

Appendix E

LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.

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 State Bar No.: 009415

Attorney for Defendant

**IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

vs.

Nolan Lewis,

Defendant.

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

**DEFENDANT'S MOTION FOR
 DETERMINATION OF COMPETENCY**

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.

s/ Michael J. Bresnehan

Attorney for Defendant

Nolan Lewis

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 On April 20, 2017, the undersigned attorney was appointed to represent the defendant as
3 counsel, ostensibly to prosecute his appeal in CA 17-10109. The defendant's previous attorney,
4 Dana Carpenter, was granted leave by the Court of Appeals to withdraw as counsel.
5

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

9 Upon initially meeting the defendant, it was immediately apparent to counsel that defendant
10 was having trouble answering basic questions about his case, and understanding the issues and
11 concepts discussed regarding restitution. The subsequent two meetings reinforced those concerns.
12 By the end of the third meeting, counsel had concluded that the defendant may be presently
13 suffering from a mental disease or defect rendering him mentally incompetent to the extent that he
14 is unable to understand the nature and consequences of the proceedings against him, or to assist
15 properly in his defense.
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17 Counsel brought these concerns to the attention of this Court on May 31, 2017, just before
18 the defendant's restitution hearing was to begin. Counsel proposed that the restitution hearing
19 proceed, provisionally, in light of the distance traveled by the victims (family of the deceased
20 victim) to attend and participate in that proceeding. Counsel requested, however, that he be granted
21 leave to request a competency hearing should he conclude, after further investigation, that there is
22 reasonable cause to believe defendant is not presently competent to proceed with his case. At the
23 conclusion of the restitution hearing, the Court provided counsel with a copy of defendant's sealed
24 Neuropsychological Evaluation (Dkt. 104), which he has since read. After reviewing that report,
25 counsel is even more convinced that defendant should undergo an evaluation for mental
26 competency, and, therefore, requests same.
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1 Defendant further moves this Court to delay any ruling on the issue of restitution until such
2 time as this Court has determined whether the defendant was competent to proceed in that matter.

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

5
6 RESPECTFULLY SUBMITTED this 1st day of June, 2017, by

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

8
9 s/ Michael J. Bresnehan
10 Attorney for Defendant
11 Nolan Lewis

12 **CERTIFICATE OF SERVICE**

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

16 Hon. Susan R. Bolton
17 United States District Court

18 Kiyoko Elizabeth Patterson, Esq.
19 Assistant United States Attorney

20 s/Michael J. Bresnehan

ELIZABETH A. STRANGE
Acting United States Attorney
District of Arizona

KIYOKO PATTERSON
Assistant U.S. Attorney
Arizona State Bar No. 023753
Two Renaissance Square
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Phoenix, Arizona 85004
Telephone: 602-514-7500
Email: kiyoko.patterson@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Nolan Lewis,

Defendant.

CR-15-08178-02-PCT-SRB

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

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).

I. 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.¹ Now,
15 Defendant would like an additional assessment, however, he did not raised 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").²

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22
23 ¹ 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 ² 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
District of Arizona

20 s/ Kiyoko E. Patterson
21 **KIYOKO E. PATTERSON**
22 Assistant U.S. Attorney
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26 defendant's sentence, such as terms of imprisonment, while deferring restitution until entry
27 of a later, amended judgment.")
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CERTIFICATE OF SERVICE

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

Michael Bresnehan
Attorney for Defendant, Nolan Lewis

s/Stephanie Hill
U.S. Attorney's Office

1 **LAW OFFICES OF MICHAEL J. BRESNEHAN, P.C.**

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3 480-345-7032

mbresnehan@hotmail.com

4 State Bar No.: 009415

5 Attorney for Defendant

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7 **IN THE UNITED STATES DISTRICT COURT**

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9 United States of America,

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

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.
19

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

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

22
23 s/ Michael J. Bresnehan

24 Attorney for Defendant

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

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

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

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant
Nolan Lewis

CERTIFICATE OF SERVICE

X I hereby certify that on June 13, 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. Bresnehan