Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 14-mj-608 (BAH/GMH)**
	)	
MARKELLE SETH,	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATION

This matter has been referred to the undersigned for the purpose of determining whether Defendant Markelle Seth ("Defendant") has been restored to mental competency to stand trial pursuant to 18 U.S.C. § 4241(e).[1] Defendant has Intellectual Disability, Mild,[2] an incurable neurodevelopmental impairment marked by stunted intellectual and adaptive functioning. The issue for this Court to determine is whether Defendant, given his diagnosis and its permanence, is competent to stand trial – that is, whether Defendant "has a sufficient present ability to consult with

[1] The relevant docket entries for purposes of this Report and Recommendation are as follows: (1) Criminal Complaint against Markelle Seth ("Compl.") [Dkt. 1]; (2) Affidavit of Investigator Myo Kyaw ("Kyaw Aff.") [Dkt. 1-1]; (3) Forensic Evaluation Report of Dr. Kristina Lloyd ("Lloyd's Report") [Dkt. 38]; (4) Transcript of the Competency Hearing on May 16, 2016 ("5/16/16 Tr.") [Dkt. 67]; (5) Transcript of the Competency Hearing on May 17, 2016 ("5/17/16 Tr.") [Dkt. 68]; (6) Defendant's Proposed Findings of Fact and Conclusions of Law ("Def.") [Dkt. 71]; (7) Plaintiff's Proposed Findings of Fact and Conclusions of Law ("Pl.") [Dkt. 72]; (8) Plaintiff's Response to Defendant's Proposed Findings of Fact and Conclusions of Law ("Pl. Resp.") [Dkt. 72]; and (9) Defendant's Response to Plaintiff's Proposed Findings of Fact and Conclusions of Law ("Def. Resp.") [Dkt. 74].

[2] Evidence in the record before the undersigned occasionally refers to Defendant's diagnosis as "Mild Mental Retardation," but Intellectual Disability, Mild has since replaced that language as the preferred terminology for that diagnosis. *See Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1990 (2014) (citations omitted); *see also* Def. Exh. 1, MCC Competency Evaluation ("DiMisa's Report") at 4. Accordingly, while recognizing that some documents may reference Defendant's "Mild Mental Retardation" or "Mental Retardation, Mild," the undersigned will refer to that diagnosis as Intellectual Disability, Mild.

his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

The undersigned held a competency hearing on May 16 and 17, 2016, after which the parties submitted their proposed findings of fact and conclusions of law. Based on the evidence adduced at the hearing and the parties' respective arguments, the undersigned recommends that the Court find that Defendant has not been restored to competency and is therefore incompetent to stand trial in this case.

BACKGROUND AND PROCEDURAL HISTORY

On October 15, 2014, the government filed the instant complaint charging Defendant with one count of production of child pornography in violation of 18 U.S.C. § 2251(a). Compl. The complaint alleges that, while responding to a report of an assault with a dangerous weapon on October 2, 2014, Metropolitan Police Department ("MPD") officers learned at the scene that two minors, aged three and five, accused Defendant of sexually abusing them. *See* Kyaw Aff. [Dkt. 1-1] at 1. Law enforcement later obtained warrants to search two cell phones that Defendant was carrying. *Id.* at 2. On the cell phones, law enforcement found sexually explicit videos of the two minors and other sexually explicit photographs of young children. *Id.* at 3. After interviewing the children accusing Defendant of engaging in sexually explicit conduct with them, the MPD officers placed Defendant under arrest and transported him to a police station in Washington, D.C. *Id.* at 2.

Once at the station, law enforcement placed Defendant in a holding room for an interview.[3] Two MPD officers proceeded to advise Defendant of his *Miranda* rights, which he waived, and ask him about the children's allegations of sexual abuse. He referred to those allegations as "the situation," and, when pressed for more details, refused to answer the MPD officers' questions. During the interview, Defendant had trouble maintaining eye contact, speaking clearly, and articulating cogent and coherent thoughts. Shortly after the interview began, he tucked his arms—and, intermittently, his face—into his shirt and stared at the ground. Indeed, his demeanor during the interview was child-like, likely due, in part, to his mental disability.

Counsel for Defendant has asserted since this case's initiation that his client is incompetent to stand trial. For that reason, immediately following Defendant's initial appearance on October 16, 2014, the Court ordered that Defendant be screened by the Department of Behavioral Health at the Superior Court of the District of Columbia to determine if he had the competency to proceed with a supervised release hearing. *See* Order re Forensic Screening [Dkt. 3]. Shortly after, and based on defense counsel's unopposed request, the Court committed Defendant to the custody of the Attorney General of the United States pursuant to 18 U.S.C. § 4241(d) for a preliminary competency screening. Order re Mental Competency to Stand Trial [Dkt. 5]. On December 22, 2014, Dr. Samantha DiMisa ("Dr. DiMisa"), a psychologist with the Federal Bureau of Prisons ("BOP"), concluded that Defendant lacked the competency to understand the nature and consequences of the proceedings against him and to assist properly in his defense. *See* Def. Exh. 1, MCC Compe-

[3] The MPD officers made a video recording of Defendant's initial arrest interview, which the government then submitted into evidence during the competency hearing. *See* Pl. at 3. The undersigned has since reviewed that recording, which serves as the basis for the Court's findings with respect to Defendant's initial interview with the MPD.

tency Evaluation ("DiMisa's Report") at 15–16. Accordingly, the undersigned committed Defendant to the custody of the United States pursuant to 18 U.S.C. § 4241(d)(1) to determine whether there was a "substantial probability in the foreseeable future that he [would] attain the capacity to permit the proceedings to go forward." Order for Further Psychiatric Evaluation [Dkt. 17].

On April 27, 2015, Defendant was transported to the Federal Medical Center in Butner, North Carolina ("FMC Butner") pursuant to the Court's Order. *See* Status Report [Dkt. 29]. The undersigned held an intermediate hearing to assess Defendant's progress on June 10, 2015, at which he and his psychologist at FMC Butner, Dr. Kristina Lloyd ("Dr. Lloyd"), appeared by videoconference. Based on Dr. Lloyd's representations at the hearing that Defendant was not competent to stand trial, the undersigned ordered Defendant to remain at FMC Butner for additional psychiatric evaluation and, if possible, competency restoration. *See* June 10, 2015 Minute Entry. On July 21, 2015, Defendant and Dr. Lloyd appeared again before the undersigned by videoconference, and Dr. Lloyd informed the Court that it was "quite likely" that Defendant would be restored to competency. *See* 7/21/2015 Transcript [Dkt. 43] at 14:1. One month later, Dr. Lloyd prepared a psychological evaluation report confirming her prediction and concluding that Defendant is "ready to be returned to court for resolution of his legal situation." *See* Lloyd's Report at 16, 20.

Dissatisfied with Dr. Lloyd's conclusion, defense counsel requested that the undersigned issue an Order directing Defendant's transportation to the Correctional Treatment Facility of the D.C. Jail ("CTF") so that his competency could be evaluated by an expert retained by the defense. *See* Order regarding Transport and Competency Report [Dkt. 36]. The undersigned granted de-

fense counsel's request, *see id.* at 2, and Dr. Robert Denney ("Dr. Denney"), a psychologist retained as a defense expert, evaluated Defendant and concluded that he is not competent to stand trial. *See* Def. Exh. 1, Competence Evaluation ("Denney's Report") at 29.

The parties then requested that the Court hold a competency hearing to determine whether Defendant has been restored to competency pursuant to 18 U.S.C. § 4241(e). On November 4, 2015, then-Chief Judge Richard W. Roberts referred this matter to the undersigned to conduct the competency hearing and to prepare a Report and Recommendation on the issue. Order [Dkt. 50]. Following a series of adjournments prompted by scheduling conflicts between the parties, the undersigned held a two-day competency hearing on May 16 and 17, 2016. The parties later submitted post-hearing briefs in support of their positions in July and August. The matter is now ripe for resolution.

LEGAL STANDARD

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439–40 (1992). To evaluate a defendant's competency, a court must make a dual inquiry into whether the defendant "has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

The procedure for determining competency is prescribed by 18 U.S.C. § 4241, which states in pertinent part that a court must hold a hearing to determine a defendant's competency "if there is a 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). "If, after the hearing, the court finds by a preponderance of the evidence" that the defendant is not competent to stand trial, the court must "commit the defendant to the custody of the Attorney General" for treatment in a suitable facility for up to four months "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 . . . ." 18 U.S.C. § 4241(d)(1). Once the facility's director certifies that the defendant "is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense," as happened here, the court must hold an additional hearing to determine whether the defendant has in fact been restored to competency by a preponderance of the evidence. 18 U.S.C. § 4241(e).

FINDINGS OF FACT

The following findings of fact are based on the testimony and evidence presented during the competency hearing or otherwise contained in the record.

A. Preliminary Observations

Defendant, now twenty-three years old, demonstrated signs of developmental disability and behavioral problems at an early age. *See* Lloyd's Report at 6. He has been diagnosed with various mental impairments at different points in his life, but Intellectual Disability, Mild ("IDM") is the diagnosis that most aptly captures his condition. *See id.* at 16; *see also* DiMisa's Report at 10-11; Denney's Report at 24. Intellectual Disability is a three-tiered neurodevelopmental disorder, with each tier – Mild, Moderate, and Severe – demarcated by the intensity of one's symptoms.[4]

[4] While Defendant's diagnosis contains the word "Mild," that is, in many ways, a misnomer. IDM applies to individuals with IQ scores that fall within the bottom two percent of IQ scores in the population, *see* 5/17/16 Tr. at 403:15–24, and approximately thirty percent of individuals that have IDM are found incompetent to stand trial. *See* 5/16/16 Tr. at 186:16–87:19. Put differently, there is nothing necessarily "mild" about the mental deficiencies associated with IDM; rather, its name is a reflection of the severity of the symptoms associated with Intellectual Disability, Moderate and Intellectual Disability, Severe, which frequently deprive individuals of their ability to function

5/16/16 Tr. at 179:15–80:15; 5/17/16 Tr. at 403:9–24. Generally, an Intellectual Disability diagnosis requires the satisfaction of three criteria: (1) limitations in cognitive or intellectual functioning; (2) limitations in adaptive functioning – that is, conceptual skills, practical skills, and social skills; and (3) a date of onset falling within one's neurodevelopmental period. *See* Lloyd's Report at 16; *see also* 5/16/16 Tr. at 130:5–21. Because the impairment is neurodevelopmental, there is no medicinal treatment for it; there is no "cure" for IDM. *Id.* at 207:5–11. Indeed, it is Defendant's lack of capacity for improvement that divides the parties in the instant case: defense counsel disputes the government's assertion that, after four months at FMC Butner, Defendant has been *restored to* competency and that he now has the capacity to rationally understand his case and to aid in his defense if provided with certain accommodations. *See* Def. Resp. at 3 n.4; *see also* 5/17/16 Tr. at 536.

B. Defendant's Competency Evaluations

Defendant has undergone four competency evaluations in two different court systems, three of which resulted in a determination that he was not competent to stand trial. Each will be addressed below.

1. Dr. Barnes' Conclusions and Opinions

In August 2011, Defendant was arrested for an incident unrelated to the instant case and appeared before the Superior Court of the District of Columbia. *See* Def. Exh. 1, Juvenile Competency Evaluation ("Barnes Report") at 1–2. After his lawyer in that case expressed concern over his comprehension of the proceedings, the court referred Defendant, who was seventeen years old

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on their own altogether. *Id.* at 404:4–405:1. For his part, Defendant has consistently demonstrated extremely low intellectual and adaptive functioning: he has never lived alone or worked a job that requires any self-direction, he has extreme difficulty planning and concentrating, he is unable to manage his emotions, and he has trouble communicating with other people. *See* Lloyd's Report at 16.

at the time, to the Child Guidance Clinic within the Court Social Services Division for a competency evaluation. *Id.* at 2. There, Dr. Michael E. Barnes ("Dr. Barnes"), a licensed psychologist, conducted a day-long evaluation of Defendant consistent with the court's order and with the assistance of a clinical intern. *Id.* at 6–14. While Defendant cooperated throughout the evaluation, he appeared both frustrated and tired, falling asleep twice and struggling to maintain attention for longer than five minutes at a time. *Id.* at 6. On the Wechsler Adult Intelligence Scale–Fourth Edition ("WAIS-IV"), a standardized assessment used to measure, among other things, an individual's general intellectual functioning, Defendant performed poorly. *Id.* at 7–8. He obtained an IQ score of sixty-three, which ranks at the bottom one percent of his age group, and demonstrated difficulty with processing information and expressing himself. *Id.* at 8–9. Dr. Barnes also administered portions of the Woodcock-Johnson Tests of Achievement ("WJ-III"), establishing that Defendant had the listening and oral comprehension skills of an eight year old. *Id.* at 9.

Given Defendant's cognitive and adaptive deficiencies, Dr. Barnes diagnosed Defendant with IDM. *Id.* at 10. He also observed that Defendant demonstrated only a "marginal understanding" of courtroom procedure and a "limited understanding" of the roles of the prominent courtroom actors. *Id.* at 12. He struggled to explain the role his own lawyer would have in the proceedings, for example, and was unable to retain new information related to these topics throughout the evaluation. *Id.* Accordingly, Dr. Barnes opined "with reasonable psychological certainty" that Defendant was not competent to stand trial and that he demonstrated little capacity for improvement. *Id.* at 14. Following the evaluation, the charges against Defendant were dropped and he spent several months in a group home. *See* Lloyd's Report at 7.

2. Dr. DiMisa's Conclusions and Opinions

Several years after his 2011 arrest, on October 15, 2014, the government filed the instant complaint in this Court charging Defendant with one count of production of child pornography in violation of 18 U.S.C. § 2251(a). Compl. On October 23, 2014, the Court committed Defendant to the custody of the Attorney General of the United States for a competency evaluation pursuant to 18 U.S.C. § 4241(d) to determine whether he suffers "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 . . . ." *See* Order re Mental Competency to Stand Trial [Dkt. 5]. During that assessment, Dr. DiMisa of the Metropolitan Correctional Center—New York ("MCC") evaluated Defendant approximately two dozen times between November 17 and December 22, 2014. *See* DiMisa's Report at 1. On November 18, 2014, Defendant disclosed that he had been diagnosed with IDM and reported auditory hallucinations. *Id.* He also expressed an interest in returning to the Washington, D.C. area. *Id.* at 5–6.

For the first month of the evaluation, MCC staff placed Defendant in a locked cell in the Psychological Observation unit due to his inability to properly interact with other inmates and staff. *Id.* He occupied his time by attending self-help programs, reading children's books, and completing children's word puzzles. *Id.* at 5. He was later transferred to general population housing, where he exercised, watched television, and interacted with other inmates. *Id.*

During her evaluation, Dr. DiMisa observed that Defendant frequently alternated between unresponsive, calm, and frustrated states. *Id.* at 4. On one occasion, he became so frustrated while talking about his criminal charge that he abruptly left his evaluation appointment. *Id.* While Dr. DiMisa noted that Defendant generally behaved appropriately, she observed several outbursts – including one involving another inmate over the television rules and one related to his difficulty

using the telephone – occasioned by his low frustration tolerance. *Id.* at 5. He also displayed a tendency to disengage when prompted to discuss his family or the charge against him, and he was observed lightly banging his head against the wall because he was, in his words, "stressing out." *Id.* at 6–7. Overall, his compliance during the evaluation process varied; he would fluctuate between hiding under his blanket and engaging in appropriate conversation. *Id.* at 6.

As part of her evaluation, Dr. DiMisa attempted to administer a number of psychological assessments. On the Reading Level Indicator, an untimed reading inventory used to determine an individual's reading abilities, Defendant demonstrated a second grade independent reading level. *Id.* at 7. On the Personality Assessment Inventory, Dr. DiMisa deemed his results invalid due to his difficulty interpreting the content. *Id.* Defendant took the WAIS-IV again and his performance yielded extremely low scores similar to those he received when Dr. Barnes administered the test. He obtained an IQ score of fifty-three, although Dr. DiMisa deemed this score invalid as well due to a "marked discrepancy between [Defendant's] subtest scores . . . ." *Id.* at 8. Dr. DiMisa noted that Defendant appeared unmotivated during the administration of the WAIS-IV, requiring constant prompting to complete tasks and disengaging when unable to immediately answer questions. *Id.* at 8–9. Defendant's performance in all four subtests of the WAIS-IV – verbal comprehension, perceptual reasoning, working memory, and processing speed – yielded extremely poor results. *Id.* Based on her observations of Defendant and his performance on the psychological assessments, Dr. DiMisa diagnosed him with IDM and gave him a provisional diagnosis of Autism Spectrum Disorder, a disorder marked by deficiencies in social interaction that manifest as difficulty reciprocating emotional behavior and relationships. *Id.* at 10–11.

With respect to Defendant's competency to stand trial specifically, Dr. DiMisa expressed serious concern. Though he demonstrated "some knowledge" of the individuals involved in court-room proceedings, he frequently became unresponsive and required significant prompting during questioning. *Id.* at 12. Defendant described the charge against him as "child abuse" or "child pornography," but disengaged when pressed further. *Id.* at 12–13. On the other hand, he appeared aware of the concept of plea bargaining and was responsive to learning new information about court proceedings. *Id.* at 13. When the legal concepts required lengthy explanations, however, Defendant struggled to maintain the attention required to retain the information. *Id.* He also expressed satisfaction with the performance of his defense counsel and denied any difficulty in their relationship, but became overwhelmed when asked how he would assist in his own defense. *Id.* at 14. Specifically, he fixated on whether the government would be able to use images and videos from his cell phone as evidence against him and became so agitated that he could no longer proceed with the evaluation. *Id.* Dr. DiMisa opined that Defendant's mental impairment rendered him completely unable to assist in his legal strategy; he failed to understand the seriousness of his case and was incapable of comprehending the recommendations of defense counsel. *Id.* Moreover, he displayed an inability to communicate with his counsel rationally, to weigh the merits of potential defenses, and to make decisions regarding his constitutionally-guaranteed rights as a criminal defendant. *Id.* at 14–15. Accordingly, Dr. DiMisa recommended that Defendant be found not competent to stand trial and that he be committed to a mental health facility for a period of competency restoration pursuant to 18 U.S.C. § 4241(d). *Id.* at 15–16.

3. Dr. Lloyd's Conclusions and Opinions

Following Dr. DiMisa's recommendation, the undersigned committed Defendant to the custody of the Attorney General pursuant to 18 U.S.C. § 4241(d) 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 . . . ." Order for Further Psychiatric Evaluation [Dkt. 17]. On April 27, 2015, the United States Marshal Service transported Defendant to FMC Butner, where medical staff at FMC Butner screened him and placed him in an open mental health unit. Lloyd's Report at 8. While leaving the dining hall the next day, however, Defendant was involved in an altercation with staff and was transferred to the segregated secure mental health unit. *Id.*; *see also* 5/16/16 Tr. at 110:5–16. Dr. Lloyd first met the Defendant in the secure mental health unit, where she discussed with him his case and her role in it. *Id.* at 110:3–113:22. She explained to Defendant that she would produce and submit to the undersigned a report regarding his competency, and Defendant communicated to her that he expected to be found not competent to stand trial and to be transported back to Washington, D.C. to see his family. *Id.* at 112:5–10, 113:8–114:18.

Dr. Lloyd began working as a licensed forensic psychologist at FMC Butner in August 2014. *Id.* at 96:20–21, 97:5–7. As a forensic psychologist, Dr. Lloyd is primarily responsible for overseeing the competency evaluations for criminal defendants who may be incompetent to stand trial and conducting evaluations of criminal defendants to assess their dangerousness. *Id.* at 96:24–97:4. Before starting her position at FMC Butner, Dr. Lloyd completed a post-doctoral fellowship at the University of Massachusetts Medical School for forensic psychology. *Id.* at 97:13–21. In November 2011, after completing her fellowship, Dr. Lloyd began working as a staff psychologist for the BOP, conducting intake screenings and psychotherapy sessions for inmates. *Id.* at 97:18–98:6. She was eventually promoted to chief psychologist for a federal institution in Pennsylvania, where she worked until taking her current position at FMC Butner. *Id.* at 98:7–16. Throughout her career, Dr. Lloyd has testified as a qualified expert witness in over two dozen cases in federal

court. *Id.* at 100:9–18. Based on the above and without objection from defense counsel, the undersigned qualified Dr. Lloyd as an expert in the diagnosis and treatment of mental illness to testify in this case. Id.

In total, Dr. Lloyd spent approximately twenty-four hours interviewing Defendant over the course of his four month stay at FMC Butner, documenting her observations in a report she prepared on August 24, 2015. *Id.* at 118:5–8; *see also* Lloyd's Report at 4. Dr. Lloyd's evaluation consisted of reviewing Defendant's record and in-person meetings with and observations of him. *Id.* at 5. During his four months at FMC Butner, Dr. Lloyd saw Defendant almost daily and she observed that he acted out in a number of ways. 5/16/16 Tr. at 108:16–23. In fact, he spent nearly all of his first forty-five days at FMC Butner in isolation in the secure mental health unit due to his misbehavior. *See* 5/16/16 Tr. at 153:18–154:1. In early May 2015, Defendant was briefly housed in a semi-locked unit, wherein inmates are permitted to leave their cells but are not free to leave the unit. *Id.* at 154:1–2. FMC Butner staff quickly transferred him back to the secure mental health unit, though, after he chewed through the cord attaching a keyboard to a computer because he became agitated by other inmates entering and leaving the recreation room. *See* Lloyd's Report at 9. Thereafter, he was transferred to the semi-locked unit following a period of good behavior, but he was again returned to the secure mental health unit the next day when he became frustrated with another inmate and ripped a television cord out of a wall. *Id.* at 10; *see also* 5/16/16 Tr. at 154:9–17. Defendant also repeatedly violated FMC Butner's dress code – refusing to wear his uniform in the dining hall and walking around the facility with his headphones on – despite being disciplined for this misbehavior. *Id.* at 154:18–155:12; *see also* Lloyd's Report at 12–13. In his

competency restoration group meetings,[5] however, Defendant was described as an "exemplary" participant, behaving appropriately and working collaboratively with his peers. *Id.* at 11.

During her interviews with Defendant, Dr. Lloyd observed similarly problematic behavioral patterns. On one occasion, for example, Defendant became "rude, insolent, and verbally aggressive" with her. *See* Lloyd's Report at 13. She also noted that Defendant is predisposed to "shut[ting] down" or disengaging when he is uninterested in his present activity, when he hears upsetting information, and when he is told that he is wrong. *See* Tr. 5/16/16 at 188:19–89:13. In order to coax him out of these states of unresponsiveness, Dr. Lloyd believes that someone with whom Defendant has a rapport needs to comfort him and provide him with time to decompress. *Id.* at 190:9–91:5. While his IDM undoubtedly contributed to this protracted development, Defendant, Dr. Lloyd explained, "has learned that [his aggressive behavior] has been effective for him to either get something that he needs or wants or not to have to do something . . . ." *Id.* at 155:15, 156:12–20.

Troublingly, the inattentiveness observed by Dr. Lloyd during her meetings with Defendant extended to his court appearances. At the June 10, 2015 status hearing before the undersigned, Defendant continuously fidgeted in his chair and did not appear to be paying attention. *See* Lloyd's Report at 10. At the July 21, 2015 hearing, Defendant spent the majority of the time coloring. *Id.* It is worth noting, however, that while Defendant appeared disinterested at those hearings, he was later able to recall details from the discussions with an amount of specificity that surprised Dr.

[5] Just as it sounds, the competency restoration group is an educational group for inmates found not competent to stand trial to improve their understanding of the legal process, courtroom procedures, and the roles of courtroom participants. *See* Lloyd's Report at 11. Dr. Lloyd informed the Court that, through his participation in the competency restoration group, Defendant would take part in a mock trial that would require him to weigh and process information and deal with simulated courtroom stressors. 5/16/16 Tr. at 221:13–19. This mock trial, however, never took place. *Id.*

Lloyd. *Id.* For example, at the June 10, 2015 hearing, Dr. Lloyd informed the Court that Defendant was not competent to stand trial and requested additional time to determine whether he could be restored to competency, and Defendant later told Dr. Lloyd that her request for him to remain at FMC Butner angered him. *Id.* These inconsistencies – Defendant's tendency to occasionally follow courtroom procedure and decorum while also appearing uninterested and distracted – makes Defendant's case a particularly complicated one; according to Dr. Lloyd, Defendant is neither "clearly competent [n]or clearly not competent" at first glance. *See* 5/16/16 Tr. at 145:17–46:8.

Despite these inconsistencies, Dr. Lloyd determined from the outset that she would largely forgo additional psychological testing of Defendant. In her view, Defendant's IDM diagnosis was well-documented and her task was to determine whether Defendant could be restored to competency in spite of that diagnosis. *See* 5/16/16 Tr. at 120:14–121:22. In the psychological testing section of her report, Dr. Lloyd relied entirely on the testing conducted by Dr. Barnes and Dr. DiMisa in 2011 and 2014, respectively. Lloyd's Report at 13–16. His consistently poor performance on those tests, as well as his medical record, which is replete with documentation of the data underlying those results, confirmed to her that further testing would be unnecessary. *See* 5/16/16 Tr. at 124:22–125:12. Accordingly, and based on his demonstrated deficiencies in intellectual and adaptive functioning, Dr. Lloyd assigned Defendant with a principle diagnosis of IDM. Lloyd's Report at 16.

At the competency hearing, Dr. Lloyd elaborated on Defendant's condition, explaining that the neurodevelopmental deficiencies associated with Defendant's IDM manifest in, inter alia, his tendency to neglect his hygiene, his restricted verbal skills, and his diminished thought process. *See* 5/16/16 Tr. at 131:3–133:1. At the same time, of course, individuals diagnosed with IDM retain the capacity to function better than those with more severe forms of Intellectual Disability.

Indeed, according to a study of federal inmates facing charges at the United States Medical Center for Federal Prisoners, roughly seventy percent of individuals with IDM are found competent to stand trial upon their initial evaluation. *Id.* at 186:16–87:19. However, the percentage of individuals with IDM found restored to competency after having been previously found incompetent to stand trial, like Defendant, is lower. In Dr. Lloyd's caseload, which focuses largely on restoration to competency proceedings, Defendant is the only individual with IDM that she has found to be restored to competency following an initial finding of incompetency. *See* 5/16/16 Tr. at 176:22–23.

Nevertheless, Defendant demonstrates some cognitive capabilities. For example, he can socialize and communicate at a rudimentary level. *Id.* at 133:7–17. According to Dr. Lloyd, though he struggles to understand unfamiliar concepts, he is capable of making basic decisions and articulating his reasoning for those decisions. *Id.* at 181:17–22. He also has a sense of humor and personal interests. *Id.* at 133:12–18. In fact, these latter two qualities led Dr. Lloyd to reject Dr. DiMisa's provisional diagnosis of Autism Spectrum Disorder. *See* Lloyd's Report at 16.

Based on the totality of her observations and her review of Defendant's record, Dr. Lloyd determined that Defendant had been restored to competency as of August 25, 2015. In her report on the matter, she started her analysis as to his competency by documenting Defendant's attorney's concerns – including Defendant's apparent inability to understand his circumstances, to behave appropriately in court, and to assist in his own defense – and offered her own assessments of his capabilities and ways to accommodate these deficiencies. *See* Lloyd's Report at 16.

With respect to Defendant's understanding of his circumstances, Dr. Lloyd noted that Defendant accurately described the purpose of his detention at FMC Butner and demonstrated a generalized understanding of the potential outcomes of his competency evaluation. *Id.* at 17. She also

believes that he understands certain complicated legal concepts, like plea bargaining. *Id.* For example, when presented with a hypothetical in which there was a large amount of evidence against him, Defendant suggested that, in that scenario, he would need to plead guilty. *Id.* at 18. Alternatively, when presented with a hypothetical in which there was little evidence implicating him, Defendant stated that he would fare better proceeding to trial. *Id.* With respect to the roles that the different parties play in the courtroom, Dr. Lloyd found that Defendant broadly understands the roles of his counsel – "to defend [him]" – and the prosecutor – "to find [him] guilty" – and knows that he should not speak to the prosecutor without his attorney present. *Id.* Dr. Lloyd testified that Defendant mastered certain aspects of courtroom procedure by analogizing them to sports; after his meetings with Dr. Lloyd, Defendant came to view a judge as an umpire in a baseball game, responsible for ensuring that both sides follow the rules. *Id.* at 133:12–18. Dr. Lloyd also found that Defendant benefits from reducing unfamiliar, complicated concepts into simpler, more digestible ones. He fails to grasp the concept of mandatory minimums in sentencing, for example, but he understands when told, step by step, that certain convictions automatically result in certain prison sentences. *Id.* at 134:2–11. According to Dr. Lloyd, this trick – breaking down a single, complicated concept into several punchier ones – improves Defendant's ability to understand things, but also prolongs discussions with Defendant about his case, which are already drawn out by his discomfort with the allegations against him. *Id.* at 134:12–35:18.

With respect to Defendant's ability to behave appropriately in court, Dr. Lloyd acknowledged that Defendant appeared distracted at the status conferences before the undersigned, but suggested that his behavior was not disruptive. *See* Lloyd's Report at 18. She also cited his ability to recall specific details from the status hearings, including the date and time of the next status hearing, as evidence of his attentiveness despite his outward appearance. *See* 5/16/16 Tr. at

223:15–24:6. Though his failure to behave appropriately in court admittedly concerned Dr. Lloyd, she found that positive reinforcement, one-on-one conversations, and "[k]eeping things short and sweet" satisfactorily improved his behavior. *Id.* at 146:10–47:3. Additionally, Dr. Lloyd observed that Defendant stopped coloring and started taking notes at the second status conference after hearing his counsel discuss his coloring in a "pejorative nature." *Id.* at 147:6–13. According to Dr. Lloyd, Defendant later expressed regret to her for coloring during the hearing. *Id.* at 147:14–21.

Finally, with respect to Defendant's ability to aid in his own defense, Dr. Lloyd noted that Defendant has a high opinion of his counsel and frequently indicated that he would need to consult with them before making a legal decision. *See* Lloyd's Report at 18. Dr. Lloyd suggested that certain approaches to interacting with Defendant, like asking specific questions that welcomed open-ended responses and providing clear explanations of what he should expect, would improve his relationship with counsel. *Id.* Moreover, Dr. Lloyd believes that Defendant has a grasp of the gravity of his situation and an ability to engage in his legal defense. As noted, Dr. Lloyd found it compelling that Defendant stopped coloring and started taking notes during a status conference after hearing his counsel negatively reference his coloring. *Id.* at 147:14–21. She also found it notable that Defendant expressed frustration with law enforcement for, in his mind, inspecting his cell phone without his consent. *Id.* at 138:16–39:9. Defendant discussed with Dr. Lloyd his eligibility for a split sentence as well, which she found to be "pretty advanced." *Id.* at 141:8–42:16. Additionally, despite his obvious discomfort discussing his charge, Dr. Lloyd was impressed that Defendant asked her why he was being charged child pornography and not "sex with a minor." *Id.* at 135:2–23. These conversations, coupled with Dr. Lloyd's observations of Defendant engaging with his counsel, *see id.* at 137:4–14, informed her opinion that Defendant's cognitive limitations do not prevent him from meaningfully assisting in his own defense.

Accordingly, Dr. Lloyd concluded that Defendant is sufficiently competent for this case to proceed, so long as he receives the following assistance at trial: counsel must explain to him legal terms while avoiding legal jargon; counsel must "explain the steps in his legal proceedings in a brief, step by step manner as the case proceeds"; prior to each day, counsel must review with him the likely schedule of events and questions that he will receive; counsel must provide him with behavioral expectations; the Court must provide him with a pencil and paper during proceedings; and the Court must provide him with breaks during the day so that he may expend excess energy and confer with counsel. *See* Lloyd's Report at 19–20.

4. Dr. Lloyd's Administration of the CAST-MR

To confirm her findings, Dr. Lloyd administered the Competence Assessment for Standing Trial for Defendants with Mental Retardation ("CAST-MR") to Defendant on August 11, 2015, shortly before he was released from FMC Butner. *Id.* at 19. The CAST-MR is an assessment designed specifically to determine whether an adult with Intellectual Disability is competent to stand trial. *See* Def. Exh. 4, CAST-MR Manual ("CAST-MR Manual"). Incorporating a means to evaluate the elements of competency established by the Supreme Court in *Dusky*, the CAST-MR includes three sections: (1) basic legal concepts, which assesses a defendant's knowledge of the criminal justice process; (2) skills to assist defense, which assesses a defendant's understanding of the attorney-client relationship; and (3) understanding case events, which assesses a defendant's ability to discuss the case against them in a coherent manner and to understand the relationship between the alleged facts and the subsequent charge. *See* CAST-MR Manual at 3–4.

The first two sections consist of forty multiple choice questions, while the final section requires a defendant to answer ten open-ended ones. For the sections containing multiple choice questions, the examiner reads the questions and the accompanying answers aloud to the defendant,

repeating the question and answers up to three times, and then records the defendant's answers. *Id.* at 5. There are also a series of practice questions that precede the first and second section of the CAST-MR designed to ensure the defendant understands the testing format and to decrease any test-related anxiety. *Id.* at 6. On the third section, the examiner may ask each open-ended question twice and must record the Defendant's answer verbatim. *Id.* at 9. The examiner may prompt the defendant for more complete answers and rephrase the questions when necessary. *Id.* While the defendant's answers in the first two sections are either right or wrong, they can receive partial credit for their open-ended responses on the third section based on the answer's accuracy and coherence. *Id.* at 10–11.

Dr. Lloyd was the first individual to administer the CAST-MR to Defendant, and she noticed that he appeared uninterested and unwilling to put forth his full effort almost as soon as the assessment began. *Id.* at 160:16–61:10, 162:11–22. In the first section testing basic legal concepts, for example, Defendant selected an answer indicating that a judge "works for your lawyer" despite demonstrating an understanding of the role of a judge in previous meetings with Dr. Lloyd. *Id.* at 163:16–64:10. Dr. Lloyd stopped administering the second section measuring his understanding of the attorney-client relationship before Defendant finished because she "could tell [that they] had done as much as [they] could get accomplished." *See* 5/17/16 Tr. at 336:25–37:6. However, on the open-ended questions in the third section, which tests Defendant's understanding of case events, Dr. Lloyd found that Defendant responded correctly ninety percent of the time. Lloyd's Report at 9. Despite what Dr. Lloyd perceived to be a strong showing on the final section, Defendant scored a twenty-two out of fifty on the CAST-MR overall, a failing performance by a number of metrics. *See* Def. Exh. 2, Defendant's CAST-MR ("Defendant's CAST-MR") at 1; *see also* CAST-MR Manual at 20. In a study cited in the CAST-MR manual, for example, the mean

score for thirty-six individuals with Intellectual Disability found incompetent to stand trial was 25.6 out of fifty, more than three points higher than Defendant's score. *Id.*

Though Defendant fared better on the open-ended questions, Dr. Lloyd suspects that the CAST-MR testing format, which required him to follow along in an examination booklet as she read aloud, caused him to disengage. *See* 5/16/16 Tr. at 163:4–64:18. Moreover, Dr. Lloyd reasoned that Defendant performed poorly in the sections of the CAST-MR containing multiple choice questions because he struggled to retain all the information – i.e., the three answer choices – at once. *Id.* at 168:19–69:14. In fact, after she finished administering the CAST-MR, Dr. Lloyd asked Defendant the multiple choice questions that he had gotten wrong as open-ended questions and noted that he answered many of them, in her view, satisfactorily. *Id.* at 170:15–71:24. When confronted with the discrepancies in his responses, Defendant claimed that the multiple answer choices confused him. *See* Lloyd's Report at 19. Despite what she perceived to be Defendant's lack of effort during the administration of the CAST-MR, Dr. Lloyd assured the Court that he is not a malingerer – his IDM diagnosis is long-standing and undeniable. 5/16/16 Tr. at 191:22–92:24.

Still, Dr. Lloyd believes that Defendant's CAST-MR score underestimates the extent of Defendant's knowledge and competency. *Id.* at 164:15–18. As she testified, the CAST-MR provides just a single piece in the mosaic of data that experts consider in completing competency evaluations. *See id.* at 160:16–24. Indeed, based on her assessment and observations of Defendant, Dr. Lloyd testified at the competency hearing that she believes he understands the nature of the allegations and charge against him, that he can assist his attorneys, and that he can rationally participate in his own defense. *Id.* at 184:4–20. In other words, Dr. Lloyd believes that he is competent to stand trial, assuming the Court provides the accommodations outlined above. *Id.*

Further, on cross-examination, she denied that her previous finding of incompetency tainted her oversight of Defendant's restoration to competency, or that she felt any pressure to find Defendant competent based on her role in the restoration process. *Id.* at 174:17–75:22. As proof, Dr. Lloyd testified that Defendant is the only individual with IDM she has ever found to be incompetent and, then, restored to competency.[6] *Id.* at 176:22–23.

5. Dr. Denney's Opinions and Conclusions

Following Dr. Lloyd's determination that Defendant has been restored to competency to stand trial, defense counsel retained Dr. Denney to provide an expert opinion on the matter. *See* Denney's Report at 1. A clinical neuropsychologist and forensic psychologist, Dr. Denney previously worked for the BOP for several decades, conducting, among other things, competency and restoration to competency evaluations. 5/17/16 Tr. at 344:19–45:12, 349:2–20. During his training, he specialized in forensic psychology and has testified "well over 100 times" in federal courts across the country as an expert witness. *Id.* at 345:5–12, 359:13–22. Though he worked as a forensic neuropsychologist for over two decades with the BOP, he currently is in private practice, operating a clinical neuropsychology office specializing in criminal evaluations related to defendants with Intellectual Disability. *Id.* at 349:2–20, 358:5–22. Additionally, Dr. Denney has authored twenty-eight peer-reviewed publications as well as several books on clinical forensic psychology. *Id.* at 354:22–56:1. For these reasons and others articulated more fully at the competency hearing, the undersigned granted Defendant's motion to qualify Dr. Denney as an expert in the area of clinical neuropsychology and forensic psychology. *Id.* at 380:1–18.

[6] At the competency hearing, Dr. Lloyd explained that approximately eighty-five percent of her caseload consists of restoration to competency cases. 5/16/16 Tr. at 182:7–84:3. Of those, she has found only forty-seven percent restored to competency. *Id.* Relatedly, eight percent of her restoration cases involve individuals with IDM, and Defendant is the only one that she has found to have been restored to competency. *Id.*

As part of his evaluation, Dr. Denney reviewed Defendant's mental health records and met with him on September 15 and 16, 2015, for a little over seven hours at CTF in Washington, D.C. *Id.* at 1–2; *see also* 5/17/16 Tr. at 463:13. During his evaluation, Dr. Denney administered a number of psychological tests, including the WAIS-IV and the WJ-III, on which he asserts Defendant performed extremely poorly. *Id.* at 2-3. On the WAIS-IV, for example, Defendant's capacity for focused attention, though adequate, "significantly weakened as it required sustain[ed] [attention], and he demonstrated impulsivity and significantly slow speed of mental processing." Denney's Report at 22. Defendant obtained a full scale IQ score of sixty-five, which falls in the bottom one percent of individual's in his age group. *Id.* at 23. His performance on the verbal comprehension section of the WAIS-IV put him in the bottom fourth percent and his performance on the WJ-III established that he has the basic reading skills of a child in the second grade. *Id.* at 22. On the oral comprehension subsection, he demonstrated the capabilities of a first grader. *Id.* He also displayed significant impairments in his learning and memory, struggling to perform simple tasks that involved retaining and recalling information. *Id.* at 23. Based on Defendant's "extremely low level of intellectual functioning and significantly impaired adaptive functioning across all domains," Dr. Denney believes that Defendant's IDM diagnosis is correct. *Id.* at 23–24.

Though he did not administer the CAST-MR during his evaluation, Dr. Denney's competency report and testimony before the undersigned highlight what he considers to be a number of problems with Dr. Lloyd's administration of the assessment as well as his own observations of Defendant's performance. To begin, Dr. Denney believes that Defendant's failure to answer the multiple choice questions correctly during the CAST-MR, only to provide satisfactory answers to the same open-ended questions afterwards, reveals the severity of Defendant's deficiencies with

his cognitive capacity and auditory comprehension. *See* 5/17/16 Tr.at 422:10–19, 428:5–20. Further, according to Dr. Denney, Defendant's score on the CAST-MR should be even lower than his already-low score because Dr. Lloyd gave him full credit for incomplete or improper answers to the open-ended questions. *Id.* at 431:6–33:12. For example, on one open-ended question asking Defendant to identify the date and time of the events that led to his arrest, Dr. Lloyd gave Defendant full credit for providing a date without a time or even a temporal approximation. *Id.* at 431:2–20. On another question, which asked Defendant to explain who he was with when he engaged in the activity that caused him to be arrested, Defendant's answer reflects instead who he was with when he was actually arrested and Dr. Lloyd gave him full credit for that response. *See id.* at 431:21 – 432:2; *see also* Defendant's CAST-MR at 7. In total, had Dr. Denney's scored Defendant's performance on the final section of the CAST-MR, Defendant would have received six points instead of nine, meaning that his overall score would have been a nineteen out of fifty instead of twenty-two. *See* 5/17/16 Tr. at 433:1–12. At a minimum, though, Defendant's performance on the CAST-MR suggests to Dr. Denney that whatever basic understanding of legal terms he possesses will be rendered useless in an actual trial by his cognitive deficits and emotional limitations. *See* Denney's Report at 27.

As noted, while Dr. Lloyd and Dr. Denney agree on Defendant's diagnosis, their opinions as to his competency differ. During the administration of the Competency Assessment Instrument-Revised, a semi-structured interview covering Defendant's comprehension of the legal process and his case, Dr. Denney noted that Defendant demonstrated a limited factual understanding of the charge against him and the potential results of a guilty conviction. *Id.* at 25. He described his charge as "child pornography," but was unable to explain that the charge involves sexual conduct with a minor without significant guidance from Dr. Denney. *See* 5/17/16 Tr. at 489:3–22. Though

he superficially understands that his counsel will defend him, he struggled to explain what it means to defend someone in court. *See* Denney's Report at 26. Moreover, after becoming frustrated while trying to explain the different roles of courtroom actors, Defendant abruptly left the evaluation room. *Id.* Overall, Dr. Denney opined that Defendant's significant deficiencies in cognitive functioning make it difficult for him to understand his surroundings. *Id.* at 27. He frequently responded to simple questions in a manner that reflected a misunderstanding of the actual question being posed; when asked how many siblings he has, Defendant was unable to articulate a clear answer for several minutes. *Id.* at 21, 27. He consistently demonstrated issues with impulsivity and poor decision-making, and Dr. Denney believes that efforts at competency restoration will do little to improve these problems. *Id.* at 27. For example, while Defendant at one point suggested that he would prefer a bench trial to a jury trial, his reasoning behind that response – that a bench trial would be faster – reflects juvenile judgment and a misunderstanding of the seriousness of his case. *Id.*

With respect to the accommodations proposed by Dr. Lloyd to permit Defendant to stand trial, Dr. Denney believes that they are insufficient to overcome his significant intellectual and adaptive deficiencies. *Id.* at 450:12–51:10. Defendant, Dr. Denney said, would surely benefit from breaks, but he demonstrates such poor mental processing and oral comprehension that he will never fully understand what is happening at trial. *Id.* According to Dr. Denney's assessment, Defendant demonstrated "severely impaired" auditory comprehension and "strikingly weak" oral comprehension skills. *See* Denney's Report at 22. His ability to understand what is being said, Dr. Denney found, is consistent with that of a seven-year-old. *See* 5/17/16 Tr. at 399:2–17. As such, Dr. Denney argues that no accommodation, including anti-anxiety medication, would have an impact on his cognitive efficiency or decision-making at trial. *Id.* at 452:20–53:11. In other

words, he lacks the cognitive ability to have a rational understanding, or even to learn to have a rational understanding, of what is happening in his case; much like trying to teach higher math to a seven-year-old, Defendant lacks the capacity to learn that kind of information. *See id.* at 391:25–94:18, 408:9–09:7. Thus, the issue with Dr. Lloyd's attempt at competency restoration, Dr. Denney explained, is that, for individuals with Intellectual Disability, there is no way to restore skills that the individual never had in the first place. The cognitive deficits caused by his IDM are, put simply, untreatable. Denney's Report at 28, *see also* 5/17/16 Tr. at 453:15–24, 534:5–11. Accordingly, Dr. Denney believes "beyond a reasonable doubt" that Defendant is not competent to stand trial and will continue to be so for the foreseeable future. *Id.* at 454:9–15.

C. Defendant's Courtroom Decorum

During the course of Defendant's competency restoration process, he appeared before the undersigned a number of times, most prominently for his competency hearing on May 16 and 17, 2016. For the majority of the competency hearing, the undersigned observed that Defendant occupied his time with distractions, coloring in children's coloring books and completing children's word puzzles. *See* 5/17/16 Tr. at 555:4–17. He seemed to be paying little attention to what was going on around him, although, to be sure, he occasionally made eye contact with witnesses and nodded as if he was agreeing with or listening to their testimony. *See id.* at 556:9–18. For the bulk of the hearing, however, Defendant was either distracted or engaging in otherwise inappropriate courtroom behavior. At one point, for example, he placed his hands over his ears as if to block out testimony that he was hearing, and he spent a portion of the second day of the hearing with his head on the table. *See id.* at 555:4–11.

While Defendant's behavior at the competency hearing is particularly noteworthy in that it occurred after Dr. Lloyd opined that Defendant has been restored to competency, it also marks a

continuation of Defendant's worrisome behavior before the undersigned. At the July 21, 2015 status hearing, for example, Defendant spent nearly the entire time fidgeting and coloring in a children's coloring book.

ANALYSIS AND CONCLUSIONS OF LAW

A. Burden of Proving Restoration to Competency

Once a court makes an initial determination, based on a preponderance of the evidence, that a defendant is not competent to stand trial pursuant to 18 U.S.C. § 4241(d), section 4241(e) provides the court with the procedure for determining whether the defendant can be restored to competency. *See* 18 U.S.C. § 4241(e). While it clearly defines the proper standard of proof at the competency restoration stage – a preponderance of the evidence – section 4241(e) is silent as to which party bears the burden of proving that the standard has been met. *See id.* Since the Supreme Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996), which stated in *dicta* that "the accused in a federal prosecution must prove incompetence by a preponderance of the evidence," some circuits have placed the burden on the defendant to prove his incompetence under section 4241(d). *See United States v. Whittington*, 586 F.3d 613, 618 (8th Cir. 2009) ("The guidance of the Supreme Court, and the recent precedent of this circuit, support the government's position that the burden is on the defendant to prove incompetence by a preponderance of the evidence."); *see also United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005) ("Under federal law the defendant has the burden, 'by a preponderance of the evidence [to show] 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.'" (citing 18 U.S.C. § 4241(d) and *Cooper*, 517 U.S. at 362)); *but see United States v. Izquierdo*, 448 F.3d 1269, 1276 (11th Cir. 2006) ("[T]he relevant competency

statute arguably contemplates that the burden will lie with the party making a motion to determine competency." (citing 18 U.S.C. § 4241)). These cases, however, fail to address who bears the burden of proving that a defendant who was previously found incompetent has been restored to competency under section 4241(e).

Finding no controlling precedent from the Supreme Court, nor any direct guidance from the D.C. Circuit Court, the undersigned concludes that the burden to prove a defendant's restoration to competency pursuant to section 4241(e) rests with the government. To begin, a litany of cases from district courts across the country uniformly place the burden under section 4241(e) on the government. *See*, *e.g.*, *United States v. Carter*, No. 1:12-CR-29, 2013 WL 6668715, at *11 (E.D. Tenn. Dec. 18, 2013) ("It appears the burden of proving a defendant who was previously found incompetent is now competent may be allocated to the government."); *see also United States v. Hall*, No. 4:11–CR–00223–04–BCW, 2013 WL 2444603, at *4 (W.D. Mo. June 5, 2013) ("After there has been an adjudication of incompetence and the defendant has been committed to the Attorney General for a determination as to whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the proceedings to go forward, as in this case, pursuant to 18 U.S.C. § 4241(e), the burden of persuasion shifts to the Government."); *United States v. Bergman*, No. 04-CR-00180-WDM, 2011 WL 1793261, at *8 (D. Colo. May 5, 2011) ("[T]he burden is upon the government to prove by a preponderance of the evidence that [the defendant's] competence was restored in October 2007 . . . ."); *United States v. Cabrera*, No. 07-20760-CR, 2008 WL 2374234, at *6 (S.D. Fla. June 6, 2008) (noting the burden of persuasion shifts from the defendant to the government after an adjudication of incompetency). Moreover, common sense dictates that the burden should rest with the government at this stage of the com-

petency proceedings. The Court found, pursuant to section 4241(d), that Defendant was not competent to stand trial and he was thereafter committed to FMC Butner to determine if his competency could be restored. Because the government now seeks a change in the Court's competency determination – that is, a finding that Defendant has been restored to competency – basic legal principles indicate that the government should bear the burden to persuade the Court to change its mind. *See United States v. Baldwin*, No. 1:10-CR-146, 2012 WL 5205814, at *2 (W.D. Mich. Oct. 22, 2012) ("[T]he burden is properly on the government in the somewhat unique circumstances of this case, where the court has already found that defendant is not competent to stand trial and the government is seeking a reversal of that finding.").

Accordingly, the undersigned concludes that the burden to prove, by a preponderance of the evidence, that Defendant has been restored to competency pursuant to section 4241(e) rests, in this case, on the government.

B. Defendant's Competency

The question of Defendant's competency to stand trial is a complicated one. It is muddled by his condition, IDM, which is often associated with a "constellation of cognitive impairments" that the Court must factor into its competency determination. *United States v. Norrie*, No. 5:11-CR-94, 2012 WL 4955211, at *7 (D. Vt. Oct. 17, 2012). As the Supreme Court noted in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), and as the undersigned observed, individuals with Intellectual Disability suffer from an amalgamation of mental impairments: below-average intelligence, limitations in adaptive skills, diminished capacities for communication and understanding, and a predilection for acting on impulse rather than premeditation. A diagnosis of Intellectual Disability by itself, however, "is not dispositive of incompetency to stand trial." *Baldwin*, 2012 WL 5205814,

at *2 (citing *Atkins*, 536 U.S. at 306). As Dr. Lloyd explained, roughly seventy percent of individuals with IDM are competent to stand trial. Defendant, having already been found not competent to stand trial, of course, is not a part of that statistic. Instead, he falls into the thirty percent of individuals with IDM who have been found incompetent to stand trial, and this Court must now determine whether, despite that previous finding, he has been restored to competency. As Dr. Lloyd acknowledged, such a determination would be a rarity; in her own experience, Defendant is the only individual with IDM that she has ever found to be restored to competency following an initial finding of incompetency to stand trial. Indeed, her acknowledgment reveals a fundamental tension at the heart of this matter: how can a person with an immutable intellectual impairment that previously rendered him incompetent to stand trial now have overcome that impairment such that he rationally understands the case against him?

Despite this tension, both parties agree that Defendant possesses a sufficient factual understanding of the case against him. At a minimum, he appears to understand that he has been charged with the production of child pornography and that the charge involves sexual conduct with a minor. He has also demonstrated an understanding of the actors involved in courtroom procedure, although the consistency and depth of his knowledge has wavered throughout his evaluation and restoration process. Seeing no reason to reject defense counsel's concession as to Defendant's factual understanding of the case, the undersigned's remaining task is to determine whether Defendant "has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational . . . understanding of the proceedings against him." *Dusky*, 362 U.S. at 402.

The government urges the undersigned to fully adopt Dr. Lloyd's conclusion as to these two inquiries. Relying on *United States v. Battle*, 613 F.3d 258, 260 (D.C. Cir. 2010), the government argues that Dr. Lloyd's opinion that Defendant has been restored to competency, which was formed over the course of Defendant's four months at FMC Butner, deserves more weight in the undersigned's competency analysis than Dr. Denney's, which was formed over the course of a two-day evaluation after Defendant left FMC Butner. *See* Pl. Resp. at 17-18. The government believes that Dr. Lloyd's longer evaluation allowed her to have more intimate discussions with Defendant, during which, the government contends, he revealed a rational and thoughtful understanding of the proceedings against him, including an understanding of the concept of split sentences, a curiosity about the government's decision to charge him with child pornography instead of another crime, and an ability to contemplate the amount of evidence that might compel him to plead guilty or go to trial. *Id.* at 19. Additionally, the government suggests that Defendant learned adaptive behavior through his meetings with Dr. Lloyd, abandoning his coloring during a court appearance after his counsel referred to the habit disparagingly. *Id.* at 20. Most significant to the government's calculus, though, is the revelation that Defendant believes that law enforcement searched his cell phone without his consent or a warrant. *Id.* This, the government argues, establishes that Defendant can reason through complicated legal issues and that he will be able to assist in his defense. *Id.* at 19–20.

The undersigned finds these arguments unavailing. For one, the government's reliance on *Battle* is misplaced. Far from creating a bright-line rule that the competency evaluator who works with a defendant the longest is entitled to the most deference, the D.C. Circuit Court in *Battle* found that this Court's decision to consider, among four other factors, the length of time for which an evaluator observed the defendant before adopting the evaluator's opinion as to the defendant's

competency to stand trial was neither clearly arbitrary nor erroneous. 613 F.3d at 262–63. Moreover, the case at bar is distinguishable; the competency evaluator in *Battle* administered a number of psychological assessments that supported his conclusion, including a standard competency test that "raised little or no concern regarding [the defendant's] ability to understand the proceedings or assist his attorney." *Id.* at 263. The same cannot be said for Defendant's performance on the CAST-MR, the sole assessment Dr. Lloyd administered.

More to the point, the handful of moments identified by Dr. Lloyd and referenced in the government's briefing fail to provide as compelling a narrative of Defendant's restoration to competency as the government suggests. In at least one of the moments on record where Defendant discussed law enforcement's seizure of his cell phone, admittedly before his stay at FMC Butner, he became so agitated that he could no longer continue his evaluation. *See* DiMisa's Report at 14. Moreover, Defendant getting upset over law enforcement looking through his property, or setting aside his coloring book after hearing someone criticize him for coloring, are hardly demonstrative of a rational understanding of his case or an ability to rationally assist in his defense. Rather, they strike the undersigned as fairly rudimentary, juvenile examples of behavioral adaptation and internal reasoning. This rings especially true when, as here, these instances are heralded as the most persuasive evidence of Defendant's competency following four consecutive months of near-daily observation.

To be sure, Defendant's inquiry into whether he is eligible for split sentencing suggests a level of sophistication and familiarity with the legal system that is not immediately reconcilable with a finding of incompetency. After all, "the *Dusky* standard . . . does not require that a defendant have a high level of ability or performance." *See United States v. Merriweather*, 921 F. Supp. 2d 1265, 1307 n.62 (N.D. Ala. Feb. 5, 2013); *see also United States v. Hogan*, 986 F.2d 1364, 1373

(11th Cir. 1993) ("Even perfectly competent defendants often do not fully comprehend the intricacies of some of the defensive theories offered by their lawyers."). But these few ostensible moments of lucidity and reasoning during Defendant's time at FMC Butner do little to overcome the overwhelming amount of evidence presented to the undersigned that compels a finding of incompetency with respect to Defendant's present ability to rationally assist his counsel and understand his case. To begin, every single mental health professional to evaluate Defendant – including, at one point, Dr. Lloyd – has found him not competent to stand trial. As such, Defendant's record is replete with data dating back to 2011 establishing that his persistently deficient intellectual functioning prevents him from effectively understanding his legal circumstances and interacting rationally with his counsel. His full scale IQ score, for example, hovers somewhere between fifty-three and sixty-five, landing at the bottom one percent of his age group regardless of where in that range it falls. He has consistently demonstrated that he has the basic reading and oral comprehension skills of a seven- or eight-year-old, and the record indicates that he has little or no capacity for improvement on that front. Indeed, Dr. Denney evaluated Defendant *after* his four month restoration process, at a point when Defendant had, according to Dr. Lloyd, learned adaptive behaviors sufficient to render him competent, and yet Dr. Denney observed that Defendant continued to perform extremely poorly in psychological assessments and showed little tolerance for frustration. At one point during Dr. Denney's assessment, Defendant abruptly ended the evaluation after becoming frustrated, just as he did with Dr. DiMisa prior to his time at FMC Butner. *See* Denney's Report at 26. He appeared unable to answer Dr. Denney's basic questions cogently, including, for instance, a question about how many siblings he has. *Id.* at 21. His answers to other, more substantive questions, like what role his defense counsel will play in his trial – he stated that he was unable to explain what it means to defend someone in court – or whether he understands

the seriousness of his charge – he described his charge as "dumb" – reveals that he still has little capacity to contemplate the gravity of his circumstances. *Id.* at 26.

While Defendant's consistent under-performance on these psychological tests and interviews do not necessarily translate into a finding of incompetency, in the judgment of the undersigned, they do when viewed alongside Defendant's performance on the CAST-MR. Though Dr. Lloyd describes his poor performance on that assessment as just one strand in the tapestry of her evaluation and suggests it underestimates his true understanding of the legal process and case against him, it seems far more likely that his performance confirms what every other competency evaluator – including one who examined Defendant *after* Dr. Lloyd – has concluded: that Defendant lacks the cognitive capacity to rationally understand his case and assist in his defense. Indeed, while not dispositive on the issue of competency, the CAST-MR "was developed specifically for evaluating adjudicative competence in defendants" with Intellectual Disability. *See United States v. Dennis*, No. 11-10250-EFM, 2012 WL 4794593, at *1 (D. Kan. Oct. 9, 2012) (citation omitted). As such, it serves as a valid, helpful, and relatively objective benchmark for a court's assessment of a criminal defendant's competency to stand trial. *See id.* at *4 ("[T]he Court finds it significant that [defendant] scored well above the average score of defendants who were found incompetent on two different administrations, by two different professionals, of the CAST-MR."); *see also United States v. Clark*, No. 2:12-00215, 2013 WL 5592806, at *5 (S.D.W. Va. Oct. 10, 2013) (explaining that "the CAST-MR is designed to fairly measure the mental grasp of" a defendant with Intellectual Disability after considering the defendant's score of 37 on the CAST-MR); *Baldwin*, 2012 WL 5205814, at *3 (considering defendant's performance on the CAST-MR, albeit a positive performance, before noting that the abundance of evidence supported a finding of incom-

petency); *United States v. Duhon*, 104 F. Supp. 2d 663, 675 (W.D. La. 2000) (noting in its summary of expert findings that "the results of the CAST-MR indicate that [defendant] is incompetent to stand trial" before reaching the same conclusion); *United States v. Cockrell*, No. CR. 97-36-N, 1997 WL 1876542, at * (M.D. Ala. June 11, 1997) (considering, among other things, defendant's poor performance on the CAST-MR in concluding that she lacks the competency to stand trial).

Accordingly, the undersigned is reluctant to discount Defendant's poor performance on the CAST-MR as readily as Dr. Lloyd. His score on the assessment provided by Dr. Lloyd – twenty-two – falls below the average score of individuals found not competent to stand trial provided by the CAST-MR manual – 25.6. When considering that the CAST-MR was administered by Dr. Lloyd, an individual with whom Defendant has developed a rapport, it is possible, even likely, that his deficiencies are more complicated and profound than his score would otherwise suggest. Indeed, Defendant struggled throughout the administration of the assessment and reportedly never finished the second round of multiple choice questions even though Dr. Lloyd administered it at a point in his restoration process when he had purportedly developed the skills needed to render himself competent to stand trial.

Moreover, the undersigned finds persuasive Dr. Denney's testimony that Dr. Lloyd likely and unintentionally over-scored Defendant's responses in the third section of the CAST-MR. A review of Defendant's answers confirms that he failed to understand the premise of many of the open-ended questions. On the first question, which asked Defendant to describe what he was doing that caused him to be arrested, Defendant replied "Child pornography. They said they had a warrant." Defendant's CAST-MR at 7. Though Dr. Lloyd gave Defendant full credit for that response, it fails to meet a number of criteria for receiving full credit listed in the CAST-MR manual, including that it provide "an accurate description of the events immediately preceding and during

the arrest," and that it "be plausible and in keeping with the rest of [Defendant's] case."[7] CAST-MR Manual at 12. Defendant's responses to the next series of questions, for which Dr. Lloyd also gave him full credit, are similarly incomplete. For example, when asked to identify how many people were present when he was engaged in the activity that caused him to be arrested and who they were, Defendant stated that he "was alone" and that he "was walking to the train station to go see [his] uncle." Defendant's CAST-MR at 7. Not only does that description of his arrest not match the description from the complaint in this case, which reports a number of individuals other than Defendant and several MPD officers at the scene of his arrest, *see* Kyaw Aff. at 1, but it also fails entirely to address the second half of the question – that is, it does not acknowledge "who was present at the time of . . . the alleged crime" that Defendant previously identified as child pornography. CAST-MR Manual at 13. On another question, this time asking where he was arrested, Defendant said that he was at his sister-in-law's house but that he did not know the address. Defendant's CAST-MR at 8. Despite receiving full credit, that response – a familiar setting, like a relative's home, with no further identifiers – is described explicitly in the CAST-MR manual as deserving only partial credit. *See* CAST-MR Manual at 16. Accordingly, and based on a review of Dr. Denney's testimony and Defendant's own CAST-MR examination form, the undersigned

[7] In Defendant's case, this question requires a more complex response than had he, for example, been arrested at a home immediately after burglarizing it. His alleged criminal activity – the production of child pornography – and his arrest related to that activity are, at a minimum, several hours apart; he was arrested on October 2, 2014 at approximately 10:00 PM and the most recent videos containing what appear to be depictions of child pornography that were retrieved from one of the cell phones in Defendant's possession were created on October 2, 2014 at approximately 4:45 PM. *See* Kyaw Aff.at 1–3. Additional images allegedly containing depictions of child pornography were taken using one of the cell phones in Defendant's possession on September 18, 2014. *Id.* According to the CAST-MR manual, however, more complex incidents call for more detailed answers, rendering Defendant's short, incomplete response even more unsatisfactory. *See* CAST-MR Manual at 12.

is confident that Defendant's score on the CAST-MR was unintentionally inflated, and that his score should be closer to nineteen than twenty-two.

Regardless, either score indicates to the Court that Defendant has a fundamental difficulty with oral and reading comprehension such that he lacks the capacity to understand, think through, and answer even the most basic questions about the legal process and the case against him. A review of some of the multiple choice questions that Defendant answered incorrectly on the CAST-MR is particularly instructive here. When asked what he would do if a prosecutor told a lie at trial, he indicated that he would refuse to answer more questions. *See* Defendant's CAST-MR at 6. If he heard the judge and his lawyer talking but could not understand what they were saying, he said he would demand that they talk to him. *Id.* If he wanted to stand up in the middle of court and tell the judge something, he indicated that it would acceptable because the judge knows him. *Id.* When asked what he would do if his lawyer told him to do something he did not want to do, he responded that he would fire his lawyer on the spot. *Id.* at 5. More fundamentally, when asked what a crime is, Defendant answered that it is "when you hate someone" and reportedly added that it is akin to "acting like a little kid." *Id.* at 3. In other words, even after four months of attempted restoration, his performance on the CAST-MR and the additional evidence in the record confirms that Defendant will struggle to effectively interact with counsel and rationally understand the proceedings by a preponderance of the evidence in this Court.

Nor does the Court believe that the government has proved by a preponderance of the evidence that the accommodations proposed by Dr. Lloyd will permit Defendant to sufficiently consult with his counsel with "a reasonable degree of rational understanding" or provide him with "a rational . . . understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. Indeed, as of now, Dr. Lloyd's suggestion that her proposed accommodations – that is, that his counsel explain

to him legal terms without using legal jargon, that his counsel review with him the likely schedule and questions he will be asked at the beginning of each day, and that the Court provide him with daily breaks so that he can expend excess energy and confer with counsel, *see* Lloyd's Report at 19–20 – are entirely untested. While Defendant was supposed to take part in a mock trial during his competency restoration at FMC Butner to explore his ability to retain and reason through information, that never took place. *See* 5/16/16 Tr. at 221:13–19. Without the benefit of a mock trial to test the coping skills Dr. Lloyd purports Defendant learned, the undersigned must rely in part on Defendant's behavior at the status conferences and competency hearing to assess his progress and his ability to reasonably and rationally participate in his defense. Defendant's conduct at those hearings, however, is less than promising. As noted above, Defendant spent the majority of his time at the competency hearing and all of his time in at least one of the status conferences coloring in a children's coloring book. He appeared completely disinterested in the discussions at those appearances despite their importance to his case and exhibited behavior, including, at one point, covering his ears as if to prevent himself from hearing testimony that he did not like, that suggests he lacks a rational understanding of how to contribute to his defense and conduct himself in a courtroom. While Dr. Lloyd maintains that Defendant was paying attention during his appearances, his ability to, for example, recall his next court date or his expression of anger over Dr. Lloyd's suggestion to the Court that he needed to stay at FMC Butner for additional restoration, *see* Lloyd's Report at 10, do little to convince the undersigned that Defendant possesses, or will ever possess, the oral comprehension and processing skills needed to rationally understand the case against him.

Indeed, the disagreement between Dr. Lloyd and Dr. Denney over the value of Dr. Lloyd's proposed accommodations lays bare the tension at the heart of the instant case. While Dr. Lloyd

frames Defendant's problem as an issue with his ability to pay attention that can be remedied by repetition and one-on-one reinforcement, Dr. Denney suggests that Defendant's condition is better viewed as an incurable deficiency in oral comprehension and mental processing. In Dr. Denney's view, no amount of breaks or explanations during trial will improve Defendant's cognitive performance. *See* 5/17/16 Tr. at 534:2–14. The undersigned agrees. In particular, based on Dr. Denney's persuasive testimony, the undersigned is concerned with Defendant's "strikingly weak" oral and auditory comprehension skills. *See* Denney's Report at 22. Defendant has consistently demonstrated that he has the auditory comprehension of a first grade student. *See* Denney's Report at 27; *see also* DiMisa's Report at 7 ("[I]t is likely that [Defendant] had a limited capacity to comprehend even the simplest items on the test."). Put differently, having Defendant stand trial would be akin to putting a seven-year-old in the courtroom and expecting them to understand the language, ideas, and theories likely to be discussed. While the child may understand some of what is going on, there is a ceiling on that understanding. 5/17/16 Tr. at 399:2–400:8, 416:4–13. The Court is reluctant to put someone with the mental processing capabilities of a seven-year-old on trial when the Supreme Court has made clear, in the context of *Miranda*, that children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them . . . ." *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (quoting *Bellotti v. Baird*, 443 U.S. 622 (1979)); *see also United States v. Han*, ___ F. Supp. 3d ___, 2016 WL 4132203, at *12 (D.D.C. Aug. 3, 2016) ("[A] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception." (quoting *J.D.B.*, 564 U.S. at 272)). After all, trials are oral in nature and, as such, require a significant degree of oral compre-

hension. The undersigned has no confidence that Dr. Lloyd's untested accommodations will sufficiently rectify Defendant's significantly deficient mental processing and oral comprehension skills.

Accordingly, the undersigned finds that the government has failed to satisfy its burden of proving, by a preponderance of the evidence, that Defendant has been restored to competency pursuant to 18 U.S.C. § 4241(e). At a minimum, the undersigned finds that Defendant presently lacks the ability "to consult with his lawyer with a reasonable degree of rational understanding" and lacks "a rational . . . understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. Additionally, the undersigned finds that, due to the lack of treatment for his mental impairment and the ineffectiveness of the efforts to restore him to competency to date, Defendant is incapable of being restored to competency for the foreseeable future.

CONCLUSION

Based on the foregoing, the undersigned recommends that the Court find that defendant has not been restored to competency pursuant to 18 U.S.C. § 4241(e) and is therefore not competent to stand trial in this matter. Further, the undersigned recommends that the Court find that Defendant is incapable of being restored to competency for the foreseeable future.[8]

The parties are advised that their failure to file objections to the findings and recommendations set forth above within fourteen days of the date of this Report and Recommendation may

[8] The undersigned also recommends that the Court provide the government with thirty days following any finding of incompetency so that Defendant can be assessed for federal civil commitment pursuant to 18 U.S.C. §§ 4246 or 4248. As the parties are aware, sections 4246 and 4248 provide the BOP with a mechanism for determining whether an individual who has been found incompetent to stand trial should nevertheless be civilly committed to a suitable federal treatment facility as a dangerous or sexually dangerous person. *See* 18 U.S.C. §§ 4246(d), 4248(d).

result in a waiver of their right of appeal from an order of the District Court adopting such findings and recommendations. *See* LCrR 59.2(b); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

Dated: December 1, 2016

G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE