for Determination of Competency  
4 requesting that Defendant undergo a psychological examination to determine whether  
5 Defendant is competent to proceed in the restitution hearing and appeal. (CR ¶149).

6 **II. Defendant is Not Entitled to a Competency Evaluation**

7 Title 18, Section §4241 authorizes parties to file a motion for determination of  
8 competency "at any time after the commencement of a prosecution for an offense and *prior*  
9 *to the sentencing* of the defendant, or at any time *after* the commencement of probation or  
10 supervised release and *prior to the completion of the sentence.*" (Emphasis added). Prior to  
11 sentencing, Defendant underwent a neuropsychological evaluation at the urging of prior  
12 counsel. The results and report were filed *ex parte* and not viewed by the government;  
13 however, Defendant proceeded to sentencing on March 3, 2017. The neuropsychological  
14 evaluation of Defendant alleviated prior counsel's concerns regarding competency.<sup>1</sup> Now,  
15 Defendant would like an additional assessment, however, he did not raise this matter prior  
16 to sentencing and he has not begun a term of supervised release, thus Section §4241 does  
17 not apply. *Ryan v. Gonzales*, 133 S.Ct. 696, 707 (2013) (Section 4241 applies only to trial  
18 proceedings prior to sentencing and "at any time after the commencement of probation or  
19 supervised release").<sup>2</sup>

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23 <sup>1</sup> The government submits that there is no evidence to support that there is  
24 "reasonable cause to believe that the defendant may presently be suffering from a mental  
25 disease or defect rendering him mentally incompetent to the extent that he is unable to  
26 understand the nature and consequences of the proceedings against him or to assist properly  
in his defense." § 4241(a).

27 <sup>2</sup> A restitution hearing is not sentencing. *See Manrique v. U.S.*, 137 S.Ct. 1266, 1270  
28 (2017). (Sentencing Courts are required to impose restitution as part of the sentence for  
specified crimes, the court enters into an "initial judgment imposing certain aspects of a

1 To the extent that Defendant argues that he is entitled to a competency hearing to  
2 determine whether he is competent to assist in his appeal is not supported in the law. The  
3 Ninth Circuit embraced a right to competency in order to assist counsel on appeal until the  
4 U.S. Supreme Court overruled them. *See Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009),  
5 *Rohan v. Woodford*, 334 F.3d 803, 806 (9th Cir. 2003) (creating a statutory right to  
6 competency in federal post-conviction proceedings), *abrogated by Ryan v. Gonzales*, 133  
7 S. Ct. 696 (2013).

8 **III. Conclusion**

9 Recently, the government has updated the victim's family on the case. The  
10 government explained the pending motion and potential process. The family expressed  
11 concern that the additional time and process to pursue the matter would further delay their  
12 closure. Thus, should the Court order a competency evaluation, the family wishes to forgo  
13 their additional claim of restitution for \$3,500.94, in order to move forward with their lives  
14 and allow their son to rest. For the foregoing reasons, the government request that the Court  
15 deny Defendant's Motion for Determination of Competency and enter an order amending  
16 the initial restitution.

17 Respectfully submitted this 9th day of June, 2017.

18 ELIZABETH A. STRANGE  
19 Acting United States Attorney  
20 District of Arizona

21 s/ Kiyoko E. Patterson  
22 KIYOKO E. PATTERSON  
23 Assistant U.S. Attorney

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25  
26 defendant's sentence, such as terms of imprisonment, while deferring restitution until entry  
27 of a later, amended judgment.”)  
28

**CERTIFICATE OF SERVICE**

1 I hereby certify that on June 9, 2017, I electronically transmitted the attached document to  
2 the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of  
3 Electronic Filing to the following CM/ECF registrant: \_\_\_\_\_

4 Michael Bresnahan  
5 Attorney for Defendant, Nolan Lewis

6 *s/Stephanie Hill*  
7 U.S. Attorney's Office

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4 State Bar No.: 009415  
5 Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT  
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United States of America,

Plaintiff,

Case No.: 3:15-cr-08178-SRB

11 | vs.

Nolan Lewis,

**Defendant.**

DEFENDANT'S REPLY TO  
GOVERNMENT'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
DETERMINATION OF COMPETENCY

15 COMES NOW the defendant, Nolan Lewis, by and through the undersigned attorney, and  
16 hereby files his reply to the government's response to defendant's motion for determination of  
17 competency, all for the reasons set forth in the accompanying memorandum of points and  
18 authorities.

20 | RESPECTFULLY SUBMITTED this 13th day of June, 2017, by

***MICHAEL J. BRESNEHAN, P.C.***

s/ Michael J. Bresnahan  
Attorney for Defendant  
Nolan Lewis

## **MEMORANDUM OF POINTS AND AUTHORITIES**

The government's assertion that 18 U.S.C. § 4241 does not authorize defendant's request because the defendant has already been sentenced is incorrect. A finding of restitution is part of the sentencing process, and a restitution order is part of a defendant's sentence. See 18 U.S.C. § 3663A(a)(1). *Manrique v. United States*, 137 S.Ct. 1266, 1270 (2017) (cited by the government in its response), is inapposite.

Moreover, the government's interpretation of §4241 is wildly counterintuitive, as due process requires that a defendant be competent at all stages of the district court proceedings. See, e.g., *United States v. Hinton*, 218 F.3d 910, 912 (8th Cir. 2000).

Next, the government argues that because prior defense counsel did not request a competency hearing after receiving, and presumably reviewing, the sealed neuropsychological evaluation, the defendant couldn't possibly be incompetent at this time. However, the author of the aforementioned report indicated that the report was prepared ostensibly for use as mitigation at sentencing, and the report was not structured as a typical competency report; and while the author makes a couple of conclusory comments about competency, his report is replete with information strongly suggesting that the defendant may very well not have been competent to proceed with his change of plea and earlier sentencing proceeding, and may not currently be competent.

Additionally, whether the defendant was previously competent would not be determinative of whether he is currently competent to proceed with his case. The undersigned attorney, without prior knowledge of the neuropsychological evaluation, independently developed concerns about the defendant's ability to understand the then-pending restitution proceedings, and to assist properly in his defense.

If a bonafide doubt regarding a defendant's mental competence is raised, the trial court *must* hold a competency hearing, which begins with an evaluation of the defendant's mental competence

1 performed by a court-appointed mental health professional. *Pate v. Robinson*, 383 U.S. 375, 385  
2 (1966). If a reasonable judge would have “genuine doubt” about the defendant’s competency to  
3 stand trial, or to be sentenced, failure to hold a competency hearing is plain error. *United States v.*  
4 *Dreyer*, 705 F.3d 951, 961 (9th Cir. 2013).

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6 Finally, the question of whether defendant has a right to competency during his appeal is not  
7 before this Court at this time, and is not relevant to this Court’s determination of whether to grant  
8 defendant’s request for a competency exam (and hearing, if warranted).

9 RESPECTFULLY SUBMITTED this 13th day of June, 2017, by  
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11 ***MICHAEL J. BRESNEHAN, P.C.***

12 s/ Michael J. Bresnehan

13 Attorney for Defendant  
Nolan Lewis

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18 **CERTIFICATE OF SERVICE**

19  I hereby certify that on June 13, 2017, I electronically transmitted the attached document to the  
20 Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the  
following ECF registrants:

21 Hon. Susan R. Bolton  
22 United States District Court

23 Kiyoko Elizabeth Patterson, Esq.  
24 Assistant United States Attorney

25  
26 s/ Michael J. Bresnehan