

1 whether Petitioner was competent to terminate representation and waive his appeal and
2 whether his decisions were rendered involuntary because of his conditions of confinement.
3 The Ninth Circuit granted habeas counsel's request, suspended ruling on Petitioner's
4 motions pending remand to this Court for an evidentiary hearing regarding Petitioner's
5 competency and the voluntariness of his decisions.

6 An evidentiary hearing was conducted on March 26-28, 2002. Before discussing the
7 evidence presented at the hearing and the legal basis for this Court's decisions, the Court
8 summarizes the circumstances involved in the filing of this action, the appointment of
9 counsel, the denial of habeas relief and appeal and pertinent post-remand events.

10 **BACKGROUND**

11 I. Procedural History

12 On July 19, 1994, Mr. Comer filed a motion for stay of execution with a petition for
13 habeas relief and a motion for appointment of counsel, personally signed by him. (Dkt. 1.)¹
14 The same day, a stay of execution was entered and John R. Hannah, then with the Federal
15 Public Defender ("FPD"), and Peter Eckerstrom were appointed as counsel for Mr. Comer.
16 On February 28, 1997, Denise I. Young of the FPD was substituted in place of Hannah.
17 (Dkt. 105.) Mr. Comer filed an amended petition for habeas relief. (Dkt. 28.) The Court
18 determined that certain of the claims in the amended petition were procedurally barred and
19 that Mr. Comer was not entitled to relief on the merits of the remaining claims. (Dkts. 86
20 and 111.) Mr. Comer was granted a certificate of probable cause on March 3, 1998. (Dkt.
21 119.)

22 On June 6, 2000, the Ninth Circuit remanded this matter to this Court with
23 instructions to hold an evidentiary hearing to determine whether Mr. Comer was competent
24 to terminate representation by counsel and forego further legal review, and whether his
25 conditions of confinement rendered those decisions involuntary. At that time, Mr. Comer

27 ¹ "Dkt." refers to documents filed in this particular action.

1 had been an inmate in the custody of the Arizona Department of Corrections (“ADOC”) for
2 twelve years. Mr. Comer was housed in Cellblock 6 (“CB6”) of the Arizona State Prison in
3 Florence, Arizona, for several months in 1988. Between 1989 and 1996, Mr. Comer was
4 housed in Special Management Unit I (“SMU I”) in the Eyman Complex of the Arizona
5 State Prison in Florence, Arizona. Since 1996, Mr. Comer has been housed in SMU II, also
6 in the Eyman Complex.

7 On June 30, 2000, Julie Hall, formerly with the FPD, was substituted for the FPD as
8 habeas co-counsel and filed a notice of appearance. (Dkt. 122.)

9 On or about July 18, 2000, Mr. Comer mailed *pro se* a letter to Assistant Arizona
10 Attorney General Jon Anderson, who then represented Respondents.² (Ex. A to Dkt. 123.)
11 In the letter, Mr. Comer thanked Anderson for his efforts seeking dismissal of Mr.
12 Comer’s appeal and suggested that Anderson represent him in his efforts to dismiss his
13 appeal. In those letters Mr. Comer claimed he did not want to meet with his lawyers;
14 however, he acknowledged that his daughter had at some point asked him to meet with
15 lawyers, which he did, and he acknowledged that he did “sign a few papers . . . so Pete
16 [Eckerstrom] can get paid.” He further stated that he had only learned “a month ago or so”
17 that his automatic direct appeal had ended some time before and that he had believed “those
18 lawyers” with whom he had met were involved in the automatic direct appeal of his
19 conviction. (Ex. A at 3 to Dkt. 123.) Mr. Comer accused habeas counsel of having
20 disseminated lies about him by calling him “delusional” and “mentally damaged.” (Id.) Mr.
21 Comer provided Anderson with the names of corrections officers he thought could or
22 would verify his competence. (Id.)

23 On July 20, 2000, Respondents filed a motion for determination of counsel for Mr.
24 Comer based in part on one of Mr. Comer’s letters. (Dkt. 123.) On July 25, 2000, Mr.

26 ² In January 2001, John Todd was substituted as counsel for Respondents.
27 (Dkt. 152.)

1 Comer filed *pro se* motions to attend any and all proceedings, and to either substitute new
2 counsel or to allow him to represent himself. (Dkts. 124 and 126.)

3 A status hearing was held on August 25, 2000, on the motion for determination of
4 counsel.³ Mr. Comer appeared by video-conference from a secure location in Florence,
5 Arizona. (Dkt. 131.) After hearing oral argument on the motion to disqualify, the Court
6 denied the motion finding no basis to disqualify the Attorney General's Office based on its
7 asserted interference with the attorney-client relationship, nor did the Court find a basis for
8 an alleged violation of Mr. Comer's Fifth and Sixth Amendment rights. (Dkts. 136 & 138.)

9 The Court also considered whether the attorney-client relationship between Mr.
10 Comer and habeas counsel had been irreconcilably broken. Habeas counsel explained that
11 while the attorney-client relationship was strained because habeas counsel sought a
12 determination that Mr. Comer was incompetent to abandon his appeal and dismiss them as
13 counsel, they remained committed to appropriately representing what they believed to
14 be Mr. Comer's "rational interests" pending a determination of Mr. Comer's competency
15 and the voluntariness issue. (R.T. 8/25/00 at 50-51.)⁴ During a sealed portion of the hearing
16 with only habeas counsel and Mr. Comer, Mr. Comer strenuously expressed his
17 unwillingness to communicate or cooperate with habeas counsel if they questioned his
18 decision to abandon his appeal, and his competence to do so. Habeas counsel opined that

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20 ³ On August 11, 2000, habeas counsel filed a motion to disqualify the Office
21 of the Arizona Attorney General. (Dkt. 130.) Habeas counsel argued the Ninth Circuit had
22 placed the Arizona Attorney General's Office on notice that Mr. Comer could not be
23 presumed competent "to waive important procedural rights in the absence of a competency
24 hearing" but that Anderson had nevertheless opened, read and cited the July 18 letter in
25 support of Respondents' motion to determine counsel. Habeas counsel argued that
26 opening, reading and citing the July 18 letter to support potential substitution of habeas
27 counsel interfered with Mr. Comer's attorney-client privilege when Mr. Comer was not
28 presumed competent to waive the privilege and when a decision to waive the privilege could
not be presumed voluntary.

⁴ "R.T." refers to the reporter's transcript of a hearing. "Dep. R.T." refers to
the reporter's transcript of Dr. Kupers's rebuttal testimony on April 2, 2002.

1 Mr. Comer was unlikely to cooperate with any attorney who did not accede to his decision.

2 On September 18, 2000, the Court granted Respondents' motion, but ordered habeas
3 counsel to continue to represent Mr. Comer in connection with his habeas claims pending a
4 determination of competency and voluntariness.⁵ (Dkt. 138.) Concomitantly, and in
5 accordance with the procedure embraced by the Ninth Circuit in Mason v. Vasquez, 5 F.3d
6 1220, 1223 (9th Cir. 1993), the Court appointed Michael Kimerer, Esq., a certified Arizona
7 State Bar criminal specialist, whose firm is A-V rated, and who enjoys an excellent
8 reputation in the legal community as special counsel, to represent Mr. Comer concerning
9 his expressed decisions to end his appeals and proceed to execution.⁶ (Id.) The Court
10 instructed Mr. Kimerer ("Special Counsel") to first assess whether he believed Mr. Comer
11 intended to waive his appeal and, if he did, to continually reassess Mr. Comer's decision. If
12 at any time Mr. Comer wavered in his decision, or if Mr. Kimerer determined that Mr.
13 Comer was not competent or his decision was not voluntary, Mr. Kimerer was to

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15 ⁵ This Court is aware of the ethical predicament facing all habeas counsel in
16 these circumstances. The Court is also persuaded, however, that throughout the proceedings
17 in this matter habeas counsel fully understood their ethical obligations and performed their
18 responsibilities ethically. They aggressively prepared and presented their position, while
19 remaining sensitive to the reality that it was contrary to the stated views of Mr. Comer and
20 would inevitably create tension in their relationship with him. See Ross E. Eisenberg, *The*
21 *Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (Fall 2001). The
22 clear potential for conflicts in these situations between ethical rules requires habeas
23 counsel to find an exquisite balance. Unfortunately there is little guidance in the rules or
24 comments for lawyers who struggle to find that balance in these difficult circumstances.

25 ⁶ Some delay occurred following Mr. Kimerer's appointment while Mr.
26 Kimerer attempted to, and successfully did, establish an attorney-client relationship with
27 Mr. Comer, who previously demonstrated his aversion to contact with any counsel and who
28 at the outset resisted contact with special counsel. (See e.g., R.T. 3/28/02 at 669.) Mr.
Kimerer was assisted by Ms. Holly Gieszl who enjoys a very good reputation within the
legal community and the Arizona District Court. The Court has been made aware
throughout these proceedings of the palpable strain on Mr. Kimerer and Ms. Gieszl in
deciding whether to undertake to represent Mr. Comer, because of their opposition to the
death penalty, and in representing him, because of his general mistrust of all attorneys and
his frustration with the proceedings which he viewed as unnecessary.

1 upon his return. (Id.) Respondents also pointed out that Mr. Comer had previously escaped
2 from prison in California. (Id.) Habeas and special counsel also opposed transporting Mr.
3 Comer to Springfield because of the extremely uncomfortable security procedures
4 necessary to ensure his safe transport. (Dkts. 160 & 161.) Expedited briefing of the
5 motion to stay/vacate was ordered. (Dkt. 153.)

6 Following argument on February 7, 2001, the Court granted the motion to vacate the
7 transport order because of the extreme security risk posed by transport, the associated costs
8 to ensure security, and the likelihood that a second evaluation would be required at ADOC to
9 assess the voluntariness issue.

10 II. Court Appointed Expert

11 The Court suggested that a neutral evaluator be appointed and ordered the parties to
12 confer and suggest candidates. (Dkts. 158 & 162.) On February 9, 2001, the Court
13 provided the parties with the curriculum vitae of Dr. Sally Johnson, Associate Warden
14 Medical/Chief Psychiatrist of the Health Services Division of the Federal Correctional
15 Complex at Butner, North Carolina for their consideration.⁸ (Dkt. 162.) Respondents
16 agreed to the appointment of Dr. Johnson. (Dkt. 164.) Habeas and special counsel had
17 proposed alternative experts, but special counsel subsequently agreed to the appointment of
18 Dr. Johnson. (Dkts. 163, 165 & 170; R.T. 3/8/01 at 3-4.) Dr. Johnson was appointed as an
19 expert for the Court and habeas counsel reserved the right to seek the appointment of their
20 own experts following the issuance of Dr. Johnson's report. . (Dkt. 174.)

21 On September 27, 2001, Dr. Johnson submitted her written evaluation concluding
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23 ⁸ Dr. Johnson had previously evaluated whether the conditions of an inmate's
24 confinement had rendered the inmate unable to make a voluntary decision and she had
25 assessed the competency of inmates or criminal defendants on numerous occasions. (R.T.
26 3/8/01 at 7.) Dr. Johnson's curriculum vitae reflected that she had expertise in the areas of
27 competency to stand trial, right to receive/refuse treatment, and criminal forensics. It also
28 reflected that she taught and lectured extensively. See Curriculum vitae for Dr. Johnson
attached to Dkt. 162.)

1 that Mr. Comer was competent to waive his appeal and that his decision to do so had not
2 been rendered involuntary by his conditions of confinement. (Dkt. 282.) There were a
3 surfeit of diversions that impeded the completion of Dr. Johnson's report and ultimately the
4 holding of the competency hearing, two of which are discussed below.

5 A. Conduct of Mr. Comer Warranting Discipline and the Media Event

6 Following Dr. Johnson's appointment, she and special counsel sought authorization
7 for contact visits with Mr. Comer to facilitate and expedite completion of their respective
8 tasks. On March 14, 2001, the Court entered a stipulated order lodged by Respondents
9 granting the request. (Dkt. 180; R.T. 3/14/01 at 5-9.) Thereafter, several contact visits with
10 Mr. Comer occurred without incident. On April 30, 2001, with the knowledge of, and
11 without objection from Respondents, special counsel asked, and received, an order
12 permitting them to forego wearing protective gear ordinarily required of anyone within
13 physical proximity of a death row inmate. (Dkt. 197; R.T. 4/30/01 at 31-32.)

14 On May 4, 2001, correctional staff discovered a piece of metal had been cut from the
15 desk in Mr. Comer's cell. A portion of the missing metal, sharpened into a blade, was
16 reportedly recovered from the cell of an inmate adjacent to Mr. Comer's cell. A lighter
17 flint, which ADOC believed Mr. Comer used to cut the metal from his desk to manufacture
18 the shank, was reportedly found concealed in a wall of Mr. Comer's cell. The remainder of
19 the metal cut from the desk was never found despite repeated searches of Mr. Comer's cell
20 and the pod in which Mr. Comer was housed, as well as medical examinations of Mr. Comer
21 and other inmates. Additionally, Mr. Comer made threatening statements to correctional
22 officers. The Court was not notified of these events nor did Respondents seek modification
23 of the stipulated-to contact visit order for Dr. Johnson and special counsel.

24 Instead, and without satisfactory explanation, Respondents contacted a local
25 television station about airing a story concerning the risks posed by death row inmates
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1 generally, and Mr. Comer in particular.⁹ On or about May 14 and 15, 2001, Respondents
2 escorted a television reporter and a film crew through SMU II. ADOC staff was interviewed
3 about Mr. Comer, his background, and his conditions of confinement, and Mr. Comer was
4 filmed without his consent. Two segments about Mr. Comer were subsequently broadcast,
5 in which Mr. Comer was described as Arizona's Hannibal Lecter, a fictional cannibalistic
6 serial killer.¹⁰ (See Dkt. 269.)

7 The Court set a status hearing for Respondents to explain why they delayed more than
8 a month after the shank was found, and weeks after the media broadcasts, before filing a
9 motion to rescind contact visitation. Hearings were held in June 2001, but Respondents
10 failed to provide a satisfactory explanation. The Court was informed, however, that Mr.
11 Comer's cell was being modified so that his bunk, commode and sink were made from a

13 ⁹ ADOC Department Order 201 regulates information release. Section 1.3
14 precludes news media representatives from "access to prisons/facilities for the purpose of
15 interviewing inmates." ADOC Dept. Orders 201.02 (1.2-1.3)(Sept. 1, 1996);
<http://www.adc.state.az.us:80/Policies/201.htm>.

16 Department Order 201.02 further generally prohibits ADOC from volunteering
17 disclosure of "non-confidential Department records" or information not "specifically
18 requested." *Id.* Finally, employees are required to "immediately notify" the Public
19 Information Officer of all media inquiries, and are barred from responding to news media
20 representatives's inquiries "unless authorized by [a Department order], the Director, or the
21 [Public Information Officer]," ADOC Dept. Order 201.05 (Sept. 1, 1996). Exceptions to
22 these requirements "shall be allowed only when approved in writing by the Director."
ADOC Dept. Order 201.08(1.5). Respondents did not clarify whether the Director gave
written approval for an exception to these requirements before FOX news was permitted to
film Mr. Comer.

23 ¹⁰ Respondents were subsequently ordered to provide a copy of these
24 broadcasts to the experts and to file a copy with the Court. (Dkt. 269.) In one episode, it
25 was incorrectly reported that this Court, without the consent of ADOC, permitted contact
26 visits with Mr. Comer despite his proclivity for making and using certain dangerous
27 weapons. Whether the erroneous information in the broadcasts was the mistake of the
28 reporter or personnel at ADOC was never determined. Habeas counsel objected to the
news report arguing that it placed Mr. Comer in danger of violence from other prisoners
seeking to enhance their reputation in prison by challenging him.

1 special type of metal to diminish his ability to make weapons, and that his desk would be
2 removed entirely. (R.T. 6/21/01 at 21-23.) Dr. Johnson expressed a concern that the media
3 event and change in Mr. Comer's conditions of confinement might introduce additional
4 issues relevant to her evaluation of his conditions of confinement, and therefore delay her
5 final report because she would need to reassess the changed conditions. She advised the
6 Court and the parties that to the extent such disruptions could be eliminated, consistent with
7 the security of the institution, the more expeditiously she would be able to complete her
8 assignment.

9 After briefing and hearings, the Court rescinded the contact visit order because Mr.
10 Comer refused to disclose the location of the missing metal, ADOC could not find it,
11 making contact visits too risky. (Dkt. 236.) Further, after extensive briefing and numerous
12 hearings regarding ADOC's contact with the media concerning Mr. Comer, the Court
13 ordered that a record of any further media contacts with Mr. Comer be provided by
14 Respondents to the evaluating experts. The Court also accepted Respondents' proposal to
15 adhere to specific rules with respect to
16 media contacts involving Mr. Comer.¹¹

17 B. Dietary Issues

18 During a status hearing on September 4, 2001, Dr. Johnson expressed concern that
19 Mr. Comer might not be eating sufficient food in light of his activity level, noted his

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21 ¹¹ On October 15, 2001, Respondents notified the Court and parties that a local
22 television station had requested an interview with Mr. Comer. (Dkt. 291.) On October 22,
23 2001, special counsel filed a notice that Mr. Comer declined to be interviewed. (Dkt.
24 301.) Following a hearing on October 24, 2001, the Court ruled that Mr. Comer's notice
25 declining to be interviewed constituted his refusal to be interviewed pursuant to ADOC
26 policies. (Dkt. 302.) On June 6, 2002, Respondents filed another "Notice of Request for
27 Interview with Petitioner," but Mr. Comer apparently independently agreed to be
28 interviewed for two published articles. (Dkt. 428.) See Paul Rubin, *Arizona's Worst
Criminal*, Phoenix New Times, May 2, 2002, at 63; Paul Rubin, *Dead Man Talking*,
Phoenix New Times, June 27, 2002, at 60. The Court is unaware of how this came about,
but no objection was made by any of the parties.

1 complaints that he was always hungry, and reported an observable weight loss.¹² (R.T. 9/4/01
2 at 17.) Insufficient food, she explained, could adversely affect his mental state which would
3 require her to reassess his competency. (R.T. 9/4/01 at 21-22.)

4 Respondents acknowledged awareness of Dr. Johnson's concerns, and reported that
5 ADOC had begun monitoring whether Mr. Comer accepted his meal trays and whether he
6 appeared to be eating. (Id. at 16-17.) In addition, Respondents reported that an ADOC
7 physician and the ADOC Facility Health Administrator ("Health Administrator") visited Mr.
8 Comer at his cell to conduct a medical examination, but Mr. Comer refused to cooperate.
9 They stated, however, that he did not appear to be in "acute distress," from their observations
10 from outside his cell. (Id. at 15-16, 25.) The Court instructed Respondents to apprise the
11 court, the parties and Dr. Johnson of Mr. Comer's mental and physical status. (Id. at 23-25.)

12 At a status hearing held on October 1, 2001, habeas counsel asked that ADOC be
13 ordered to provide Mr. Comer vegetarian meals without requiring him to meet the ADOC
14 regulation for vegetarian meals.¹³ The Court learned that Mr. Comer had supplemented the
15 non-meat portion of his ADOC meals with commissary items. The Court declined to order
16 ADOC to make an exception to its policy concerning the provision of vegetarian meals to
17 inmates based in part on Respondents' representations that Mr. Comer had commissary
18 privileges. (Id. at 18.)

19 On October 18, 2001, at the request of habeas counsel, an emergency hearing was
20 held regarding Mr. Comer's health. At the hearing, habeas counsel reported that Mr. Comer
21 had informed her that he lacked the strength to leave his cell for recreation or exercise. (Id.
22 at 7.) The Court learned from Respondents that Mr. Comer had been found guilty of a

24 ¹² Mr. Comer informed Dr. Johnson that he had become a vegetarian two or
25 more years previously and had not eaten meat for at least two years. This was a personal
26 decision and not a consequence of religion or faith.

27 ¹³ Under ADOC policies, an inmate can receive vegetarian meals based on the
28 religious tenets of the inmate's faith or if medically required. (R.T.10/19/01 at 9-10.)

1 major and a minor violation for unidentified conduct on August 31, 2001, and sanctioned
2 with a thirty and fifteen-day loss of commissary privileges. (R.T. 10/18/01 at 9-10.)
3 Respondents informed the Court that the revocation of those privileges did not take effect
4 until Monday, October 15, 2001, and would be in effect for thirty days. The Court also
5 learned that as of October 15, ADOC staff observed packages of “Honey Buns,” Mr.
6 Comer’s favorite commissary item, in his cell. (R.T. 10/18/01 at 27-28.) Additionally,
7 Respondents reported that since October 15, Mr. Comer had refused five or six meals. (Id.)
8 The Court directed Respondents to medically evaluate Mr. Comer’s condition; determine
9 the date and nature of the rule infraction; provide and explain ADOC’s vegetarian meal
10 policy; and submit its procedures regarding ADOC’s response to inmates who engage in
11 hunger strikes. (Id. at 28-30.)

12 At a hearing on October 19, ADOC medical staff reported that Mr. Comer had
13 refused to consent to a medical examination on October 18 and 19, 2001.¹⁴ (R.T. 10/19/01
14 at 4-5, 6.) Also, the Health Administrator reported that only thirteen percent of Mr.
15 Comer’s meals (of 2,800 calories daily), was comprised of protein or meat. (Id. at 9-10.) It
16 was undisputed that Mr. Comer never requested a vegetarian diet pursuant to the ADOC
17 policy because his decision to become a vegetarian was not faith based and he did not have a
18 medical condition that made vegetarian meals necessary. Finally, the Health Administrator
19 summarized ADOC’s procedures for inmates who became endangered as a consequence of a
20 “hunger strike,” described as the refusal of meals for seventy-two hours, or nine meals. (Id.
21 at 11.) He testified that the prisoner would be monitored, and if his health deteriorated, a
22 decision would be made whether hospitalization and force-feeding was required. (Id. at 11-
23 12, 13-14.)

24 Significantly, the Court learned that Mr. Comer’s major rule infraction was for
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26 ¹⁴ According to Respondents, Mr. Comer had last consented to a medical
27 examination in May, 2000, and refused an annual medical examination in January, 2001.
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1 threatening a corrections officer who had issued him a minor violation charge for passing or
2 “fishing” materials to another inmate.¹⁵ (R.T. 10/19/01 at 18-19.) Moreover, Mr. Comer
3 waived his right to attend the disciplinary hearing, and was notified the same day that he had
4 been found guilty and sanctioned to a thirty day loss of commissary privileges. (Id. at 19-
5 20.)

6 In light of the evidence, the Court found that ADOC’s vegetarian meal policy was not
7 irrational and that by his own admission it did not apply to Mr. Comer. The Court refused to
8 interfere with ADOC’s discipline of Mr. Comer for the infractions nor did the Court order
9 ADOC to make a special exception to its vegetarian meal policy for Mr. Comer.¹⁶ (Id. at 30-
10 33.) See Turner v. Safley, 482 U.S. 78, 89, 90-91 (1987); accord Lewis v. Casey, 518 U.S.
11 343, 361 (1996). The Court found that Mr. Comer had voluntarily made the choice not to
12 eat any portion of the meals provided by ADOC, but it ordered ADOC to continue
13 monitoring Mr. Comer’s physical and mental condition. (Id.)

14 Mr. Comer’s commissary privileges were reinstated following the expiration of the
15 sanction period without further Court involvement. He appeared healthy and not underweight
16 at the time of the competency hearing in March 2002 and the Court’s visit with him at
17 ADOC in April 2002.

18 III. Second Expert Evaluation

19 After Dr. Johnson’s report was filed in late September 2001 finding Mr. Comer
20 competent and his decision voluntary, habeas counsel renewed requests for the appointment
21 of Dr. Terry Kupers, a psychiatrist, and Dr. Craig Haney, a psychologist and attorney, as
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23 ¹⁵ “Fishing” refers to the illicit transmission of items from one cell to another.
24 In this case, Mr. Comer was charged with fishing envelopes and magazines to another
25 inmate. (Id. at 19.)

26 ¹⁶ At the competency hearing, Mr. Comer testified that he only studied the
27 Buddhist religion, but he had never declared Buddhism as his religion. (R.T. 3/27/02 at
28 388.)

1 their experts. Both were appointed, and the evidentiary hearing was scheduled to commence
2 on January 22, 2002.¹⁷

3 Dr. Kupers met with Mr. Comer on November 28 and 29, 2001, and again on January
4 11, 2002. Habeas counsel filed a motion to continue the evidentiary hearing to allow Drs.
5 Kupers and Haney sufficient time to complete their evaluations. Mr. Comer, who appeared
6 telephonically, strongly objected to a continuance and threatened not to cooperate with their
7 evaluations. (See R.T. 1/11/02 at 4-9, 13-17.) The Court expressed understanding of Mr.
8 Comer's frustration with the delay, but made it clear that it could not legally determine his
9 competency and the voluntariness of his decisions without consideration of habeas
10 counsel's expert's opinions. (Id.) He was told his cooperation was necessary and, if he did
11 not cooperate, the Court's task would be incomplete, resulting in a return of the case to the
12 appellate court for possible resolution of the habeas petition. (Id.) To ensure that Drs.
13 Kupers and Haney had sufficient time to complete their evaluations, the evidentiary hearing
14 was reset to March 26-28, 2002. (Dkts. 349 & 353.)

15 Mr. Comer cooperated and Dr. Kupers completed his evaluation and submitted a report
16 on March 19, 2002. Dr. Kupers concluded that Mr. Comer suffered from depression, post-
17 traumatic stress disorder, and SHU Syndrome,¹⁸ and, consequently, he was not mentally

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19 ¹⁷ Dr. Haney was subsequently forced to withdraw from participation due to a
20 serious family illness. Habeas counsel did not seek the appointment of another expert in
21 his place.

22 ¹⁸ "SHU Syndrome" stands for Security (or alternatively, Segregated or
23 Supermax) Housing Unit Syndrome, which has been identified by some mental health
24 professionals as a collection of psychological symptoms experienced by inmates confined
25 in cells with little social interaction or other sensory stimulus, particularly for lengthy
26 periods of time. See David McCord, *Imagining a Retributivist Alternative to Capital*
27 *Punishment*, 50 FLA. L. REV. 1, 98-103 (January 1998); Sally Mann Romano, *If the SHU*
28 *Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45
EMORY L.J. 1089, 1092 (Summer 1996); Nan D. Miller, *International Protection of the*
Rights of Prisoners: Is Solitary Confinement in the United States a Violation of
International Standards? 26 CAL. W. INT'L L.J. 139, 156 (Fall 1995). The symptoms are

1 competent to waive further legal review. Dr. Kupers further found that the conditions of Mr.
2 Comer's confinement rendered his decision to waive further legal review involuntary. (Ex.
3 1 to Dkt. 383.)

4 IV. Changes in Mr. Comer's Conditions of Confinement, January 2002

5 Beginning sometime in January 2002, Mr. Comer was permitted to have in his cell for
6 the first time in several years a radio cassette player, and a television, in recognition of the
7 absence for six months of any significant disciplinary infraction. (R.T. 3/26/02 at 272-73,
8 280, 282-83; R.T. 3/27/02 at 535-37, 546-47, 550-51; R.T. 3/28/02 at 836, 873.) As
9 Deputy Warden Marshall explained at the competency hearing, he had promised Mr. Comer
10 a radio cassette player and a television if he did not have a significant disciplinary write-up
11 for six months. (R.T. 3/27/02 at 535-37, 546-47, 550-51.)

12 V. Evidentiary Hearing, Prison Tour and Briefing

13 The Court required counsel to agree on a fair allocation of the time for presentation of
14 evidence at the evidentiary hearing. Counsel complied. In addition, the Court considered
15 Respondents' motion to hold the hearing at SMU II, rather than the Federal Courthouse,
16 because of security concerns in transporting Mr. Comer to Phoenix. Habeas counsel
17 opposed the motion; special counsel sought to ensure that Mr. Comer would be physically
18 present whether the hearing was held at SMU II or at the Federal Courthouse. (Dkts. 376 &
19 419.) After numerous planning meetings with the United States Marshal's Service, working
20 with ADOC security, the Court ordered that Mr. Comer participate by video-conference at
21 the hearing on March 26, 2002. The Court further ordered that if he complied in all
22 respects with the orders of the transporting officers, he would be transported to Phoenix to
23 appear in person on March 27 and 28. Mr. Comer persuaded the Court that he understood

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25 also denominated as Ad Seg Syndrome or Reduced Environmental Stimulus Syndrome
26 ("RES Syndrome"). See Miller, *International Protection of the Rights of Prisoners*, 26
27 CAL. W. INT'L L.J. at 162; see also McCord, *Imagining a Retributivist Alternative to*
28 *Capital Punishment*, 50 FLA. L. REV. at 114; Romano, *If the SHU Fits*, 45 EMORY L.J. at
1129.

1 what was required of him and was committed to adhere to the requirements.¹⁹

2 On March 26, 2002, Mr. Comer cooperated with the transporting officers and was
3 transported without incident to a secure prison facility in Florence, Arizona, where he
4 participated during the hearing with special counsel by video-conference. Because of his
5 cooperation on the first day of the proceedings, Mr. Comer was transported without incident
6 to Phoenix where he appeared at the hearing in person on March 27 and 28. Again, he
7 cooperated in all respects with security personnel during the last two days of the hearing.
8 For security reasons, Mr. Comer was not permitted to testify from the witness box and was
9 seated approximately twenty-five feet from the Court and twenty feet from habeas counsel.
10 Because of this distance the Court was unable to clearly observe his demeanor. Thus, his
11 testimony was video-taped without objection for review by the Court before rendering its
12 decision, and for counsel's preparation for briefing. It was filed under seal for appeal to the
13 Ninth Circuit.

14 After the hearing, and without objection, on April 6, 2002, the Court and counsel for all
15 the parties toured the portions of ADOC in which Mr. Comer had been, and is presently,
16 housed since his incarceration began at ADOC, including CB6, SMU I and SMU II. The
17 Court and counsel inspected the various cells, as well as the shower and recreation areas.
18 Mr. Comer was present when his cell was inspected, and answered questions posed by the
19 Court in the presence of all counsel.

20 Finally, the parties submitted proposed findings of fact and conclusions of law. (Dkts.
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22 ¹⁹ Because Mr. Comer was designated by ADOC at the highest level for risk of
23 escape and violence, the U.S. Marshal and the Court conferred and designed special
24 security procedures to be implemented during the hearing. These included the use of a
25 belly chain and a stun belt. Also, Mr. Comer was positioned very close to the door where
26 he entered the courtroom and sat between his two special counsel; he was not permitted to
27 move from his seat; four ADOC corrections officers and four U.S. Marshals were
28 strategically positioned in the courtroom; a special magnetometer was used outside the
courtroom to screen visitors and; the visitors were seated in specially designated portions
of the audience.

1 399, 402 & 413.) Respondents filed objections and a response to habeas counsel's
2 proposed findings and conclusions. (Dkt. 407.) Special counsel also filed objections to
3 habeas counsel's proposed findings and conclusions. (Dkt. 423.) Habeas counsel filed
4 responses to Respondents' and special counsel's proposed findings and conclusions.²⁰
5 (Dkts. 414 & 420.)

6 Habeas counsel argues that Mr. Comer is not competent to waive his habeas appeal
7 because he suffers from three mental disorders: depression, post-traumatic stress disorder
8 ("PTSD") and SHU syndrome. Counsel further argue that the conditions of Mr. Comer's
9 confinement at ADOC, and his conditions at the California Department of Corrections
10 resulted in PTSD and SHU syndrome, and in turn, have rendered his decision to waive
11 further legal review involuntary.²¹ Special counsel argues that Mr. Comer has the capacity to
12 make the decision to terminate representation by habeas counsel and to waive further legal
13 review and that his decisions to do so are not rendered involuntary by his present and/or past
14 conditions of confinement. Respondents agree that Mr. Comer has the mental capacity to
15 make the decision to terminate representation by habeas counsel and to waive further legal
16 review.

17
18 ²⁰ Habeas counsel also filed a motion to strike certain exhibits submitted by
19 special counsel after the hearing. (Dkt. 424.) That motion was granted. (Dkt. 432.)

20 ²¹ Habeas counsel argues the Court must "assess [Mr. Comer's] competence
21 with reference to his *capacity to rationally decide the specific decision posed*. Second,
22 the Court must employ a heightened standard for evaluating competence if the potential
23 consequences of the decision are grave." (Dkt. 365 at 6.) They argue the standard for
24 evaluating Mr. Comer's competence to waive his appeal "should be uniquely high" because
25 it is essentially an election to die. (*Id.*, citing Miller v. Stewart, 231 F.3d 1248, 1250 (9th
26 Cir. 2000)). For this reason, habeas counsel argues that at a minimum the Court should
27 employ the standard used to evaluate the voluntariness of the waiver of a constitutional
28 right, such that it must be determined whether Petitioner has "that degree of competence
required to make decisions of very serious import" so that he is not competent to waive
appeal "if mental illness has substantially impaired his . . . ability to make a reasoned choice
among the alternatives presented and to understand the nature and consequences of waiver."
(Dkt. 365 at 7, quoting Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981)).

1 Comer has competently and voluntarily made his dire choice, though the Court will never be
2 comfortable with it.²³

3 I. Guidance for Determining Competency and Voluntariness Set Forth in the Ninth Circuit
4 Opinion

5 The Ninth Circuit remanded this case for an evidentiary hearing, and the majority
6 expressed its “grave concerns that a mentally disabled man may be seeking this court’s
7 assistance in ending his life,” mandating “an evidentiary hearing to determine if [Mr. Comer]
8 can validly withdraw his consent to proceed with this appeal.” Comer v. Stewart, 215 F.3d
9 910, 916 (2000). The Ninth Circuit directed this Court, after considering medical and
10 psychiatric evaluations offered by the parties, to:

11 determine “whether [Petitioner] has capacity to appreciate his position and make a
12 rational choice with respect to continuing or abandoning further litigation or on the
13 other hand whether he is suffering from a mental disease, disorder, or defect which
14 may substantially affect his capacity in the premises.” Rees, 384 U.S. at 314, 86
15 S.Ct. 1505.

16 Id. The Ninth Circuit also expressed concern regarding the voluntariness of Mr. Comer’s
17 decision noting that, “we and other courts have recognized that prison conditions remarkably
18 similar to Mr. Comer’s descriptions of his current confinement can adversely affect a
19 person’s mental health.” Id. at 915-16.

20 ²³ The Court read a number of articles that provide a rich lode of interpretive
21 material on the issues before the Court. See Ross E. Eisenberg, *The Lawyer’s Role When*
22 *the Defendant Seeks Death*, 14 CAP. DEFENSE J. 55 (Fall 2001); C. Lee Harrington, *A*
23 *Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25
24 LAW & SOC. INQUIRY 849 (Summer 2000); Mathew T. Norman, *Standards and*
25 *Procedures for Determining Whether a Defendant is Competent to Make the Ultimate*
26 *Choice-Death; Ohio’s New Precedent for Death Row Volunteers*, 13 J. LAW & HEALTH
27 103 (1998-99); Julie Levinsohn Milner, *Dignity of Death Row: Are Death Row Rights to*
28 *Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the*
Terminally Sentenced, 24 N.E. J. CRIM. & CIV. CONFINEMENT 279 (Winter 1998); Christy
Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897 (July 1998); Sally Mann
Romano, *If the SHU Fits: Cruel and Unusual Punishment at California’s Pelican Bay*
State Prison, 45 EMORY L.J. 1089 (Summer 1996); Jane L. McClellan, Comment,
Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer
Cases, 26 AZ.ST. L.J. 201 (Spring 1994).

1 II. History and Present Conditions of Confinement of Mr. Comer

2 Although the Ninth Circuit expressly disavowed any intention that this Court assess
3 whether the conditions of confinement on Arizona’s death row, *i.e.*, in SMU II, violate the
4 Eighth Amendment, it directed this Court to assess whether Mr. Comer’s conditions of
5 confinement have rendered his decision to waive further review involuntary. In addition, the
6 conditions of his confinement in the California Department of Corrections (“CDC”) figure
7 in the experts’ evaluations regarding whether Mr. Comer suffers from a mental disorder.
8 Therefore, an overview of those conditions is included below.

9 A. Conditions in Soledad, DVI and Folsom Security Housing Units

10 Between 1979 and 1984, Mr. Comer was incarcerated at the Corrections Training
11 Facility at Soledad (“Soledad”), Deuel Vocational Institute at Tracy (“DVI”), and Folsom
12 Prison. Mr. Comer was incarcerated at Soledad between April and October, 1979. On
13 October 19, 1979, Mr. Comer escaped from Soledad. (See ER 25, Habeas Ex. Vol. 1, Dkt.
14 383.) In May 1980, Mr. Comer was apprehended in Dallas, Texas, returned to CDC custody,
15 and assigned to Unit IV at Soledad, a Segregated Housing Unit (“SHU”), where he remained
16 for approximately eight months until February 1981, when he was transferred to general
17 population at Folsom as a Level IV inmate. (See id.) Mr. Comer remained in general
18 population at Folsom until September 8, 1982, when he was slashed in the neck by another
19 inmate and seriously injured. (See id.) Following emergency treatment outside the prison,
20 Mr. Comer was reassigned to a Folsom SHU²⁴ based on the attack and remained there for
21 approximately six months. (See id.) In February 1983, Mr. Comer was transferred from
22 Folsom to a DVI SHU. (See id.) In August 1984, Mr. Comer was paroled. In total, Mr.
23 Comer was confined to Soledad SHUs for approximately eight months from June 1980 until
24 February 1981, to Folsom SHUs for approximately six months from September 1982 until

25
26 ²⁴ It appears Mr. Comer was held in Folsom’s SHU II, which is described
27 further below, but it is unclear whether that is the only Folsom SHU in which he was
28 confined.

1 February 1983, and to DVI SHUs for as long as seventeen months.²⁵

2 Prior to and continuing through the period of Mr. Comer's confinement in Soledad,
3 Folsom and DVI SHUs, a class action²⁶ was litigated regarding the conditions of
4 confinement in those SHUs.²⁷ See Toussaint v. Rushen, 462 F.2d 1129, 1135 (9th Cir.
5 1981); Toussaint, 553 F. Supp. at 1368 n.1; see also McCord, *Imagining a Retributivist*
6 *Alternative*, 50 FLA. L. REV. at 99; Romano, *If the SHU Fits*, 47 EMORY L. J. at 1097-1106;
7 Miller, *International Protection of the Rights of Prisoners*, 26 CAL. W. INT'L L.J. at 156-
8 60. On November 3, 1980, the district court issued a preliminary injunction requiring the
9 CDC to implement steps to ameliorate the conditions in the SHUs at the four institutions
10 and to establish procedures with respect to the assignment of inmates to those units. See

11
12 ²⁵ It is unclear from the CDC records submitted to the Court the length of Mr.
13 Comer's confinement to DVI's SHU, but both Mr. Comer and Dr. Terry Kupers testified
14 that Mr. Comer was assigned for some period of time to DVI SHUs, including K-Wing.
15 (R.T. 3/26/02 at 35; R.T. 3/27/02 at 344-45.) See Toussaint v. Rushen, 553 F. Supp. 1365,
16 1368 n.1 (N.D. Cal. 1983), aff'd in part and rev'd in part sub nom., Toussaint v. Yockey,
17 722 F.2d 1490, 1491 (9th Cir. 1984).

18 ²⁶ The class, certified February 25, 1976, consisted of three sub-classes: (1) all
19 prisoners confined and/or subject to being confined in maximum security units at the four
20 institutions as a result of disciplinary procedures; (2) all prisoners so confined who
21 knowingly and voluntarily requested confinement in such units; and (3) all prisoners
22 confined in such units or subject to being so confined who were not included in sub-class
23 (1) or (2), including those confined for "administrative" reasons. See Toussaint v. Rushen,
24 462 F. Supp. 397, 398 (N.D. Cal. 1976), aff'd 434 U.S. 1052 (1978). In a later decision,
25 the district court noted that class members could be defined "principally by reference to
26 the percentage of each day that they [were] required to spend in their cells" and "not
27 permitted to mingle with general population inmates" and who were only allowed out of
28 their cells for showers, exercise, visits, medical treatment and classification hearings. See
Toussaint v. McCarthy, 597 F.Supp. 1388, 1393 (N.D. Cal. 1984), aff'd in part and rev'd in
part, 801 F.2d 1080 (9th Cir. 1986).

²⁷ The class action also challenged the conditions of confinement in San
Quentin SHUs. In addition to challenging the conditions in these SHUs, the class action
challenged the absence of consistently applied procedures with respect to the assignment
and retention of inmates in SHUs.

1 Appendix to Toussaint v. Rushen, 462 F.2d 1129 (9th Cir. 1981). However, on March 13,
2 1981, the Ninth Circuit vacated the injunction and remanded for application of the
3 appropriate standard. See Toussaint, 642 F.2d at 1135.

4 The class renewed its motion for a preliminary injunction, and, on January 14, 1983, the
5 district court issued a new preliminary injunction concerning the conditions of confinement
6 in the SHUs at Soledad, DVI and San Quentin.²⁸ See Toussaint v. Rushen, 553 F.Supp. 1365,
7 1368 n.1, 1385 (N.D. Cal. 1983). The district court made detailed findings regarding the
8 conditions at those institutions.

9 With respect to SHUs at Soledad and DVI, in which Mr. Comer was confined between
10 May 1980 and February 1981 (Soledad) and between February 1983 and August 1984 (DVI),
11 respectively, the court found that approximately one-fifth of Soledad's total inmate
12 population was housed in its SHUs and that approximately one-third of DVI's total inmate
13 population was housed in DVI's SHUs. The court determined that such placement was
14 arbitrary, lengthy, indefinite, and without the benefit of procedural protections. Toussaint,
15 553 F. Supp. at 1370. The court also found that the capriciousness with which inmates were
16 assigned to the SHUs intensified the "debilitating effects" on them of the conditions in
17 those units. Id.

18 The physical conditions of the cells in the units were described as follows: The cells
19 measured five or six feet wide and eight to nine feet long, furnished with a bed "of some
20 sort" and thin mattress, a pillow and blanket, a coverless toilet and a sink. Id. at 1371. Many
21 cells were windowless and were primarily lighted only by a single bulb of "inadequate
22 wattage." Id. The court found inmates were, at best, irregularly provided changes of
23 clothing, bedding and linens, and at worst, weeks or even months could elapse before an

25 ²⁸ The plaintiffs elected not to present evidence concerning Folsom. See id. at
26 1368 n.1. The Soledad units addressed in the order were the Security Housing Unit,
27 Management Control Unit, Protective Housing Unit No. 1 and Protective Housing Unit No.
28 2. See id.

1 inmate was provided with clean clothing, bedding and linens. See id. The court found the
2 cells in the units lacked adequate heating and ventilation, causing them to be hot and stuffy in
3 the summer and cold in the winter, and that the antiquated and inadequate plumbing
4 frequently resulted in leaking toilets, wet floors, water shut-downs and an inability to flush
5 toilets.²⁹ See id. at 1371, 1372. The court also found rodents, insects, dirt and excrement
6 present in the cells in the units, and that inmates were not provided with the means to clean
7 their cells. See id.

8 The court found that inmates spent as many as twenty-three and one-half hours a day in
9 their cells and, to their detriment, most did not receive daily exercise. See id. at 1372-73.
10 It also found many inmates were denied contact visits with family or friends, and that
11 delivery and mailing of inmate correspondence was often obstructed by corrections staff.
12 See id. at 1374. The court further found the lack of vocational, educational and recreational
13 activities exacerbated boredom, tension and idleness. See id. at 1373. It found that SHU
14 inmates experienced difficulty in obtaining reasonably prompt access to necessary medical,
15 dental and psychiatric treatment. See id. at 1374. In addition to all of these conditions, the
16 court found that despite the tiny size of the cells, there was substantial involuntary double-
17 celling in the units. Id. at 1371. It found that double-celling, in conjunction with the other
18 conditions in the units, engendered “violence, tension, and psychiatric problems.” Id. at
19 1372. It also found that the arbitrariness with which inmates were consigned to the units,
20 together with the lengths and conditions of such confinements, and the absence of
21 procedural safeguards, seriously debilitated the physical and psychological well-being of
22 inmates. See id. at 1374-76. The court concluded that double-celling of inmates and the
23 failure to provide adequate sanitation, lighting, heating, ventilation, plumbing, exercise,
24 visitation, medical care, and procedural safeguards, among other deficiencies, in the units
25 was inconsistent with notions of human decency and posed serious questions regarding the

26 ²⁹ The court noted that defendants admitted there were leaking toilets and that
27 they considered making the inmates use covered chamber pots. See id.
28

1 CDC's compliance with the federal and state constitutions. See id. at 1379-81. It enjoined
2 the CDC to correct many of the deficiencies.³⁰

3 On October 18, 1984, the court issued findings of fact and conclusions of law regarding
4 the conditions in the SHUs at Folsom and San Quentin,³¹ and entered a permanent injunction
5 with respect to those units.³² See Toussaint v. McCarthy, 597 F. Supp. 1388 (N.D. Cal.
6 1984), aff'd in part, rev'd in part and vacated and remanded in part, 801 F.2d 1080 (9th Cir.
7 1986).³³ As noted above, Mr. Comer was confined in Folsom's SHUs between September
8

9 ³⁰ The court noted that substantial evidence had been presented regarding
10 conditions that might constitute cruel and unusual punishment, including (1) the inadequate
11 size and furnishing of cells; (2) the denial of family visitation; (3) the constant din of noise;
12 (4) unpreparedness in case of fire; (5) the level of guard brutality against inmates; (6) the
13 absence of educational and vocational opportunities; (7) the lack of religious services for
14 all inmates; and (8) excessive security. See id. at 1383. However, the court declined to
15 grant preliminary injunctive relief with respect to those conditions because "*inter alia*, of
16 the capital expenditures needed to correct them," but without prejudice to plaintiffs seeking
17 relief at trial. See id.

18 ³¹ The court noted that CDC policies called for housing only Level IV inmates
19 at Folsom and San Quentin. It described those inmates as requiring the highest level of
20 security in custody based on precommitment history, commitment offense, term of
21 imprisonment, and other factors. See id. at 1394. Inmates were assigned to those prisons'
22 segregated units as punishment for disciplinary infractions, management control, their own
23 protection, or pending a determination regarding permanent assignment to segregated
24 status. See id. at 1393-94. It described the inmates assigned to Folsom and San Quentin
25 SHUs, including many of the plaintiffs, as among the "most antisocial and violent of the
26 inmates" at Folsom, and at San Quentin those who posed "formidable behavior problems for
27 correctional staff." Id. at 1394.

28 ³² The district court explained that it bifurcated trial with respect to Folsom and
San Quentin from DVI and Soledad based on representations by CDC officials that
administrative segregation would be discontinued at DVI and Soledad. See id. at 1391. By
the time the permanent injunction was entered Mr. Comer had already been paroled.

³³ The Ninth Circuit found certain provisions of the permanent injunction
overbroad. Inasmuch as Mr. Comer was released from CDC custody in August 1984, this
Court only discusses the district court order and appellate opinion to the extent that the
conditions of confinement in Folsom SHUs are described.

1 1982 and February 1983.

2 With respect to conditions in Folsom’s SHUs, the court found that Folsom was one of
3 the oldest penal institutions still in use in the United States and that the majority of inmates
4 confined to its SHUs were confined in its SHU II.³⁴ See id. at 1393 n.4. It found little
5 natural light present in the units and the artificial lighting so dim as to make reading and
6 writing difficult, if not impossible. See id. at 1393, 1394, 1397. It found the noise levels,
7 particularly in SHU II, substantially exceeded standards set for prisons, and filled the units
8 day and night with “unrelenting, nerve-racking din,” including blaring televisions, radios,
9 inmates shouting to one another and clanging cell doors.³⁵ See id. at 1397, n.15. It found
10 this “unceasing racket exert[ed] a profound impact on lockup inmates, some of whom
11 consider[ed] it the single worst aspect of their confinement” and contributed to difficulty
12 sleeping and adversely affected their mental health. Id. at 1398.

13 The court described the average cell size in SHU II as 49.5 square feet and 45.5 square
14 feet in SHU I, with each cell furnished with one or two bunks, a coverless toilet, a sink, a
15 shelf and a small mirror. See id. at 1394. Despite the small size of the cells, inmates were
16 frequently double-celled and despite the double-celling, SHU inmates were nearly
17 perpetually confined, except for sporadic exercise, showers, visitation, and hearings or
18 medical treatment. See id. at 1393, 1401-1402. The court found it not uncommon for an
19 inmate to remain in his cell for five or more consecutive days at a time. See id. at 1395. It
20 further found that the prolonged idleness of SHU inmates adversely affected their mental
21 health, see id. at 1403, and that the extensive double-celling “in the midst of the other
22 abhorrent conditions . . . engender[ed] tension and psychiatric problems” as well as
23 “violence, particularly violence between cellmates.” Id.

24
25 ³⁴ Records submitted by habeas counsel reflect that Mr. Comer was held in
26 Folsom’s SHU II for some period of time.

27 ³⁵ Cells in SHU I at Folsom, which were separated by floors with cell fronts
28 facing enclosed corridors, were somewhat less noisy. See id.

1 Among the “other abhorrent conditions” found by the court was inadequate heating and
2 ventilation in SHU II and the entry of moisture through leaky roofs and overflowing sinks,
3 toilets and showers. Id. at 1396. It found that a “putrid odor” lingered in the units because
4 of poor ventilation. See id. It found “the plumbing and sewage disposal systems antiquated,
5 deteriorated, and in need of replacement” and leaking toilets and sinks prevalent, which
6 increased the damp and cold of the units. Id. It found the pipe chases behind the back walls
7 of the cells exhibited numerous pipe leaks and sewage mains and steam water lines with
8 accumulations of rotting garbage and human waste that fostered infestations of vermin and
9 posed a “substantial hazard” to the health of the inmates. Id. at 1396-97. Despite these
10 conditions, the court found that inmates were not provided with clean clothing and bedding
11 on a regular basis or supplies to clean their cells. See id. at 1399. It also found inmates
12 were not afforded regular access to showers and that the shower facilities were “revolting”
13 due to accumulated filth, clogged drains and standing water. Id. It described the sanitation in
14 the units as generally deplorable in part because inmates were instructed to throw trash onto
15 walkways, which were infrequently cleaned, and debris clogged the gutters. See id. at 1400.

16 The court also found SHU II infested with cockroaches, mice and rats. See id. It found
17 the Folsom kitchen facility exhibited: (1) active infestations of rats, roaches and flies; (2)
18 pools of standing water; (3) poor ventilation resulting in heavy deposits of grease and grime
19 on exposed surfaces that could contaminate food; (4) exposed electrical wires; (5)
20 unsanitary food preparation surfaces; (6) dried food residue on food preparation equipment;
21 and (7) greasy, slippery floors. See id. at 1401. It noted that “[f]ood [served to SHU
22 inmates] often arrive[d] contaminated with foreign objects such as roaches, hair, and
23 incredibly, bits of plastic from shoes” and food preparers were sometimes directed to use
24 spoiled cheese or meat in sandwiches which made inmates ill. Id. Finally, the court
25 described a small number of cells in Folsom’s SHUs that had solid outside doors and no
26 window or only a small window, which the guards, who controlled the lighting, could make
27 completely dark for long periods of time (“quiet cells”). Id. at 1395.

1 It is undisputed that Mr. Comer endured most, if not all and possibly worse, of these
2 deplorable conditions while he was confined in SHUs at Soledad, DVI and Folsom.³⁶
3 Furthermore, Dr. Terry Kupers, habeas counsel's expert, was an expert witness for the
4 plaintiffs in Toussaint and visited Folsom's and DVI's SHUs, and in fact, toured Folsom
5 SHUs while Mr. Comer was confined there. (R.T. 3/27/02 at 342-43.) During his
6 testimony in this case, Dr. Kupers synoptically corroborated the findings of the district
7 court in Toussaint and elaborated on certain features of Folsom's SHUs. Dr. Kupers
8 testified that Folsom SHUs contained "Intensive Custody Units" in which SHU inmates were
9 confined as additional punishment and which lacked any facilities or furnishings and which
10 were usually filthy with only a hole in the floor for a toilet, the flushing of which was
11 controlled by the guards. (R.T. 3/26/02 at 45-46, 56.) Dr. Kupers testified that inmates
12 placed in ICUs were almost completely isolated from others, including guards. (R.T.
13 3/26/02 at 46.) Based upon his review of the available CDC records and his interviews with
14 Mr. Comer, Dr. Kupers concluded that Mr. Comer spent four or five months in a Folsom
15 ICU. (R.T. 3/26/02 at 46.)

16 B. Mr. Comer's Conditions of Confinement While Incarcerated in Arizona

17 Following his arrest in February 1987, and while awaiting and during trial, Mr. Comer
18 was in the custody of the Maricopa County Jail. During that period, Mr. Comer was housed
19 in a single cell twenty-four hours a day. (R.T. 3/26/02 at 50-51.) Mr. Comer reported one
20 incident in which he asked a jail officer to loosen handcuffs that were tight, but the officer
21 further tightened the handcuffs and raised Mr. Comer's arms behind his back. (R.T. 3/26/02

22
23 ³⁶ Declarations of plaintiffs' experts in Toussaint have been submitted as
24 exhibits by habeas counsel to substantiate the conditions of confinement Mr. Comer
25 experienced in Folsom and Soledad SHUs. (See Dkt. 383, ER 24, Declarations of Arnold
26 Pontesso in Support of Plaintiffs' Motion for Preliminary Injunction Following Remand
27 dated 5/81 and to Modify Preliminary Injunction signed 4/18/83; Declaration of Craig
28 Haney in Support of Motion for Preliminary Injunction Following Remand signed 5/1/81;
Declaration of Terry A. Kupers, M.D., in Response to Defendants' Opposition to Motion
for Preliminary Injunction signed July 23, 1980.)

1 at 51.) Mr. Comer barricaded himself in his cell, armed with a shank, when officers
2 attempted to take him to court for sentencing. (R.T. 3/26/02 at 51-52.) He was forcibly
3 removed and transported to court where he appeared in a wheelchair, naked except for a
4 towel over his midriff. (Id.) A doctor for the County examined Mr. Comer and found him
5 competent to be sentenced.

6 Following his sentencing in April 1988, Mr. Comer was transported to Arizona's death
7 row then located in Cell Block 6 ("CB6"), of the Arizona State Prison in Florence, Arizona.
8 (See R.T. 3/26/02 at 53-54.) It was there that Mr. Comer met and became friends with
9 another death row inmate, Robert ("Bonsai" or "Banzai") Wayne Vickers.³⁷ (R.T. 3/27/02 at
10 352.) A few months later, Mr. Comer and Mr. Vickers were placed in SMU I, because of
11 their disciplinary infractions in CB6, including making weapons and assaulting other inmates
12 and staff. (R.T. 3/26/02 at 54; R.T. 3/27/02 at 353, 679-80.) Mr. Comer has reported that
13 on one occasion while housed in SMU I, he was subjected to inverted four-point restraints,
14 *i.e.*, he was placed in four-point restraints (shackled hands and feet) to a stiff board and then
15 inverted with his feet above his head at about a 45° angle facing downward for several hours.
16 (R.T. 3/26/02 at 55-56; R.T. 3/28/02 at 771, 838, 843-44.)

17 In 1996, Mr. Comer and Mr. Vickers were moved to SMU II. (Id.) In 1997, most of
18 Arizona's other death row inmates were moved from CB6 to SMU II. (R.T. 3/26/02 at 54.)
19 Mr. Comer remains confined to SMU II. He remained close friends with Mr. Vickers until
20 Mr. Vickers's execution on May 5, 1999.

21 ³⁷ Robert Vickers was first sentenced to death for the murder of a former
22 cellmate, who failed to wake Vickers for a meal and drank Vickers's Kool-Aid, on whose
23 back Vickers spelled "Bonsai" in puncture wounds. Then in 1982, Vickers threw a burning
24 container of flammable hair tonic into the cell of, and on, another death row inmate in
25 retaliation for a crude remark made by that inmate about Vickers's niece. The inmate died
26 and Vickers was convicted and sentenced to a second death sentence for the latter murder.
27 During his tenure on death row, Vickers was notorious for his ability to manufacture
28 weapons, particularly shanks and darts, out of anything available to him, and for his use of
such weapons against inmates and staff. Although Mr. Comer and Vickers were friends, the
record does not reflect that Mr. Comer's loyalty to Vickers was consistently reciprocated.

1 For purposes of this action, the physical layout of SMU I and SMU II do not materially
2 differ. (See R.T. 3/26/02 at 58.) SMU I is a few years older than SMU II. (Id.) Both units
3 consist of two levels of cells which extend like spokes from an elevated central control
4 booth. (Id.) At the end of each spoke, or pod, is an outdoor recreation area measuring
5 twelve feet by twenty feet with high concrete walls and floors and cyclone fencing over the
6 top. (Id. at 59.) At times relevant to this matter, Mr. Comer has been held in a single cell
7 measuring seven feet by eleven feet. (Id. at 59.) His cell door is covered with a translucent
8 material called Lexan, which prevents materials from being thrown out of, or into, his cell.³⁸
9 His cells in SMU I and II have been equipped with a bunk, toilet, sink, desk and stool
10 constructed of metal secured to the concrete walls and floors of the cell. (Id.) As noted
11 above, Mr. Comer's cell was modified during the summer of 2001 to remove the desk and
12 stool and to reinforce the bunk to make it more difficult for Mr. Comer to fashion weapons.
13 (Id.) Mr. Comer receives between an hour and an hour and a half of individual recreation
14 three times a week. (R.T. 3/27/02 at 516, 540.) He also has the opportunity to shower three
15 times a week. (R.T. 3/26/02 at 64; R.T. 3/27/02 at 455, 516.) In addition, Mr. Comer has
16 access to cleaning materials. Pursuant to ADOC policy, he and other death row inmates are
17 not permitted "contact" visits absent court order, but he is permitted non-contact visits.

18 III. Competency

19 In remanding this case, the Ninth Circuit found the circumstances warranting remand
20 for an evidentiary hearing "virtually indistinguishable" from those in Rees v. Peyton, 384
21 U.S. 312 (1966)(*per curiam*). See Comer v. Stewart, 215 F.3d 910, 915-16 (2000). In
22 Rees, a condemned Virginia inmate filed, through counsel, a certiorari petition after his
23 federal habeas corpus petition was denied by the district court and the denial affirmed by the
24 Fourth Circuit. See Rees, 384 U.S. at 313. Shortly thereafter, the inmate directed counsel
25 to withdraw the certiorari petition and forego further legal proceedings. Id. Counsel

27 ³⁸ Other inmates in his pod also have Lexan on their doors for the same reason.

1 advised the Supreme Court that he could not accede to his client's instructions without a
2 psychiatric evaluation of his client because evidence cast doubt on his client's mental
3 competency. Id. The inmate was evaluated by a psychiatrist retained by his counsel, who
4 found Rees mentally incompetent. Id. Rees was then evaluated by psychiatrists retained by
5 the State of Virginia who expressed doubts that he was insane. Id. The Supreme Court
6 remanded to the district court to determine, "in aid of the proper exercise of [the Supreme
7 Court's] certiorari jurisdiction," and "upon due notice to the State and all other interested
8 parties," Rees' mental competence and report back to the Court. Id. at 313-14.

9 Specifically, the district court was directed to:

10 determine Rees' mental competence in the present posture of things, that is,
11 whether he has the capacity to appreciate his position and make a rational choice
12 with respect to continuing or abandoning further litigation or on the other hand
13 whether he is suffering from a mental disease, disorder, or defect which may
14 substantially affect his capacity in the premises.

15 Id. at 314.³⁹

16 In Godinez v. Moran, 509 U.S. 389, 396 (1993), the Supreme Court observed that
17 though it had used the phrase "rational choice" in Rees to describe the competence
18 necessary to withdraw a certiorari petition, it had not indicated that phrase meant "something
19 different from 'rational understanding'" as used in Dusky v. Missouri, 362 U.S. 402 (1960).
20 Godinez, 509 U.S. at 398 n.9.

21 Since Rees was decided, courts have repeatedly applied its direction to evaluate a
22 capital inmate's competency to waive review, but found that condemned inmates who are
23 mentally competent may nevertheless rationally decide to waive legal review of their

24 ³⁹ The Supreme Court carried the case on its docket following remand to the
25 district court, see Rees v. Peyton, 386 U.S. 989 (1967), and only denied the certiorari
26 petition following Rees's death by natural causes in 1995. See Rees v. Superintendent of
27 Virginia State Penitentiary, 516 U.S. 802 (1995); see also Smith v. Armontrout, 812 F.2d
28 1050, 1056 n. 7 (1987); Rumbaugh v. Procnier, 753 F.2d 395, 398 n.1 (5th Cir. 1985).
Rees was held at the Federal Medical Center in Springfield, Missouri, following remand,
until his death. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly*
Changing Facts and the Appellate Process, 78 TEX. L.R. 269, 330 n. 217 (1999).

1 sentences. See Gilmore v. Utah, 429 U.S. 1012 (1976); Whitmore v. Arkansas, 495 U.S.
2 149, 165 (1990)(“next friend” standing is not available if “an evidentiary hearing shows that
3 the defendant has given a knowing, intelligent and voluntary waiver of his right to proceed,
4 and his access to court is otherwise unimpeded”); see also Brewer v. Lewis, 989 F.2d 1021,
5 1027 (9th Cir. 1993); Lenhard v. Wolff, 603 F.2d 91, 93 (9th Cir. 1979). In Smith v.
6 Armontrout, 812 F.2d 1050, 1056 (8th Cir. 1987), the Eighth Circuit rejected the
7 contention that Rees barred waiver of post-conviction review in capital cases based on the
8 mere possibility that the inmate’s decision was the product of a mental disease, disorder or
9 defect, citing Rumbaugh v. Proconier, 753 F.2d 395, 398-99 (5th Cir. 1985), and Hays v.
10 Murphy, 663 F.2d 1004 (10th Cir. 1981). The court determined that a literal interpretation
11 of the portion of the Rees standard asking whether an inmate suffered from “‘a mental
12 disease, disorder, or defect which may substantially affect his capacity,’ would conflict with
13 a similarly literal interpretation of the other half of the test, which asks whether the prisoner
14 has, rather than absolutely, certainly, or undoubtedly has, the capacity to appreciate his
15 position and make a rational choice.” Smith, 812 F.2d at 1057. The court noted that:

16 Though Rees recites these two portions of the standard as disjunctive alternatives,
17 there is necessarily an area of overlap between the category of cases in which at the
18 threshold we see a possibility that a decision is substantially affected by a mental
19 disorder, disease, or defect, and that of cases in which, after proceeding further, we
20 conclude that the decision is in fact the product of a rational thought process.

21 Furthermore, we think it very probable, given the circumstances that perforce
22 accompany a sentence of death, that in every case where a death-row inmate elects
23 to abandon further legal proceedings, there will be a possibility that the decision is
24 the product of a mental disease, disorder, or defect. Yet, Rees clearly
25 contemplates that competent waivers are possible, see also Gilmore v. Utah, 429
26 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976), and there is little point in
27 conducting a competency inquiry if a finding of incompetency is virtually a
28 foregone conclusion.

812 F.2d at 1057.

The Smith court also rejected the petitioners’ contention that “the [d]istrict [c]ourt
erred by construing Rees’s requirement that Smith have the capacity to appreciate his
position and to make a rational choice to require only that he be cognizant of his factual
circumstances, and that his choice be logical, the product of reason” without determining

1 whether Smith was reasoning from premises or values that were “within the pale of those
2 which our society accepts as rational ‘because’ [I]logic employed in the service of irrational
3 premises does not produce a rational decision.” Id. The Eighth Circuit noted that the
4 district court “examined the rationality of the values and beliefs underlying Smith’s
5 decision, including his aversion [to] confinement, and his conclusion that . . . he [would] be
6 unable to avoid a life sentence” and affirmed the district court’s conclusion that Smith’s
7 decision to forego further legal review was competent. Id. at 1058, 1059.

8 Similarly, in Franklin v. Francis, the court rejected a construction of the Rees standard
9 that first required an inquiry into the capacity of the inmate to make the waiver decision, and
10 then, if the inmate was found to have the capacity, to require an inquiry whether the inmate
11 was “suffering from a mental disease, disorder, or defect which may substantially affect that
12 capacity.” 144 F.3d 429, 433 (6th Cir. 1998)(quoting Rees, 384 U.S. at 313). The Sixth
13 Circuit concluded that Rees was stated in the alternative rather than the conjunctive: “[e]ither
14 the condemned has the ability to make a rational choice with respect to proceeding *or* he
15 does not have the capacity to waive his rights as a result of his mental disorder.” Id. (citing
16 Demothenes v. Baal, 495 U.S. 731, 734 (1990); Whitmore, 495 U.S. at 165). The Sixth
17 Circuit found the “best explanation of the Rees test” in Smith v. Armontrout, 812 F.2d 1050
18 (8th Cir. 1987), and held that because competency hearings are contemplated
19 “incompetency is [not] a foregone conclusion.” 144 F.3d at 433 (quoting Smith, 812 F.2d at
20 1057); see also Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992); Rumbaugh v. Proconier,
21 753 F.2d 395 (5th Cir. 1985).

22 Further, with respect to application of the Rees standard, many courts have simplified
23 the inquiry by requiring a three-part analysis:

- 24 (1) Is the person suffering from a mental disease or defect?
- 25 (2) If the person is suffering from a mental disease or defect, does that
26 disease or defect prevent him from understanding his legal position and the
27 options available to him?
- 28 (3) If the person is suffering from a mental disease or defect which does
not prevent him from understanding his legal position and the options available
to him, does that disease or defect, nevertheless, prevent him from making a

1 rational choice among his options?

2 If the answer to the first question is no, the court need go no further,
3 the person is competent. If both the first and second questions are answered
4 in the affirmative, the person is incompetent and the third question need not
be addressed. If the first question is answered yes and the second is answered
no, the third question is determinative; if yes, the person is incompetent, if no,
the person is competent.

5 Rumbaugh v. Proconier, 753 F.2d 395, 398-99 (5th Cir. 1985)(footnote omitted); accord

6 Lonchar, 978 F.2d at 641-42; Ford v. Haley, 195 F.3d 603, 615 (11th Cir. 1999).

7 Likewise, in Mason v. Vasquez, 1993 WL 204625, *3 (N.D. Cal. 1993), the district
8 court utilized Rumbaugh's three part inquiry in determining whether a condemned inmate
9 was competent to waive further legal review. Although not specifically addressing the
10 district court's application of Rumbaugh's three-part inquiry, the Ninth Circuit affirmed the
11 district court's analysis, finding the inmate competent and concluding that the third-party
12 petitioner lacked next friend standing.⁴⁰ See Mason v. Vasquez, 5 F.3d 1220, 1224 (9th Cir.
13 1993), aff'd vacatur of stay, 1 F.3d 964 (9th Cir. 1993)(en banc), recalling en banc mandate
14 and remanding, 5 F.3d 1226 (9th Cir. 1993)(en banc). Significantly, the Ninth Circuit also
15 established that the district court's findings of fact are governed by the clearly erroneous
16 standard, and decisions regarding credibility are entitled to great deference. See Mason, 5
17 F.3d at 1224.

18 This Court concludes that the three-part inquiry set forth in Rumbaugh as applied in
19 Mason provides an appropriate framework for assessing Mr. Comer's competency to waive

21 ⁴⁰ The majority of the Ninth Circuit endorsed the district court's application of
22 the following standard to determine competency:

23 [W]hether [the petitioner] has the capacity to appreciate his position and
24 make a rational choice with respect to continuing or abandoning further
25 litigation or on the other hand whether he is suffering from a mental disease,
26 disorder, or defect which may substantially affect his capacity in the
premises.

27 Mason v. Vasquez, 5 F.3d at 1224 (citing Rees, 384 U.S. at 314).

1 further legal review of his conviction and sentence.

2 With respect to the allocation of the burden of proof, the Ninth Circuit has held that:

3 Initially sufficient evidence must be presented to cause the court to conduct
4 an inquiry. After that point, it is no one's burden to sustain, rather it is for the
5 court to determine by a preponderance of the evidence whether the petitioner
6 is mentally competent to withdraw his petition.

7 Mason, 5 F.3d at 1225.⁴¹

8 Finally, the Ninth Circuit in this case determined before remanding it to this Court,
9 that a presumption of competency does not apply to Mr. Comer. In accordance with Mason,
10 this Court concludes that no party bears the burden of proof.⁴² Instead, the question is
11 whether, giving full and fair consideration to all of the evidence, does it establish by a

12 ⁴¹ Although the district court expressly determined that the third-party
13 petitioner bore the burden of proving incompetence and implicitly found that the petitioner
14 had failed to meet his burden, the three-judge panel affirmed the district court's finding that
15 the petitioner was competent, see id., 5 F.3d 1220 (1993), and a majority of the Ninth
16 Circuit special death penalty en banc court affirmed. See id., 1 F.3d 964 (9th Cir. 1993)
17 (en banc). The petitioner was executed shortly thereafter. Approximately a month later,
18 the en banc court recalled its mandate and remanded the cause to the panel. See id. at 1226.
19 Judges Pregerson and Noonan dissented contending that the case should have been
20 remanded to the district court to properly allocate the burden of proof enunciated by the
21 panel. The two dissenting judges maintained that, "[b]y concluding that no one had the
22 burden of proving David Mason's competency, the three-judge panel necessarily
23 determined that the district court erred in stating that the burden of proof was on Attorney
24 Marson This being the case, the three-judge panel should have remanded this matter to
25 the district court to determine David Mason's competency by applying the burden of proof
26 enunciated by the three-judge panel--viz. whether Mason, by a preponderance of the
27 evidence, was mentally competent to withdraw his petition and to waive his appeals." Id. at
28 1228. Judge Pregerson argued that by improperly allocating the burden of proof to
determine Mason's competency, the district court had placed more weight on the
deficiencies in Marson's proof establishing incompetency than on the government's proof
establishing competency which required a remand to the district court. See id.

⁴² The issue regarding who had the burden of proof and of going forward was not
definitively determined prior to the hearing. (R.T. 3/28/02 at 928-30.) The Court gave
equal and fair consideration to all the evidence presented by all the parties, who appeared
throughout the proceedings to assume the burden and aggressively acquire and present the
evidence in support of their respective positions.

1 preponderance that Mr. Comer is competent to dismiss his habeas counsel and waive further
2 legal review of his convictions and sentences. Adhering to this standard, the Court finds
3 after a thorough review of all the evidence presented that Mr. Comer is competent to
4 dismiss his habeas counsel and waive further review of his convictions and sentences.

5 A. Mental Disease or Defect

6 Pursuant to Rumbaugh, 753 F.3d at 398-99, the first inquiry is whether Mr. Comer is
7 suffering from a mental disease or defect. Habeas counsel maintains that Mr. Comer
8 suffers from depression, PTSD, and SHU syndrome. Mr. Comer, special counsel and
9 Respondents disagree. The Court finds that Mr. Comer is not suffering from any mental
10 disease or defect, or SHU syndrome. This determination is based primarily on the
11 evaluations, reports, and testimony of the psychiatrists, Dr. Johnson and Dr. Kupers, the
12 report of the psychologist Dr. Landis, and the testimony, writings, and background of Mr.
13 Comer, but is also based on other witness testimony and all the exhibits admitted.

14 Rule 702 of the Federal Rules of Evidence, which codified the principles of Daubert
15 v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), sets forth the requirements for the
16 admissibility of expert testimony. No party specifically objected to the admissibility of the
17 testimony of either psychiatrist based upon Rule 702. Thus, the Court admitted and
18 considered all of the psychiatric testimony, but the Court finds the application of the
19 principles of Rule 702 helpful in evaluating the reliability of the opinions of the two
20 psychiatric experts, and their credibility.

21 Rule 702 provides:

22 If scientific, technical, or other specialized knowledge will assist the trier of
23 fact to understand the evidence or to determine a fact in issue, a witness
24 qualified as an expert by knowledge, skill, experience, training, or education,
25 may testify thereto in the form of an opinion or otherwise, if (1) the
26 testimony is based upon sufficient facts or data, (2) the testimony is the
27 product of reliable principles and methods, and (3) the witness has applied the
28 principles and methods reliably to the facts of the case.

26 In Kuhmo Tire Co., Ltd v. Carmichael, 526 U.S. 137 (1999), the Supreme Court clarified
27 that these principles also apply to technical and other specialized knowledge, including

1 psychiatric testimony. See S.M. v. J.K., 262 F.3d. 914, 921 (9th Cir. 2001). The Supreme
2 Court in Daubert provided trial courts guidance relevant to determining reliability which the
3 Court finds useful in this case:

4 [T]he word “knowledge” connotes more than subjective belief or unsupported
5 speculation. . . .[I]n order to qualify as “scientific knowledge,” an inference or
6 assertion must be derived by the scientific method. Proposed testimony must
7 be supported by appropriate validation i.e., “good grounds,” based on what is
8 known. In short, the requirement that an expert’s testimony pertain to
9 “scientific knowledge” establishes a standard of evidentiary reliability.

10 Daubert, 509 U.S. at 590. In Kuhmo, the Supreme Court went further in defining the
11 standard of reliability holding that the standard:

12 requires a valid . . . connection to the pertinent inquiry as a precondition to
13 admissibility. And where such testimony’s factual basis, data, principles,
14 methods, or their application are called sufficiently into question . . . the trial
15 judge must determine whether the testimony has a reliable basis in the
16 knowledge and experience of the [relevant] discipline.

17 526 U.S. at 149; General Elec. Co. v. Joiner, 522 U.S. 136, 144 (1997)(the evidence must
18 be excluded if the court finds “that there is simply too great an *analytical gap* between the
19 data and the proffered opinion”) (emphasis added); see Joy v. Bell Helicopter Textron, 999
20 F.2d 549 (D.C. Cir. 1993)(expert testimony based upon speculative assumptions is
21 inadmissible); Jinro America Inc. v. Secure Inv., Inc., 266 F.3d 993 (9th Cir. 2001)
22 (“*impressionistic generalizations*” were held inadmissible)(emphasis added).

23 Dr. Kupers is qualified to render opinions on the issues before this Court, but Dr.
24 Johnson for a number of reasons is significantly more qualified to render the competency
25 opinion, with due respect accorded to Dr. Kupers’s special expertise regarding the SHU
26 syndrome. First, Dr. Kupers has never worked inside a correctional setting, is not primarily
27 a forensic psychiatrist, and has no incarcerated patients. (R.T. 3/26/02 at 132-33.) In
28 quantifying his practice, he said “number one is private practice; number two is teaching; and
number three is consulting in public mental health and correctional settings as a trainer and a
seminar conductor or giving lectures. And then a small part of my work is forensic work
within the jail and prison setting.” (R.T. 3/26/02 at 197.) Also, Dr. Kupers has never

1 engaged in “a forensic evaluation to determine the competency of an inmate to be executed,”
2 nor has he “ever [previously] had an occasion to do a forensic evaluation of an inmate
3 sentenced to death who wants to dismiss his appeal.” (Id. at 133.) In contrast, all of Dr.
4 Johnson’s patient evaluations are of persons who are incarcerated, and several of them
5 currently face capital sentences. (R.T. 3/28/02 at 735-38.) She is also a board certified
6 forensic psychiatrist, and her work is focused on competency evaluations.⁴³ (Id. at 733-34,
7 735.) Second, Dr. Johnson’s investigation and preparation for her opinion and report were
8 more thorough than that of Dr. Kupers and the methods she employed to reach her decision
9 were more reliable than Dr. Kupers’s. She spent at least fifty hours,⁴⁴ by her count fifty-two
10 and one-half hours, beginning in April 2001 and ending on March 25, 2002, personally
11 interviewing and evaluating Mr. Comer, including eight hours the day before Mr. Comer
12 testified; and before she testified and rendered her final opinion at the hearing on March 28,
13 2002, she was present and observed Mr. Comer testify on March 27 and 28, 2002. (R.T.
14 3/28/02 at 745-48, 915.) In contrast, Dr. Kupers spent perhaps twenty hours with Mr.
15 Comer, which included some phone conversations rather than in-person interviews, all of
16 which occurred during portions of two days in November 2001 and two days in January
17 2002. (R.T. 3/26/02 at 19, 165.) According to Mr. Comer, Dr. Kupers left early during two
18 of the four interviews. Mr. Comer testified that at “the last one he kept looking at his watch,
19 so I told him, why don’t you just go? And he left. He was worried about whether he was

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21
22
23 ⁴³ See Curriculum vitae of Dr. Johnson attached to Dkt. 162.

24 ⁴⁴ At one point, habeas counsel asked the ADOC visitation officer, Sergeant
25 Hackney, whether she knew of any limitations imposed on Dr. Kupers in evaluating Mr.
26 Comer (she did not). (R.T. 3/27/02 at 559, 595.) In response to a subsequent Court
27 inquiry, habeas counsel acknowledged that Dr. Kupers felt that “his evaluation was very
28 complete and thorough ” and that he had not required more time than authorized to evaluate
Mr. Comer. (Id. at 626.)

1 gonna make his next flight.”⁴⁵ (R. T. 3/27/02 at 662-63.) Further, Dr. Johnson told the

2 Court that the “crux” of her “diagnostic opinion” was based upon the

3 series of in depth, broad range, and comprehensive sessions with Mr. Comer
4 revealing his life, his mental status, observing and assessing his ability to
5 process information, looking at his mood and his -- the modulation of his
mood in response to various situations that arose, looking for consistency and
symptoms or behaviors over time.

6 (Id. at 741.)

7 Additionally, the breadth of Dr. Johnson’s investigation is demonstrated by her
8 personal interviews of “a number of people directly who would have had the short and long-
9 term opportunity to review Mr. Comer’s mental status” to learn of their independent
10 “behavioral observations” of him, and “conversations and interactions” with him, and she
11 interviewed Amy Young, the woman with whom Mr. Comer developed and maintained a very
12 close relationship for nine years. (R.T. 3/28/02 at 741-42, 743.) Dr. Kupers merely “talked
13 with staff as [he] conducted [his] tours and interviews,” and though he attempted to do so, he
14 did not interview Ms. Young. (R.T. 3/26/02 at 17.) Also, Mr. Comer carefully reviewed Dr.
15 Kupers’s report and made thirty-three pages of comments including noting a number of
16 factual errors and improper inferences made by Dr. Kupers.⁴⁶ (R.T. 3/27/02 at 381-90.) In
17 contrast, Mr. Comer made very few corrections of Dr. Johnson’s report. (Id.) Finally and
18 significantly, Dr. Kupers failed to ask Mr. Comer questions critical to a determination of

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20 ⁴⁵ Sergeant Hackney, the visitation officer for SMU II at relevant times,
21 testified that Dr. Kupers spent 14.25 hours in SMU II, a portion of which was spent touring
22 the facility rather than face-to-face interviews of Mr. Comer. (R.T. 3/27/02 at 556, 559-
60.)

23 ⁴⁶ At some point, Mr. Comer stopped correcting the errors because it was so
24 time consuming. With respect to one of the errors, he testified, “I just was helping him out
25 because, like, the sentencing to death row was in April. I didn’t know if I was supposed to
26 be that thorough with it or not.” (R.T. 3/27/02 at 382.) Concerning the improper inferences
27 drawn by Dr. Kupers, Mr. Comer testified “[T]hat’s what he’s got to say about it. That’s not
28 -- that’s not the way I’m talking about anything. That’s all--that’s something from his mind .
. . his persona.” (Id. at 385-86.)

1 whether his decision was voluntary and competent such as “why [Mr. Comer] was
2 withdrawing his appeals” and whether Mr. Comer had “thought about changing [his] mind
3 since [he] first filed [his] motion to withdraw the appeals.” On rebuttal Dr. Kupers claimed
4 for a variety of unpersuasive reasons that it was not necessary to ask him these direct
5 questions. (Id. at 388; Dep. R.T. at 20-21.) By comparison, Dr. Johnson asked all these
6 questions of Mr. Comer “a whole lot.” (Id.)

7 The Court finds that Dr. Johnson’s opinions were “supported by appropriate
8 validation-- *i.e.*, ‘good grounds’ based on what is known.” Daubert, 509 U.S. at 590.

9 **1. Depression**

10 Dr. Kupers found Mr. Comer suffers from a “Major Depressive Disorder, severe and
11 recurrent with alternating periods of psychomotor agitation and psychomotor retardation.”
12 (R.T. 3/26/02 at 20.) Dr. Johnson disagreed, and the Court finds the credible and reliable
13 facts support, and are consistent with, Dr. Johnson’s judgment.

14 Dr. Kupers began his testimony on depression by explaining that his opinion and his
15 current diagnosis is that Mr. Comer suffers “Major Depressive Disorder” which Dr. Kupers
16 based upon the diagnostic criteria for this disorder identified in the Diagnostic and
17 Statistical Manual of Mental Disorders (DSM-IV) (“DSM-IV”) which “has a format for
18 diagnosing depression.” (Id. at 20- 21.) He then drifts into a discussion of a “depressive
19 episode” explaining that the DSM-IV defines a “depressive disorder” as “someone who has
20 two or more depressive episodes” and he then offers the undifferentiated opinion that “Mr.
21 Comer indeed had two very serious depressive episodes, probably more, and probably is
22 very depressed in between episodes,” and that he “fit **all** of [the] characteristics” for this
23 disorder. (R.T. 3/26/02 at 21.)(Emphasis added.)

24 The DSM-IV identifies a “Major Depressive Episode” as within the category of
25 “Mood Episodes,” but characterizes a “Major Depressive Disorder” as within a separate
26 group of the DSM-IV titled “Depressive Disorders.” DSM-IV at 318, 320, 339. Dr. Kupers
27 is correct that the two disorders clearly overlap in that a “Major Depressive Disorder” does
28

1 include the condition of a “depressive episode,” and the integral definition of a “Major
2 Depressive Disorder,” is as follows: the “*essential feature* of a Major Depressive Disorder
3 is a *clinical course* that is *characterized* by one or more Major Depressive Episodes.”⁴⁷
4 DSM-IV at 339 (emphasis added). The DSM-IV also expressly provides, however, that a
5 reliable diagnosis of Major Depressive Disorder requires deductively excluding alternative
6 explanations for the symptoms and that: “General Medical Condition [does] *not* count
7 toward a diagnosis of Major Depressive Disorder.”⁴⁸ DSM-IV at 339. (emphasis added.)
8 Concomitantly, in a comparable section under the heading “Differential Diagnosis,” the
9 DSM-IV states that “Major Depressive Episodes in Major Depressive Disorder must be
10 distinguished from **Mood Disorder Due to a General Medical Condition.**” *Id.* at 343.
11 During his direct testimony, Dr. Kupers rendered his opinion without distinguishing,
12 excluding or dismissing any possible alternative diagnoses, including a medical condition,
13 before firmly concluding that Mr. Comer was afflicted with a major depressive disorder.

14 Dr. Kupers identified what he claimed was the first of two depressive episodes
15 experienced by Mr. Comer as occurring in May 1999 when Robert Vickers died. (R.T.
16 3/26/02 at 22.) The DSM-IV, which Dr. Kupers relied on, sets forth the criteria for a
17 “Major Depressive Episode” as requiring the presence of “[f]ive (or more) of [identified
18 symptoms] during the same 2-week period and represent a change from previous functioning
19” DSM-IV at 327. Significantly, neither in his testimony nor in his report did Dr.

21 ⁴⁷ The essential feature of the Major Depressive Episode is described as “a
22 period of at least 2 weeks during which there is either depressed mood or the loss of
23 interest or pleasure in nearly all activities.” *Id.* at 320.

24 ⁴⁸ The term general medical condition refers to “conditions and disorders that
25 are listed outside the ‘Mental and Behavioral Disorders’ chapter of [the International
26 Classification of Diseases].” DSM-IV at XXV. The criteria for a mental disorder due to a
27 general medical condition is that “[t]here is evidence from the history, physical
28 examination, or laboratory findings that the disturbance is the direct physiological
consequence of a general medical condition.” *Id.* at 7.

1 Kupers find at least five of the identified symptoms as being experienced by Mr. Comer
2 over the two-week period following Mr. Vickers's death. Instead, Dr. Kupers's report cited
3 Mr. Comer's comments that after the death of his friend:

4 [h]e had no interest in anything. He had no pleasure in anything. He spent
5 most of the time in his bunk. Contrary to his usual pattern of walking 14 to 20
6 hours a day in his cell in any recreation area, he didn't walk much at all. He
7 expressed great sadness and he was in deep depression.

8 (R.T. 3/26/02 at 22.) This description of Mr. Comer's emotional condition after his
9 friend's death does fit two of the criteria in the DSM-IV, that is, he had a (1) "depressed
10 mood most of the day . . ." and a (2) "markedly diminished interest or pleasure in all, or
11 almost all, activities most of the day . . ." DSM-IV at 327. However, Dr. Kupers did not
12 testify that Mr. Comer complained that he also experienced any of the remaining symptoms
13 identified in the DSM-IV for a major depressive episode which are, (3) significant weight
14 loss, (4) insomnia or hypersomnia,⁴⁹ (5) psychomotor agitation or retardation, (6) fatigue or
15 loss of energy nearly every day, (7) feelings of worthlessness or excessive inappropriate
16 guilt, (8) diminished ability to think or concentrate, or indecisiveness, or (9) recurrent
17 thoughts of death. Id. Hence, Dr. Kupers's testimony describing Mr. Comer's symptoms
18 following Mr. Vickers's death do not establish a major depressive episode pursuant to the
19 DSM-IV.

20 Dr. Johnson's perception of this period of time in Mr. Comer's life as bereavement
21 or grieving rather than a "depressive episode" is more reliable than Dr. Kupers's. She
22 concluded that Mr. Comer,

23 clearly experienced the significant effects of the bereavement or grieving.
24 There were no pathological effects that I was able to identify in going through
25 that period quite consistently with him. The period of time did last, in his

26 ⁴⁹ Dr. Kupers stated during cross-examination that although he never mentioned
27 it in his report or prior testimony, Mr. Comer had "problems sleeping" because "most
28 prisoners in that situation" have sleeping problems. (R.T. 3/26/02 at 217.) This conclusion
is nothing more than a generalization without a known source, reason or analysis for
extending it to Mr. Comer in particular.

1 account, for a couple of months, he was able to come out of it, and he still has
2 good memories of that relationship and sadness about his friend's death . . .
3 When you look at a grieving process, you have to look at it with the individual
4 and in their culture and what is normal for them in that situation, and to look as
5 to whether there's anything abnormal about what happens to them during that
6 period of time, and there wasn't. He was sad, had some crying and loss of
energy in things that you would expect during that, thinking about it, and
wondering if he could have done more or what he could do about the situation,
looking at the impact it had on him. But all of those are still within the
parameter of a normal grief reaction or normal period of bereavement, so
that's how I would call that period of time, not depression.

7 (R.T. 3/28/02 at 788.)

8 Moreover, bereavement is mentioned in the DSM-IV as a possible differential
9 diagnosis for a "Major Depressive Episode."

10 Even if depressive symptoms are of sufficient duration and number in the
11 criteria for a Major Depressive Episode, they should be attributed to
12 *Bereavement* rather than to a Major Depressive Episode, unless they persist
13 for more than 2 months or include marked functional impairment, morbid
preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or
psychomotor retardation.

14 DSM-IV at 326. Neither in his report nor his testimony did Dr. Kupers attempt to
15 distinguish the differential diagnosis of bereavement from the symptoms he attributed to a
16 major depressive episode until questioned on cross-examination and during his rebuttal
17 testimony. (R.T. 3/26/02 at 22; Dep. R.T. at 50-52.) On cross-examination Dr. Kupers
18 attempted to bolster his opinion by emphasizing that Mr. Comer's symptoms seemed to have
19 occurred for more than two months after the death, but he agreed with Dr. Johnson that the
20 length of time is not "absolute" and that the circumstances that warrant a diagnosis of a
21 depressive episode is a matter of "clinical judgment involved on a case-by-case basis." (R.T.
22 3/26/02 at 216; Dep. R.T. at 91.)

23 Finally and crucial to this Court's determination of whether Mr. Comer has a
24 psychiatric illness, including major depressive disorder, is that when he testified no
25 characteristics surfaced that might suggest that he had not recovered from the loss of his
26 friend. Instead, his testimony was credibly consistent with Dr. Johnson's judgment that he
27 felt grief following Mr. Vickers's death. (R.T. 3/27/02 at 435.)

1 Dr. Kupers's identification of Mr. Comer's purported second major depressive
2 episode fares no better than the first. Dr. Kupers claims this episode began in the spring of
3 2001 and lasted until November of 2001, when Mr. Comer lost 30 to 40 pounds. (R.T.
4 3/26/02 at 22.) Dr. Kupers testified that during this time Mr. Comer "spent most of this
5 time in bed. He was unable to get out of bed for most of the time. He was not interested in
6 anything. He cutoff contact with the outside world. He stopped reading the newspaper. He
7 became uninterested in living." Id. Although Dr. Kupers cited the existence of five of the
8 DSM-IV's criteria for the diagnosis of major depressive episode, DSM-IV at 327, he did not
9 consider or reconcile his diagnosis of depression with the material facts that could
10 otherwise explain Mr. Comer's weight loss at that particular time.

11 The evidence established that Mr. Comer voluntarily decided not to eat the meals
12 provided him by the prison during that period for a combination of reasons. He was not
13 pleased with the discipline imposed upon him for major infractions of prison rules, and he is
14 a vegetarian. (R.T. 3/27/02 at 402-405.) His loss of commissary privileges as a sanction
15 aggravated Mr. Comer because as a vegetarian he supplemented his diet with commissary
16 items. As a consequence, Mr. Comer chose not to eat *any* portion of the meal trays provided
17 by the prison, including the non-meat items. Further, this Court did not yield to Mr.
18 Comer's threat that he would starve himself if the prison did not make an exception to its
19 vegetarian meal policy (or rescind its sanction.) Eventually after the sanction expired, Mr.
20 Comer began eating again and devouring his favorite commissary items. His weight was
21 completely regained. (R.T. 3/27/02 at 405-406.) See discussion supra at §§ B pp. 11-14 in
22 this Order.

23 In this instance the differential diagnosis of a general medical condition applies. For
24 example, the disorder of anorexia nervosa, defined as the refusal to eat because of a fear of
25 gaining weight, is a differential diagnosis to a major depressive disorder. DSM-IV at 539.
26 Individuals with anorexia nervosa manifest depressive symptoms such as depressed mood,
27 social withdrawal, irritability, insomnia, and diminished interest in sex. Such individuals may
28

1 have symptomatic presentations that meet criteria for Major Depressive Disorder.

2 **“Because these features are also observed in individuals without anorexia nervosa**
3 **who are undergoing starvation, many of the depressive features may be secondary to**
4 **the physiological sequella⁵⁰ of semistarvation.”** DSM-IV at 541.

5 Mr. Comer did not suffer from anorexia nervosa, but he did manifest depressive
6 features of semistarvation during this period when he voluntarily chose not to eat. Thus, his
7 physical and mental condition mimicked depression, but he was not experiencing a major
8 depressive episode as defined in the DSM-IV.

9 During his rebuttal testimony, however, Dr. Kupers dismissed the possibility that Mr.
10 Comer’s symptoms could be explained by inadequate nourishment. He testified that failure
11 to receive proper food intake does not “explain the laying in bed for long periods, the
12 tiredness, the slowing down, which is psychomotor retardation, [and] the lack of interest in
13 anything.” (Dep. R.T. at 51-52.) Dr. Kupers’s opinion is completely at odds with the very
14 manual that he cites to sustain his opinion. (Dep. R.T. at 52.)

15 Dr. Johnson’s explanation for Mr. Comer’s weight loss during this period is credible,
16 taken in conjunction with the relevant events occurring at this particular time and Mr.
17 Comer’s testimony. Consistent with the DSM-IV, Dr. Johnson testified that if the
18 symptoms of depression are caused by a “physical reason,” it is not a “major depressive
19 disorder.” (R.T. 3/28/02 at 765) DSM-IV at 327 stating, **“Note:** Do not include symptoms
20 that are clearly due to a general medical condition”). She continued,

21 if the weight loss is caused by intentional dieting, . . . or in this case, not
22 eating for, you know, your principles then that would not be a--that wouldn’t
23 be a qualifying characteristic [of depression]. The not eating would have to
24 come because . . . you’re mood was low, you didn’t have energy, . . . you didn’t
25 have an appetite.

25 ⁵⁰ Defined by Dr. Johnson during her testimony as “[t]he aftermath or
26 aftereffects or leftover features or the development of a new illness as a result.” (R.T.
27 3/28/02 at 811.) In other words, depressive features can be secondary to the physiological
28 aftermath or aftereffects of semistarvation.

1 (R.T. 3/28/02 at 765.) In other words, symptoms of depression would surface first, and as a
2 consequence energy would be depleted and appetite would diminish or disappear. Here Mr.
3 Comer first freely chose not to eat for an extensive period of time and as a result
4 experienced a loss of energy. He acknowledged having previously engaged in hunger
5 protests, and conceded he lost weight in the Summer and Fall of 2001 because he chose not
6 to eat and explained “this time everybody’s got a camera on me.” (R.T. 3/27/02 at 402.)
7 Significantly, he added that he had no major weight loss within the last few years except
8 when he lost commissary privileges or engaged in hunger actions as a means of protest.
9 (R.T. 3/27/02 at 406.)

10 Finally, Dr. Kupers’s third, more theoretical conclusion, is that Mr. Comer may be
11 afflicted with depression “during the windows of time” between his “depressive episodes.”
12 (R.T. 3/26/02 at 23.) Significantly, his opinion was not confidently asserted. He testified
13 that Mr. Comer “**probably** is very depressed in between episodes.” (Id. at 21.)(emphasis
14 added.) To sustain his perception, Dr. Kupers claimed that Mr. Comer has experienced:

15 a chronic pattern for the last approximately eight years, seven or eight years,
16 of . . . withdrawing from the world, distancing himself from his experience,
17 becoming numb, becoming basically dead inside, having no interest in
18 anything going on in the world, having anhedonia, which is a major symptom
19 of depression which means deriving no pleasure from activities from anything,
20 really. Isolating himself, cutting himself off from anyone.

21 (Id. at 23.) His conclusion is based on his observations of Mr. Comer during the interview
22 and he testified, “I consistently found . . . that while Mr. Comer said that he was not
23 depressed, as the interview proceeded he became--he slowed down. He exhibited what I call
24 psychomotor retardation. His thoughts, his feelings slowed down. He became noticeably
25 sad.” (R.T. 3/26/02 at 25.) He added that he observed Mr. Comer’s “posture slumped, he
26 became sad, he teared during our discussion, and it was more than the usual normal range of
27 affect. Rather, he **appeared** to be depressed.” (Id. at 26) (emphasis added.) Dr. Kupers’s
28 theory is unsound for a number of reasons.

First, Dr. Kupers’s reliance on the description in the DSM-IV of the “episode

1 features” of a major depressive episode for the “windows of time” when he conceded that
2 Mr. Comer was not experiencing a major depressive episode is erroneous. Simply put, if
3 Mr. Comer is not suffering a major depressive episode, the features for this disorder, absent
4 some authority to the contrary, are irrelevant to whether Mr. Comer is experiencing a
5 *different* type of depression between the purported episodes. It is undisputed in Dr.
6 Kupers’s rebuttal testimony, given after reviewing the transcript of Mr. Comer’s hearing
7 testimony, that Dr. Kupers did not believe Mr. Comer had “depressive episodes” other than
8 the two discussed above. (See Dep. R.T. at 54.) Significantly, he testified that Mr. Comer
9 “**came out** of his major depressive episode” adding “No. I don’t have -- I don’t have an
10 opinion” that Mr. Comer was in a severe depressive episode at the time Mr. Comer testified
11 at the evidentiary hearing. (emphasis added). Nonetheless, Dr. Kupers, without specific
12 reference to the DSM-IV, or any other authoritative source, persisted in maintaining that Mr.
13 Comer “continued to suffer a depressive disorder.” (Dep. R.T. at 54, 57.) Dr. Kupers’s
14 opinion is therefore “not supported by appropriate validation.” Daubert, 509 U.S. at 590.

15 Further, the frailty of this diagnosis was demonstrated during Dr. Kupers’s rebuttal
16 testimony, which reflected a troubling degree of uncertainty and unpredictability. Dr.
17 Kupers said he reviewed the transcript of Mr. Comer’s hearing testimony and opined that
18 Mr. Comer was “still under the influence of depression” when he testified about his
19 “decisions” to waive his right to appeal, though now asserting that Mr. Comer’s depression
20 “could be a lesser level of depression” than those identified as previous periods of
21 depression. (Dep. R.T. at 58, 60-61.) Then completely undermining this opinion, he said he
22 could not identify the symptoms of depression he observed during Mr. Comer’s testimony
23 because he did not see him testify. Significantly he added that he “wouldn’t offer an
24 interpretation of symptoms from a transcript” and declined to testify about symptomology
25 based on reading a transcript, stating that he “would rather have been there in person or view
26 a video.” (Dep. R.T. at 87-88.) His opinion was further discredited when after testifying
27 that “he would not offer an interpretation of symptoms from a transcript,” he offered such an
28

1 opinion, testifying “[o]h, I don’t think his symptoms have disappeared, no. I just don’t think
2 he’s expressing psychomotor retardation **at the moment.**” (Dep. R.T. at 87)(emphasis
3 added.) This new opinion, however, represents a complete change of position, without
4 explanation, from the opinion given only seven days before that “psychomotor retardation”
5 was a feature he observed in Mr. Comer and that strongly influenced his opinion that Mr.
6 Comer had depression. (R.T. 3/26/02 at 25-26.) Dr. Kupers’s conclusion that Mr. Comer
7 continued to suffer depression, based only on his review of the transcript, together with his
8 failure to identify any facet of Mr. Comer’s testimony to support this conclusion, renders it
9 highly dubious.

10 In a further attempt to explain away Mr. Comer’s coherent and rational testimony, Dr.
11 Kupers made his primary focus during rebuttal his emphatic view that Mr. Comer was
12 feigning mental health by behaving “very rational[ly] and methodical[ly]” to convince the
13 Court that he does not have a mental disorder. Dr. Kupers offered an apocryphal analogy of
14 a suicidal patient hospitalized for depression who behaves and responds to treating staff with
15 the goal “to convince the psychiatrists to let him out so he can go out and kill himself.”
16 (Dep. R.T. at 19; see also R.T. 3/26/02 at 98-99.) The deficiency in this analogy is that it
17 fails to take into account the substantial differences in the environments of a mental hospital
18 and a prison. In a hospital, the patients are under constant supervision to insure they do not
19 commit suicide, but in a prison, inmates are not watched to prevent attempted suicide unless
20 staff have some reason to suspect an inmate will attempt it.

21 Mr. Comer has never been placed on suicide watch. Moreover, Dr. Kupers
22 acknowledged that Mr. Comer could have accomplished suicide in prison at any time during
23 the almost twenty years he has been incarcerated. When asked whether he was familiar with
24 the term “suicide by cop,” Dr. Kupers answered “yes” and explained that it was part of the
25 prison code of male inmates who “don’t commit suicide. People who commit suicide are
26 weaklings. So the tough way out, and also a way to harm your loved ones less, is to get into
27 some kind of altercation with an officer and get shot and killed.” (R.T. 3/26/02 at 250.) It is
28

1 undisputed that Dr. Kupers believes Mr. Comer ascribes to, and lives by, this prison code,
2 describing him as “a stand-up con . . . [who] has the respect of the other prisoners” and who
3 is “a tough enough guy” that he is now working on walking away from a fight. (R.T. 3/26/02
4 at 187-88.) Responding to Dr. Kupers’s opinion that Mr. Comer was attempting to commit
5 a form of “suicide by cop” by waiving his appeal, Mr. Comer testified that,

6 How hard is it to make yourself -- I mean, hell, you’s guys saw the -- the toilet
7 paper noose on TV. I know how to do that. I didn’t make that one, but I know
8 how to do it. God, it’s the easiest thing to do. They -- I remember [Dr.
9 Kupers] talked about suicide by cop. Hell, there’s a lot of officers back there
10 [referring to the officers in the courtroom and the U.S. Marshals in the court
11 house jail]. Can go back, commit suicide with them.

12 (R.T. 3/27/02 at 442.) More elegantly put, and to the point, Dr. Johnson testified,

13 I think he, if he was suicidal, he could clearly kill himself. I don’t know
14 whether he would choose to stab himself, but he could do that. But he could
15 have obtained drugs or medication or hung himself or suffocated himself,
16 drugged himself, any number of things. Or he could have gotten somebody to
17 kill him if he didn’t want to do it himself. **I mean, so if he was actively
18 suicidal over these years, he has had ample opportunity and continues to
19 have ample opportunity to end his life that way.**

20 (R.T.3/28/02 at 813)(emphasis added.)

21 Again, Dr. Johnson’s judgment that Mr. Comer is not suffering any type of
22 depression is reliable and supported by credible evidence, including the testimony of Mr.
23 Comer, Warden Marshall, and Sgt. Hackney. After the many hours Dr. Johnson personally
24 spent with Mr. Comer, including the day before he testified and her observation of him
25 during his testimony, she persisted in her opinion that “he is not clinically depressed.” (R.T.
26 3/28/02 at 777.) She also relied on the DSM-IV and “reviewed all of” the criteria with Mr.
27 Comer “and more in the areas of depression” and firmly disagreed that Mr. Comer was
28 denying his symptoms of depression. She explained that the proper evaluation method is “to
look for a set of symptoms, most classically those include neurovegetative signs, which
have to do with sleep and appetite and concentration and a variety of things, all spelled out in
our classification system.” (R.T. 3/26/02 at 767.) She continued that a person may
“adamantly deny they’re depressed” but if they are depressed there still is “the presentation

1 of depression” from the “signs and symptoms” of the diagnosis, but Mr. Comer never
2 displayed these symptoms during her visits with him nor during his testimony in court. (R.T.
3 3/28/02 at 767-68.)

4 The only meaningful evidence that might suggest Mr. Comer suffered from
5 depression are his prolific writings in the nature of correspondence and declarations. Taken
6 in isolation, the content of his writings is enigmatic if not troubling because some can be
7 interpreted as expressing unhappiness, despair, and perhaps no purpose to continue living.
8 Dr. Johnson’s analysis and interpretation of these writings, however, is correct. Mr. Comer
9 is very intelligent and an avid communicator both orally and in writing.⁵¹ The Court finds that
10 writing for Mr. Comer is, just as journaling is for some people, a method he uses to
11 effectively cope with feelings. He also uses it to get attention, and as the Court observed, as
12 a manipulative tool. Dr. Johnson explained:

13 he has a question, or he’s frustrated, or he’s aggravated, he writes. And he
14 writes his feelings out pretty clearly. And sometimes you have to sit down
15 with him, which is what I try to do with all his writings, and go through them
16 over time and look at the evolution . . . And I think if you take them in that
17 context and look at his feeling, he didn’t know where to go at the beginning,
18 and his own experience that if you are **kind of flashy and bold in your
writing, to put it politely, you get people’s attention.** And that’s worked
for him before. It works for him verbally. . . . If he needs some attention right
now, he doesn’t sit back and necessarily explain that to you in the most
considered way, you now. It comes out and it gets somebody’s attention. And
then he likes the opportunity to explain.

19 (R.T. 3/28/02 at 756-57)(emphasis added.) Considering them cumulatively, they are, as
20 described by Dr. Johnson,

21 not irrational . . . [they] demonstrate that he does have an in-depth
22 understanding, particularly his writing in regard to reviewing the different
parts of his whole year of activity that has gone on. . . . It’s very organized, it’s

24 ⁵¹ Mr. Comer’s skills were demonstrated during his testimony when he spoke
25 without hesitation, and though sometimes using the foreign idiom “joint talk,” *i.e.*, prison
26 slang, see R.T. 3/27/02 at 336-338, he also used more sophisticated language than one
27 would expect from someone with a high school education, who had been incarcerated for
most of his adult life, *e.g.*, “construed,” “persona,” “nuances,” “mitigate,” “circumvent,”
“compelled,” “equate,” “abating,” etc. (R. T. 3/27/02 at 409, 414, 711, 386, 446, 452, 481.)

1 very to the point. It's reflective, has original thought in it, and expresses an
2 interface with this process [the litigation] that's going on.

3 (R.T. 3/28/02 at 761.)

4 An excellent example of the validity of this interpretation is the explanation Mr.
5 Comer gave the Court for the letters he wrote to the Ninth Circuit, precipitating the remand
6 to this Court. The Court explained to Mr. Comer that the Ninth Circuit was concerned about
7 his state of mind when in his letters, he claimed he never appealed but the record established
8 that he signed documentation representing his intention to appeal. (R.T. 3/27/02 at 716-18.)

9 Mr. Comer first insightfully explained,

10 [I]f we did this all over, started today and started all over, with everything I've
11 been taught this last couple of years, I would not have done something like
12 that. You see how I've evolved to that? When I tell you that--that I didn't
13 never appeal it, I have never-- I'll tell you right now. I have never appealed it.
14 But see, that's joint talk.⁵²

15 (Id. at 716-17.) He adds that what he means is that he did not *personally* intend to get
16 involved in his appeal, which this Court finds credible. He stated:

17 I didn't want to see Mr. Eckerstrom back in '97. Amy asked me to go see him,
18 I went and seen him. I thought about it, okay, I'll go see him. So whatever I
19 signed for them, I signed for them. I don't deny signing anything. I don't deny
20 that we ever had an attorney visit. I don't deny that I signed paperwork that
21 said continue with my appeals. I don't deny any of that. I am just telling you I,
22 in my heart, have not appealed this. I never appealed any of this.

23 (R.T. 3/28/02 at 717.)

24 Mr. Comer's use of troubling terminology in his letter to the Ninth Circuit such as
25 "conspiracy" and "ZOG" is a very good example of his use of "flashy and bold" expressions
26 to get attention. He explained that "ZOG" is used in prison to apply to something you do not
27 agree with. He stated, "[I]f the Republican Party is something you don't agree with, in prison
28

⁵² Mr. Comer has also recognized that there is a downside to his abundant spontaneous utterances or "running his mouth;" "he gets his feelings out" and "then he feels better, but he has already mailed the letter." (Id. at 360, 716-17, 756-57.)

1 you can call it the ZOG.”⁵³ (R.T. 3/28/02 at 719-20.) He continued by explaining his
2 frustration because he was unable to get assistance to withdraw his appeal and “to decide
3 what to do with [his] life.” Thus, when he used the word “conspiracy” he “felt [that various
4 people] were working together against [him]” and “interfering with what [he] thought was
5 [his] right” to control his life. (R.T. 3/28/02 at 720-23.) The use of this terminology is not
6 the product of a delusional mind, but was Mr. Comer’s unsophisticated way of trying to get
7 noticed, which was effective, but also conveyed an unintended meaning.

8 This Court was also a recipient of one of Mr. Comer’s bold and flashy letters
9 designed to capture the Court’s interest. On or about October 24, 2001, Mr. Comer wrote
10 an angry letter to the Court emphatically expressing his views on his diet, and ADOC’s
11 failure to meet his demands for vegetarian meals. Significantly, and in character for Mr.
12 Comer, he included a threat to gain the attention of everyone. He stated: “Everybody listen
13 up real good now and pay attention, so the second half of this evaluation can proceed without
14 hitches and not be drawn out over the next 10 years!” (Tr. Ex. 24.) He then details all the
15 improprieties he has experienced with ADOC and concludes this portion of his letter with
16 the warning that he “will live off ONLY inmate store until my execution date.” (Id.) He
17 continues, “[s]o if I become not competent because of all the bullshit ADOC has put me
18 through, oh well!” (Id.) He finishes with the distinct and forceful promise not to back down,
19 or give up “working to pull [his] appeal, if it takes 3 more months or 20 years.” (Id.)

20 The words and terminology used in this letter are not the expressions of a man who
21 intends to commit suicide because he suffers a mental disorder. They are the language used
22 by a man with a strong will and strong ego who wants as much control of his life as possible
23 within the realities of a prison setting, and who will demand control using threats when his
24 inclinations are challenged. The letter reinforces the view that he is expressing an intention

25
26 ⁵³ Mr. Comer did not fail to mention that the ZOG is also prison slang for the
27 Zionist Occupational Government which is “racist.” (R.T. 3/28/02 at 719.)

1 to pursue execution, not suicide, and execution was, and is, his choice and plan, which he
2 will persistently pursue for as long as he is incarcerated, with or without the help of anyone,
3 including ADOC, whose alliance he questions in the letter.⁵⁴

4 Dr. Johnson's explanation of the significance of Mr. Comer's letter writing and his
5 purpose in doing so was depicted during his testimony when he strongly reaffirmed his
6 conviction to continue seeking to fulfill his choice to waive his appeal.

7

8 ⁵⁴ It is noteworthy that Mr. Comer expresses in this letter empathy and
9 compassion for his habeas counsel who took his part on the ADOC diet controversy.
10 Concomitantly, the letters from habeas counsel to Mr. Comer show sympathy for his
11 failure to get his deserved results from the Court and ADOC. This, however, is the same
12 habeas counsel Mr. Comer chided, threatened, and made very offensive comments about in
many of his other writings because they would not submit to his decision to waive his
appeals, and allow him to make that choice.

13 This letter and others he wrote to habeas counsel after his reluctant agreement to
14 speak with them during the evaluation process, demonstrate that he can be manipulative and
15 has used his writings to accomplish his objectives. The Court finds that in these letters Mr.
16 Comer strategically does his best to mollify habeas counsel with an explanation which
17 might draw their sympathy and persuade them to withdraw their opposition and accept his
18 decision. When, however, he felt vindicated by the Court's ruling in his favor his expression
of antipathy for habeas counsel returned. Recently, after this Court issued the order in
favor of Mr. Comer he in no uncertain terms told habeas counsel "YOU'RE FIRED,"
admonishing them not to "interfere with [his] case when it goes back before the 9th circuit."
(Dkt. 436; see n. 54, infra.)

19 On about July 21, 2001 the Court received a letter/declaration from Mr. Comer of
20 the same vintage. In this letter, Mr. Comer strenuously protested the Court's decision to
21 discontinue his contact visits with special counsel because he would not disclose the
22 whereabouts of the metal he cut from his desk. See supra 11-14. Again his complaints
23 were straight forward, passionate, bold and flashy. Without the diplomatic flair one might
24 expect of a literary scholar or a seasoned politician, he makes his point by making
25 offensive, derogatory and defamatory characterizations of everyone involved in this
26 litigation. The letter, however, is just another example of Mr. Comer's expression of
27 anger and frustration when something has not gone his way, and his use of an energetic,
albeit sometimes crude writing style to get noticed and to make sure that everyone
understands his point of view. The letter does not in any manner demonstrate indicia of
depression. Rather, it conveys that Mr. Comer is a resolute man with the courage to
express his opinions his way to anyone and everyone sometimes without considering the
long-term consequences. See supra n. 51.

28

1 Further the Court credits Dr. Johnson's opinion that Mr. Comer does not have
2 depression because she witnessed the testimony of Mr. Comer and because her opinion
3 embodies the Court's perception of Mr. Comer, acquired over the two years of the Court's
4 contact with him, including four hearings where he appeared in person, by telephone or by
5 video teleconferencing on August 25, 2000, October 19, 2001, January 11, 2002, and
6 March 18, 20, and 26-28, 2002. Mr. Comer was alert and an active participant in the
7 competency hearing. He keenly concentrated on the questions posed to him and he answered
8 them cogently. His testimony did not communicate sadness, despair, or no purpose in
9 living. He demonstrated the full range of normal human emotions throughout the
10 proceedings and hearing,⁵⁵ including sadness, happiness, anger, frustration, and humor.⁵⁶

12 ⁵⁵ This was most clearly reflected by his emotional evolution in his relationship
13 with his habeas counsel. Following remand, Mr. Comer refused to have anything to do with
14 habeas counsel and both threatened and ridiculed them. See n. 53, supra. Special counsel
15 persuaded Mr. Comer to reinitiate contact with habeas counsel, who were afforded the
16 opportunity to explain the merits of his pending appeal and to attempt to enhance certain
17 aspects of Mr. Comer's confinement and ultimately to attempt to dissuade Mr. Comer from
18 his decision, as was their right. (See Chandler, *Voluntary Executions*, 50 Stan. L.R. at
19 1917 (in one defense attorney's experience, "developing a personal relationship with the
20 client can help to alter even an adamant position in favor of dying"); Harrington, *A*
21 *Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25
22 *LAW & SOC. INQUIRY* at 863 ("Attorneys agree that their first responsibility [after a client
23 volunteers] is what Dieter calls 'effective persuasion'--vigorously attempting to dissuade
24 the client from actually dropping appeals")). Correspondence from habeas counsel to Mr.
25 Comer offered at the hearing reflected habeas counsel's efforts to strengthen their
26 relationship with Mr. Comer. Their efforts were not without effect. Thus, Mr. Comer
27 noted that only Pete Eckerstrom sent him a Christmas card in December 2001, which by all
28 appearances, genuinely touched Mr. Comer. At the same time, Mr. Comer played on habeas
counsel's sympathetic nature in an attempt to get them to understand why he decided to
abandon his appeal, and ultimately, to dissuade them from opposing that decision. Thus, in
his letter of January 2002, after thanking Pete Eckerstrom for sending him a Christmas
card and noting the absence of a realistic possibility of being released or even being moved
to a main line cell in light of his disciplinary history, Mr. Comer says:

you guys can't help me. I'm way past helping. You put down a hurt, sick dog.
I want to be, to have the same consideration. I know how you feel Peter. I

1 (R.T. 3/28/02 at 710-11.) In fact, Dr. Kupers readily admitted during his rebuttal testimony
2 that Mr. Comer “can do a whole number of things and he is **rational**.” (Dep. R.T. at 58.)

3 Mr. Comer does not suffer the mental disorder of depression.⁵⁷

4 **2. Post-Traumatic Stress Disorder**

5 Dr. Kupers begins his explanation of this disorder by stating that post-traumatic
6 stress disorder (“PTSD”) “play(s) into depression.” (R.T. 3/26/02 at 29.) He again relies on
7 the DSM-IV for the criteria defining this disorder. (Id. at 92.) He testified that there were
8 three main sets of symptoms associated with this disease. First, after a trauma, and as a
9 consequence of it, the initial phase is “reexperiencing of the event” in the nature of
10 “flashbacks, nightmares, and startle reaction.” (Id. at 32.) The second group of symptoms

12 do. I’ve told you before I am probably more anti-death penalty than you ever
13 will be. If there was any way to make me right, dang Pete, I’d try it! But there
14 isn’t. . . .

15 (Tr. Ex. 25 at 3.) Ultimately, neither Mr. Comer nor habeas counsel were persuaded by the
16 other’s efforts.

17 ⁵⁶ His humor was displayed throughout the competency hearing. See his testimony
18 about his marriage, need for glasses, the cattle prod, and his special counsel losing papers.
(R.T. 3/27-28/02 at 318, 710, 439, 429, 436, 309, 715.)

19 ⁵⁷ The only credible evidence that Mr. Comer ever experienced a mental
20 disorder while at ADOC SMU II was identified by Dr. Johnson when Mr. Comer reported to
21 her that he had severe anxiety and panic occurring immediately following the emotionally
22 painful interview and evaluation conducted by Dr. Kupers. Certainly it is undisputed that
23 Dr. Kupers never intended to hurt or harm Mr. Comer, but of greater significance for this
24 Court’s decision, the symptoms disappeared shortly after they emerged and were not
25 present at the time of his competency hearing. (R.T. 3/28/02 at 769-775.) Further, these
26 symptoms may have been observed by Dr. Kupers during his interview of Mr. Comer
27 leading him to conclude Mr. Comer is “**probably very depressed in between**” the two
28 depressive episodes identified by Dr. Kupers. (R.T. 3/26/02 at 23)(emphasis added.) Mr.
Comer’s and Dr. Johnson’s explanation for Mr. Comer’s response to Dr. Kupers’s
interview is credible. During the two interviews by Dr. Kupers and Dr. Johnson, Mr. Comer
had to reveal all the emotionally searing experiences of his entire life. He had a normal
reaction to this process and it was temporary.

1 involves “avoidance, that is . . . the individual closes themselves off so they can constrict
2 their feelings, the range of feelings, they constrain their activities. They don’t go places that
3 remind them of the trauma. They don’t have as much interest in any kind of activity. They
4 have a restricted range of affect.” (Id.) The final stage of symptoms he explains are referred
5 to as “arousal.” (Id.) At this time “the pain of the trauma breaks through” and the individual
6 “can’t fall asleep; they’re irritable; they don’t know what’s wrong; they can’t concentrate;
7 they become hypervigilant, that is, they’re very alert to noises or to certain things; and they
8 have a strong startle reaction.” (Id. at 33.) He then opines that Mr. Comer “endorses most of
9 that list of symptoms, especially from the time he was in the California Department of
10 Corrections.” (Id.) He continues that what occurred to Mr. Comer at ADOC, and allegedly
11 typical of PTSD, is that the painful experience causes a closure of “emotional range,” a

12 close down of their activities. And what happens is a kind of deadness sets in,
13 and that’s where the distancing, the depersonalization, dissociation,
14 derealization, feeling that what’s going on is not real, those all follow, and
15 then that’s what leads into what I consider the end stage of post-traumatic
16 stress disorder, which is a **severe depression**. So that is how **depression and**
17 **post-traumatic stress disorder come together**.

18 (Id. at 33- 34)(emphasis added.) After discussing SHU syndrome, he conflates the three
19 diagnoses, saying “[s]o here we have three conditions, all of which lead to **depression**.” (Id.
20 93-94.)

21 Because Dr. Kupers’s opinion that Mr. Comer has PTSD is dependent on the ultimate
22 finding that he has depression, the Court’s analysis could conclude here because the Court
23 has found that Mr. Comer does not suffer depression. It is, however, worthwhile to evaluate
24 Dr. Kupers’s opinion that Mr. Comer has PTSD, starting with the authoritative source upon
25 which he places reliance and in light of all the evidence, including the testimony of Mr.
26 Comer and Dr. Johnson.

27 The Court assumes that some of the experiences Mr. Comer endured while
28 incarcerated by the California Department of Corrections at Folsom, DVI, and Soledad, and
while incarcerated in Arizona, including a cell extraction at Maricopa County jail and the

1 four-point inverted punishment at ADOC's SMU I, constituted traumatic events meeting the
2 first criteria in the DSM-IV to find PTSD. Mr. Comer readily admitted that he had some
3 painful experiences at these institutions.

4 Although the remainder of Dr. Kupers's interpretation of the DSM-IV's criteria for
5 PTSD appears plausible, it is, however, misleading because he imprecisely applies the
6 criteria to Mr. Comer. Apart from some traumatic experience, the DSM-IV describes three
7 groups of symptoms for PTSD, and one or more of each group must be suffered by the
8 patient to establish a diagnosis of PTSD. DSM-IV at 428. The first group of symptoms is
9 that the patient is "persistently reexperienc[ing]" the traumatic event in at least one of
10 various specific ways. Id. Of these, Dr. Kupers mentioned two: "flashbacks" and
11 "nightmares" but he did not state that these events were severe and recurrent. This is
12 required. Id. For example, the DSM-IV describes "dissociative flashback episodes," *i.e.*,
13 flashbacks, as causing the sufferer to feel as though the traumatic event is "recurring." Id.
14 Also on rebuttal, after Mr. Comer testified that he did not experience flashbacks, Dr. Kupers
15 retracted this aspect of his opinion, conceding that, "[y]es. I think that he might be
16 technically correct about that." (Dep. R.T. at 30.) Dr. Kupers attempted to rehabilitate his
17 diagnosis by identifying a different way in which Mr. Comer "reexperienced" traumatic
18 events as "recurrent and intrusive distressing recollections of the events, including images,
19 thoughts or perceptions." (Id. at 30-3.) Dr. Kupers failed, however, to specifically identify
20 any phenomena that he observed in Mr. Comer to support his newly minted opinion of Mr.
21 Comer's alleged persistent reexperiencing of traumatic events.

22 The second group of symptoms, of which at least three must occur to appropriately
23 diagnose PTSD, require that a patient "[p]ersistent[ly] avoid[s] stimuli associated with the
24 trauma." DSM-IV at 428. Dr. Kupers failed to identify any three of the seven symptoms
25 from this group in the DSM-IV, much less, persuasively point to observable phenomena that
26 establish Mr. Comer is avoiding stimuli associated with the trauma.

27 Significantly, Dr. Kupers's imprecise account of some of Mr. Comer's
28

1 characteristics, and casual rejection of others, renders his opinion of PTSD invalid. This is
2 particularly clear with respect to the fourth group of PTSD symptoms, two or more of which
3 must be present to demonstrate that the person experiences “increased arousal” not present
4 before the trauma. Those symptoms include: (1) difficulty falling or staying asleep; (2)
5 irritability or outbursts of anger; (3) difficulty concentrating; (4) hypervigilance; and (5)
6 exaggerated startle response. Id. Dr. Kupers testified that Mr. Comer experienced each of
7 these symptoms, but he failed to point to evidence which supported his opinion, and other
8 credible evidence contradicts his assessment.

9 Mr. Comer denied having trouble falling or staying asleep, the only basis for Dr.
10 Kupers’s opinion was that “most prisoners in that situation” have sleeping problems. (R.T.
11 3/26/02 at 217.) This is mere supposition. Daubert requires that opinions be “supported by
12 appropriate validation--*i.e.*, ‘good grounds,’ based on what is known.” Daubert, 509 U.S. at
13 590. The incidents cited by Dr. Kupers as examples of hypervigilance⁵⁸ and exaggerated
14 startle response were unconvincing, and his interpretation of those incidents were refuted by
15 Mr. Comer.⁵⁹

17 ⁵⁸ Dr. Kupers described hypervigilance as “very alert to noises or to certain
18 things.” (R.T. 3/26/02 at 33.)

19 ⁵⁹ During his testimony Mr. Comer credibly refuted Dr. Kupers’s opinion that
20 he suffers PTSD. He has no trouble sleeping or nightmares. (R.T. 3/27/02 at 410; 456.)
21 He does not have flashbacks. In fact he stated that he does not think about the problems at
22 Folsom. (Id. at 436; 447-48.) He explained that he is not afflicted with “startle reaction”
23 merely because he reacts when someone shakes the trap door of his cell, particularly at
24 night. He stated his cell is his house (though he refers to it as his box) and, “[He] could
25 equate that to like to a burglar trying to open your window, same sound.” (R.T. 3/27/02 at
26 452-53.) Similarly his reaction to unexpectedly hearing music in the commissary, which
27 Dr. Kupers characterized as “reality testing,” was understandable because Mr. Comer knew
28 that radio music from the commissary is unusual. He later learned why it had occurred on
that day. (Id. at 422-23.) What is more, Mr. Comer’s capacity to concentrate was more
than adequately demonstrated throughout his testimony. He seldom misunderstood
questions or responded inappropriately, which was remarkable because his appearance at
the competency hearing was the first time in fifteen years that he had been outside of a

1 In contrast, Dr. Johnson’s portrayal of Mr. Comer’s characteristics, and her opinion
2 that he does not suffer from PTSD, is both reliable and credible and is consistent with Mr.
3 Comer’s characteristics as observed by this Court throughout the past two years, particularly
4 at the competency hearing.

5 Dr. Johnson observed Mr. Comer at the competency hearing as he watched and
6 narrated tapes of his extractions from two different cells. Later, when asked if someone
7 who was suffering from chronic symptoms of PTSD would be likely to sit calmly, and
8 comment on and narrate videos of the traumatic events, Dr. Johnson testified “if they’re
9 chronic, then that would probably be an unlikely thing to be able to do.” (R.T. 3/28/02 at
10 789.) She further testified that Mr. Comer,

11 certainly can give you the history [of traumatic experiences], and he has been
12 exposed to what another person would view, or he viewed as traumatic
13 experiences. But the disorder is when you develop the specific set of
14 symptoms as a result of that. But not everybody does. You know, some
15 people develop that syndrome and some people don’t, following trauma. And
16 he adapted in other ways. And none of those symptoms [of PTSD] are
17 currently present with him, nor was I able to elicit a history of them over time.
18 So I’m not—I don’t believe he had it and then it’s just gone now.

19 (R.T. 3/28/02 at 790-91.)

20 When Dr. Johnson “first started evaluating him, obviously, [she] thought about post-
21 traumatic stress disorder and she explored those symptoms to find an absence.” (Id. at 790.)
22 After she concluded that he does not have PTSD, and then received and reviewed Dr.
23 Kupers’s report, she made “a specific effort” the day before Mr. Comer testified at the
24 competency hearing “to sit down and look at those issues again” and “reviewed . . . in a fair
25 amount of depth” the symptoms of the diagnosis with Mr. Comer before he testified. (Id.)

26 prison. He has demonstrated periods of irritability and outbursts of anger, but they
27 certainly occur less frequently than previously in his incarceration history. The only
28 notable negative emotion he occasionally expressed during his testimony was frustration,
which is understandable considering his view that this matter should had been resolved long
ago.

1 She reaffirmed that he does not have PTSD. (Id.) She also refuted Dr. Kupers’s opinion that
2 Mr. Comer was able to conceal the symptoms. She testified that:

3 [h]e thought about each of the questions that I asked directly, and obviously
4 indirectly, I approached the same symptoms pictures to see, you know,
5 whether I could find any evidence--evidence of it. And, you know, he asked
6 questions if he didn’t feel he entirely understood what I was asking him, to
7 clarify what it was, and that--that is not the way he has handled those
8 experiences that he has had.

9 (Id. at 791.) She concluded that:

10 someone who had chronic and severe post-traumatic stress disorder would
11 appear much more ill on a day-to-day basis in the prison system than Mr.
12 Comer does, because he is being exposed to those very triggers that could
13 remind him or precipitate that kind of reaction if he had this disorder. . . [I]t
14 wouldn’t be something that he could box up and put away and put on the shelf,
15 because there are too many potential triggers in the environment. If indeed he
16 had this disorder, he would be pretty symptomatic on a day-to-day basis.

17 (Id.) In the end, she did not find any PTSD symptomology in Mr. Comer that was apparent
18 on a day-to-day basis.

19 Concomitantly, Mr. Comer gave the Court a cogent and detailed account of his
20 incarcerations, the institutions where he was housed, and their conditions. He did not
21 minimize the extent of violence among the prisoners, or the brutality and cruelty of guards
22 towards inmates while he was incarcerated in the California Department of Corrections,
23 particularly Folsom. Nevertheless, he noted that he actually “liked Folsom because
24 something was always going on.” (R.T. 3/27/02 at 340.) The Court finds that while he gave
25 this account, Mr. Comer manifested none of the groups of symptoms identified in the DSM-
26 IV for the diagnosis of PTSD. Rather, Mr. Comer explained with actual pride that he learned
27 coping mechanisms to survive his prison experiences, including developing close
28 relationships with prisoners that he considered his “brothers.” (Id. at 350.) He recounted his
institutional history which brought him to ADOC in April 1988, where he first met and
bonded with Robert Vickers. Again expressing self-respect, and not symptoms of distress,
he provided a detailed history of the three units in which he has been housed by ADOC
(CB6, SMU I, and SMU II).

1 As noted above, Robert Vickers was considered the most dangerous prisoner at
2 ADOC who, in conjunction with Mr. Comer, posed a very serious security problem at the
3 prison. Mr. Comer acknowledged that he and Mr. Vickers were locked down three weeks
4 before they were moved from CB6 to SMU I, because “from day one that I got [to CB 6 in
5 April 1988], we were nothing but a problem together.” (R.T. 3/28/02 at 677.) Somewhat
6 boastfully, Mr. Comer explained how he and Vickers, for recreation, “used to spend our time
7 trying to circumvent security all these years.” (Id. at 675.) He continued explaining that as
8 an inmate “you don’t have to have [self-]control” because “[t]here are no rules for convicts in
9 [prison]. None at all. There’s no rules for inmates.” (Id. at 420.) He related how he and
10 Vickers cut through the chain link so that they “could go wherever the hell [they] wanted to
11 go [in CB 6]. And that’s what we were doing;” they “made shanks [at CB6] that were like . . .
12 ice picks, go right through [corrections officers’] vests;” and they went after a “black guy”
13 who killed a white Aryan Brotherhood prisoner and “almost got the guy” before they were
14 caught. (Id. at 678.) He did not avoid testifying about the violence or indicate an inability to
15 recall events relating to it.

16 The violence and his willing participation in it persisted during his incarceration at
17 SMU II, and again he discussed it without any manifestation of anxiety or stress. Further, he
18 did not blame ADOC for the disciplinary actions they took in response to his behavior and in
19 particular placing him in a segregated housing unit. He testified, “I built that cell that
20 [Deputy Warden] Marshall put together for me. He just paid for it.” (Id. at 679.) When
21 queried by the Court whether his will to live and his healthy state of mind had been
22 overborne by the violence and cruelty he had witnessed and participated in while
23 incarcerated he responded: “Ma’am, I’ve spent 15 years in an isolation cell. Already. And
24 look at me. What is wrong with me that I’m hiding--what am I hiding?” (Id. at 712.) He
25 readily admitted that Folsom “was bad;” Soledad “was bad;” and SMU “was bad. Different
26 degrees of badness.” (Id. at 712- 13.) He concluded by explaining that he happened to be
27 one of the prisoners who survived and he did so by “disconnect[ing]” from the violence, and
28

1 associated with it.⁶⁰

2 As with PTSD, it is Dr. Kupers's opinion that there is significant overlap between
3 depression and SHU syndrome. In fact he testified that "the depression develops as the end
4 stage of the SHU syndrome. So here we have three conditions, all of which lead to
5 depression." (R.T. 3/26/02 at 93-94.) Hence, once again, because this Court found that Mr.
6 Comer does not have depression, the analysis of SHU syndrome could conclude here.
7 Evaluation of the syndrome, however, and in particular whether any of the symptoms are
8 apparent in Mr. Comer's behavior, is worthwhile because the Court finds that he does not
9 presently experience the symptoms of SHU syndrome.

10 It is undisputed that Mr. Comer spent a considerable amount of time in segregated
11 housing units while incarcerated in the California Department of Corrections, in the
12 Maricopa County jail, and in ADOC's SMU I and II. According to Dr. Kupers, the structure
13 of these facilities generally cause "significant psychiatric symptoms [to] develop." (Id. at
14 65.) The reason is that these units "pretty substantially cut them off from social contact
15 with other prisoners, who are their peers, make them just about totally idle. They're in the
16 cell with very few things to do, very few activities." (Id.)

17 Although the theory of the psychiatric disorder was recognized by the Supreme Court
18 in 1890, in the latter part of the Nineteenth Century Dr. Stuart Grassian "really invented the
19 concept of SHU syndrome." (Id. at 67.) What has been learned from studies of the
20 syndrome is that, according to Dr. Kupers, "[i]solated confinement causes severe symptoms
21 in just about everyone." (Id.) The symptoms observed from this type of confinement are, in
22 Dr. Kupers's opinion that the person "start[s] becoming disinterested in the outside world;
23 they start to become numb, to some extent." (Id. at 77.) The list of the most common
24 symptoms are the ones identified by Grassian, though Dr. Kupers does not believe that

25
26 ⁶⁰ The Court has no doubt from Dr. Kupers's experience and knowledge of SHU
27 syndrome, as well as his educational background, that he is qualified to offer an opinion
28 concerning whether Mr. Comer is afflicted with the symptoms of this disorder or concept.

1 someone with SHU syndrome must experience any of the Grassian symptoms and can
2 experience others. (Id. at 79.) This opinion has hazy contours, however, because an
3 alternative list of symptoms was not provided by him. Further, the Court assumed that the
4 other symptoms were *observed* by Dr. Kupers in some prisoners, in some institutions, and
5 under varying circumstances, but this assumption undermines Dr. Kupers's opinion.

6 Applying the list of Grassian symptoms to Mr. Comer, Dr. Kupers found that he has
7 SHU syndrome. The first is "massive free-floating anxiety," which Dr. Kupers found Mr.
8 Comer suffered at Folsom and SMU I. (Id. at 78.) Mr. Comer informed Dr. Kupers,
9 however, that he stopped experiencing such anxiety about "halfway through his tenure in
10 SMU I." (Id.) It is Dr. Kupers's opinion, which he admits is unsupported by Mr. Comer, that
11 the anxiety terminated because Mr. Comer "started distancing himself." Then this allegedly
12 caused his "compulsions [to] become more intense." (Id. at 78.)

13 The second common symptom is "hyperresponsiveness," which Dr. Kupers found
14 Mr. Comer experienced in SMU I because of midnight cell searches. (Id. at 80.) Dr.
15 Kupers does admit that Mr. Comer told him the searches ceased. (Id.) Another symptom is
16 "perceptual distortions and hallucinations and multiple fears in multiple spheres." (Id.) The
17 one incident Dr. Kupers believes demonstrates this symptom is that while in custody at
18 Folsom, Mr. Comer thought he heard "the voice of a rat who was in his cell." (Id.) In the
19 opinion of Dr. Kupers, this symptom still exists because during the interview Mr. Comer
20 unexpectedly heard music and responded with a strange look on his face. Dr. Kupers
21 interpreted this as Mr. Comer "questioning his own perception of reality." (Id. at 81.) The
22 next symptom is "derealization" experiences purportedly evidenced by Mr. Comer's
23 December 20, 2001 declaration. (Id.) Another symptom is difficulty with concentration
24 and memory, and Dr. Kupers found that Mr. Comer has intermittent difficulty concentrating
25 and that he has significant memory lapses. (Id. at 81-82.) His support for this observation is
26 that Mr. Comer does not remember meeting habeas counsel, nor various disciplinary
27 sanctions imposed on him. (Id. at 84.) Acute confusional states is also a symptom that Dr.

1 Kupers testified that Mr. Comer has, but “not so much in recent years.” (Id. at 85-86.) Dr.
2 Kupers opined that “all through [Mr. Comer’s] record” and interview were indications of the
3 emergence of primitive “ego-dystonic” aggressive fantasies, which are rage reactions and
4 discomfort with one’s perception of oneself. (Id. at 87.) Ideas of reference and persecutory
5 ideation, *i.e.*, paranoia, is also something Dr. Kupers believes Mr. Comer has had “on and off
6 throughout his experience in prison.” (Id.) In Dr. Kupers’s view, Mr. Comer experiences
7 “motor excitement, often associated with sudden, violent destructive or self-mutilatory
8 outbursts” evidenced by banging his fist on the wall and walking in his cell. (Id.) Finally, Dr.
9 Kupers stated it was his personal observation that compulsive activities occur with chronic
10 SHU syndrome and Mr. Comer’s walking, shank-making, and depression are examples of
11 Mr. Comer’s compulsions. (Id. at 88-92.) He concludes his diagnosis of SHU syndrome
12 with the assessment that “[Mr. Comer] has his own idiosyncratic ways of coping, which
13 accentuates certain symptoms.” (Id. at 92.)

14 The Court finds it undisputed that Mr. Comer was subjected to some physical
15 brutality and abuse while incarcerated that no human being should be made to endure for any
16 length of time. The Court has no difficulty concluding that this abuse would shock even a
17 person with hardened sensibilities; and that even a cold-eyed critic of any disapproval of
18 prison administration would agree that these forms of corporal punishment run afoul of the
19 Eighth Amendment. See Atkins v. Virginia, 122 S.Ct. 2242, 2245 (2002)(holding “[t]he
20 Eighth Amendment succinctly prohibits ‘excessive’ sanctions. It provides: ‘Excessive bail
21 shall not be required, nor excessive fines imposed, nor cruel and unusual punishments
22 inflicted.’”); Trop v. Dulles, 356 U.S. 86, 100 (1958)(holding that “[t]he basic concept
23 underlying the Eighth Amendment is nothing less than the dignity of man”); Farmer v.
24 Brennan, 511 U.S. 825, 834 (1994)(holding that the gratuitous infliction of wanton and
25 unnecessary pain is a violation of the Eighth Amendment). The question before the Court
26 however, is whether Mr. Comer presently suffers any mental illness, including SHU
27 syndrome, because of or related to the abuse.

1 Dr. Johnson and Mr. Comer refute Dr. Kupers's opinions and findings concerning the
2 SHU syndrome and whether Mr. Comer is afflicted with it. The Court finds Dr. Johnson's
3 opinion reliable and supported by the credible evidence.

4 Dr. Johnson regularly works with patients who are in segregated housing units, and in
5 her experience, prisoners confined in these units do not develop mental illnesses. (Id. at
6 805.) She discussed at length with Mr. Comer the deplorable experiences he endured, and it
7 was her judgment that today he is not rendered mentally ill because of them. In fact she
8 believes that "his mental health actually provided him some protection or ability to adapt to
9 some of those experiences." (Id. at 811.) She added,

10 [i]n some individuals . . . who are unable to process that trauma, it would make
11 it more difficult in the future to endure, and that would be where you would
get the symptoms of post-traumatic stress.

12 In some individuals, which is how I see Mr. Comer having had that experience,
13 in future experiences he was better prepared physically and psychologically to
14 meet that. It wasn't a surprise as to him what was going to happen; he
15 anticipated it. So he actually might have been able to handle the second or
third one better than he handled some of the earlier ones, but handled them
better down the road because of his experience and successful emotional
handling of the prior episodes.

16 (Id. at 855.) Further, Dr. Johnson did not believe that Mr. Comer's shank-making was a
17 compulsion because "[t]hat would be a very unusual compulsion . . . it would be a very
18 atypical compulsion if it was." (Id. at 812.) Further, in her discussions with Mr. Comer she
19 learned that over time he refined his talent for making shanks, which became very useful to
20 him in prison. She added that "it's been a very deliberate, controlled activity that's been
21 done for specific purposes at various times more or less throughout his prison existence"
22 and that she "never found any evidence in talking with him or looking at his history that it
23 was a behavior he couldn't stop." (Id. at 813.)

24 Mr. Comer's testimony corroborates Dr. Johnson's opinions. Further, the Court
25 finds that Mr. Comer has a very good memory and ability to concentrate. His explanation
26 for his failure to remember visits by habeas counsel and disciplinary sanctions is logical.
27 He testified that he remembers only "what [he] wants to remember." (R.T. 3/27/02 at
28

1 411-12.) It is beyond peradventure that people generally remember what is important to
2 them. Visits by habeas counsel and the imposition of discipline was immaterial to Mr.
3 Comer, but his relationship with his prison brothers, particularly Mr. Vickers, or Amy
4 Young, were and are matters of significance to him. Moreover, Mr. Comer demonstrated
5 that he has a snap tight memory for a variety of matters. For example, he recognized a
6 doctor in the audience at the competency hearing, who he had not seen in fourteen years.
7 (Id. at 351.) He also remembered details of his first meeting with Mr. Vickers which
8 occurred in April 1988. (Id.) He remembered which CDC prisons Dr. Haney and Dr.
9 Kupers visited. (Id. at 338.) Additionally, he often corrected special counsel when she
10 made mistakes concerning various factual matters. (Id. at 376, 392.) He made a number of
11 factual corrections to Dr. Kupers's report. (Id.) He also frequently works crossword
12 puzzles. (Id. at 424.) He understood almost all of the questions asked of him at the hearing,
13 and gave appropriate and insightful responses to them.

14 Mr. Comer also explained that he has made shanks for his protection and to engage in
15 aggressive action in prison when it suited him. He told the Court "you've gotta understand if
16 something hurts you in [prison] and you're totally free to go to any extent of violence that
17 you wish to, and nobody can stop that . . ." and that there is no one "to watch his back" in
18 prison and there are "no rules for convicts." (Id. at 713; 344, 420.) He expounded, "making
19 shanks, I need one, I make one. The last one I made was on the anniversary of Bonzai's
20 execution, and you remember I used to call it murder. Bonzai was executed . . . I felt I had to
21 avenge it." (Id. at 430.) He added it was his choice "I didn't--I didn't hear any--any DOC
22 officer come in there and tell me to make any shank. That was me. I made it myself. That
23 was my choice. I made the same choice not to make any more."⁶¹ (R.T. 3/27/02 at 441.)

25 ⁶¹ Dr. Kupers readily admitted that when Mr. Comer arrived at Folsom there
26 were six stabbings, and that Mr. Comer "began to make shanks in self-defense," and that his
27 shank-making skill could have been due in part to his past, as an enforcer for the Aryan
28 Brotherhood. (Id. at 137, 141.) Dr. Kupers conceded that whether Mr. Comer any longer

1 Mr. Comer addressed Dr. Kupers's supposition that his walking was also a compulsion. He
2 explained that he walks for exercise to stay healthy, and that it is an adaptive mechanism for
3 thinking and meditating. (R.T. 3/27/02 at 405, 431-33.) Mr. Comer's explanation for his
4 reaction to the music he heard during his interview with Dr. Kupers was sensible. (R.T.
5 3/26/02 at 81; R.T. 3/27/02 at 424.) Mr. Comer's concern regarding midnight cell
6 searches was normal. (Id. at 451; n. 59.) His testimony, and that of those who know him
7 well, does not reflect that he suffers paranoia or is uncomfortable with his perception of
8 himself. Rather, he has a strong sense of self.

9 The Court also finds that Mr. Comer is not inactive or "dead in his cell." He takes
10 three showers a week; has three recreational periods a week for one and one-half hours; he
11 listens to tapes from Amy; writes to her everyday; reads the mail she sends to him almost
12 everyday; he receives regular visitation from Amy and his lawyers; visits with the officers he
13 cares about, including Deputy Warden Marshall and Sergeant Hackney; makes a five-minute
14 phone call each week; enjoys reading a book every two weeks; works crossword puzzles;
15 reads the newspaper; has had contact with his father; had contacts with Robert Vickers; cares
16 about people, including Amy, his daughter and granddaughter; and he has hopes and dreams
17 for his daughter and granddaughter. (Id. at 387, 369, 370, 424, 437, 419-20, 444-45, 692-
18 93, 704.) His close relationship with Amy Young is reflected on the video of his testimony
19 by his repeated smiles and glances to his left where she was seated in the audience
20 throughout the hearing.

21 Finally, Mr. Comer has a realistic and mentally healthy attitude about his conditions
22 of confinement. He testified that he does not,

23 believe [he has] a life that will make me jump up and down and clap my hands
24 and go to a party or nothing. Within the limits that I have, I try to live it fully.
That's like with Amy. We just do with--with what we got, what we can.

25 (Id. at 442-43.) Mr. Comer described his conditions at SMU II as heaven compared to

26 _____
27 needed a shank was in dispute. (Id. at 137.)

1 Folsom, which was hell, and the staff at SMU II as humane. (Id. at 670.) He did not
2 unrealistically paint a “rosy picture of SMU II,” but compared to other units “it’s better”
3 because it is “less dangerous,” “less assaultive,” “cleaner” and “smells” better. (Id. at
4 506-507.) Mr. Comer observed that by the time ADOC officers “stripped [him] out” of the
5 Rec Pen in 1999, there was not a bruise on him, whereas the guards at Folsom beat inmates
6 because, he surmised, they thought the more they beat inmates the better persons they would
7 become. (Id. at 673-74.) Mr. Comer’s cell is also much larger and cleaner now than the
8 ones at Folsom and the Lexan on the cell fronts keep the prisoners from “getting stuck” with
9 a shank or darted. (Id. at 675.) The temperature in the cell is comfortable. (Id. at 677.) All
10 of these features are important to Mr. Comer on a day-to-day basis. (Id.)

11 Significantly, Mr. Comer has adapted well to the conditions in SMU II. Persuasively,
12 he described his present conditions and his capacity to adjust to them. He testified:

13 It is harsh. But it ain’t gonna kill you, ain’t gonna drive you nuts . . . We
14 got a few guys went nuts back there. That’s ‘cause they let it get to them. They need -
15 - you need to recognize it when it’s getting to be a problem and find yourself another
16 outlet. Just add one more thing will keep a guy going. But that, you do that on the
17 street. . . . You get depressed on the street, don’t you go do something? Don’t you
18 find--find something else to cure that? It’s the same thing here. You get sad, get off
19 your damn bunk. Instead, everybody wants to sit on their bunk. “Cause that’s all I can
20 do.” It’s not all you can do. You can get your butt off the bunk, walk around. Think. If
21 you--all you can think about’s your . . . old life, think about it. If something will
22 center you--center you, focus you, and then you’ll make it through the next day. And
23 the next day, whatever sadness you had the day before, it will start abating. It just
24 start[s] lessening on you. That’s all you gotta do. One day at a time.

19 (R.T. 3/27/02 at 480-81.)

20 Undeniably, some people do not have the mental health and the adaptive skills to
21 tolerate segregated housing and will immediately, or inevitably develop psychiatric illnesses
22 when housed in these units. Mr. Comer, however, has developed the means to cope with the
23 conditions, and he exercises the initiative to ensure that he maintains his mental health while
24 housed in them. According to Dr. Johnson, Mr. Comer is successful and functional in
25 prison because he lives “it to the fullest of his capacity in the environment that he is in;” by
26 learning to “value smaller increments of things” and to “gain pleasure on a day-to-day basis
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1 with the little things in his existence.” (R.T. 3/28/02 at 792-93, 814.) He concurred,
2 volunteering “[w]ithin the limits that I have, I try to live it fully.” (Id. 442-43.)

3 Recently, his segregated conditions have improved, allowing him a walkman and a
4 television set, and he and the other inmates in the unit now have more meal selections. (R.T.
5 3/27/02 443-45.) The enhanced stimulation, however, has not changed Mr. Comer’s
6 emotional status, or improved his already healthy mental status. Also, of significant note,
7 the changes certainly have not altered his decision to waive his appeals and proceed to
8 execution.⁶²

9 Mr. Comer is not afflicted with the SHU syndrome.

11 ⁶² On April 6, 2002, the Court, accompanied by counsel for all the parties,
12 toured the cells in which Mr. Comer has been held during his confinement by ADOC. As
13 expected, the wet and dry cells in SMU I and II were very uncomfortable because they are
14 very small. We also toured his former cells in SMU I and CB6. While inside these cells
15 without Lexan doors, the Court found they were not more uncomfortable than Mr. Comer’s
16 present cell at SMU II with Lexan doors. We toured the recreation area now used by Mr.
17 Comer from which one can see the sky. We saw Mr. Comer in his cell at about 9:30 a.m.,
18 and the Court spoke to him from outside of his cell. He was aware that we were coming to
19 visit, but did not know when it would occur. He appeared alert and slightly out of breath
20 when we arrived because he had been working out in his cell. The Court was able to speak
21 to him and he was able to respond without raising the tone of his voice because he spoke
22 directly through the slight opening where the cell door meets the wall. After the Court’s
23 conversation with him he carried on an animated conversation with one of his habeas
24 counsel. He was removed from his cell to allow us to enter and inspect it, and the Court
25 noticed that he appeared healthy and in good spirits. Inside of his cell, with the door
26 closed, light could be seen through the Lexan door. The light and temperature in the room
27 were adequate. His bed was comfortable enough, and he had a TV and walkman on the side
28 of his bed. The cell also had a mirror, and his box of personal papers was kept under his
bed. Obviously the Court’s limited experience in Mr. Comer’s cell does not approximate
the life he lives everyday. However, the Court found that his cell was not intolerable. His
cell is not the place a non-imprisoned person would voluntarily choose as a home. Having
personally observed and inspected it, however, the Court finds that it is a false premise to
assume that every person who lives in Mr. Comer’s cell must at some time develop
psychiatric illnesses. This visit confirmed the evidence establishing that Mr. Comer has
lived in, and survived, his conditions of confinement, including segregated housing, while in
ADOC custody for the past 14 years without a current psychiatric illness.

1 Finally, it is the opinion of Dr. Johnson that Mr. Comer is not currently suffering a
2 “diagnosable mental illness”; that historically he has never met the criteria for a mental
3 disease or defect except perhaps antisocial personality disorder; but that his behavior as a
4 juvenile does not support a conclusive finding for even this disorder. (Id. at 808.) She
5 comprehensively detailed the nature of her mental status examination followed by her
6 psychiatric assessment noting that “from a cognitive aspect . . . he’s oriented, meaning he
7 understands where he is;” “his attention to self-care . . . is excellent;” “[t]here is no problem
8 with his motor activity;” “[h]is conversation is coherent;” “he is not and has not for years had
9 any hallucinatory experiences or perceptual disturbances;” “his thought processes are
10 intact;” he has “a full range of [mood] affect;” he was “[v]ery cooperative;” she “never saw
11 him dissociate through any of the 50-plus hours of interviewing that [she] had;” his “general
12 knowledge was good” and his “[c]oncentration was excellent;” and, he “doesn’t have any
13 significant memory problems.” She concludes that she “feel[s] very firmly, and over time
14 has seen it bear out, that his thought process is not being impacted by **any** mental disease,
15 disorder, or defect at this time.” (Id. 815-20)(emphasis added.)

16 Because of her extensive relevant experience, thorough and lengthy evaluation of Mr.
17 Comer, and because of the reliable and consistent validation methods employed by her to
18 reach her opinions, the Court concurs with her judgment and conclusion. The Court finds
19 that Mr. Comer does not suffer any mental disease or defect at this time.

20 **4. Legal Position and Options Available and Rational Choices**

21 The Court has found that Mr. Comer does not have a mental disease or defect, which
22 according to the first part of the three-part analysis in Rumbaugh for determination of
23 competency obviates parts two and three. Evaluation of the second and third parts, however,
24 is valuable because it ensures that the reasons for Mr. Comer’s important decision was
25 thoughtfully considered by him and is rational.

26 First, Mr. Comer testified plainly and logically that he understands that the merits of
27 his habeas appeal are legally strong because they were explained to him by both special and
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1 habeas counsel, and he is aware that the Ninth Circuit expressed concerns about his
2 conviction and sentence. Further, Dr. Johnson repeatedly reminded him of the option to
3 change his mind, as did both habeas and special counsel. (Id. at 700-708.) The Court also
4 inquired of him concerning the same subject in the following colloquy:

5 Q. You've heard and we've talked a lot about what could happen if
6 your habeas is considered by the appellate courts. And I think you have said
7 that you believe, from everything that you've been told and everything that
8 you've read, that you have a good -- good prospects for a new sentencing.
9 Right?

10 A. Yes, ma'am.

11 Q. Okay. And certainly --

12 A. They did their work.

13 Q. So that would mean -- if you got a new -- another sentencing, do
14 you understand, then, that you may not get the death penalty?

15 A. Yes, ma'am.

16 Q. And that there's a good chance of that, at least the way it's been
17 presented.

18 A. Yes.

19 Q. You gotta think about that. And you may even get a new trial.

20 A. Yes.

21 Q. And you understand, then, that the standard for the government will
22 be the same-

23 A. Yes.

24 Q. -- proof beyond a reasonable doubt. You understand that?

25 A. Yes, ma'am.

26 Q. It would be their obligation, not yours--

27 A. Yes.

28 Q. -- to prove that you committed the crimes, right?

A. Yes, ma'am.

Q. Do you understand you could be found not guilty?

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A. Yes, ma'am.

Q. And I presume that you don't believe that that's really much of a possibility, am I right?

A. No, ma'am.

Q. And why?

A. I did it.

Q. Well, but the government has to prove it. They can't -- you don't have to testify.

A. Doesn't matter. I stuck a gun in the guy's ear, pulled the trigger.

Q. You understand that if the government were to try this case 13 years later or by the time this decision is made, habeas decision is made, and if it was made in your favor, that there would be an enormous amount of delay in the proceedings before they tried you?

A. It could be, yes, ma'am.

Q. And you understand that memories fade over that long period of time and the government-

A. Yes, ma'am.

Q. -- it's often much harder for the government to prove their case--

A. Yes, ma'am.

Q. -- the second time? And that evidence could be destroyed and witnesses could disappear or could die?

A. Yes.

Q. And those witnesses who were vital in your trial--And you remember your trial.

A. Yes.

Q. -- may not be around.

A. That's quite possible.

Q. With all of that, then, with that possibility, you could -- you could have a not guilty verdict in your favor and you'd be out on the street, right?

A. No.

Q. Why not?

1 A. I'll never be on the street. I got 300 years, 300 some odd years on
2 top of that. On top of that, with my values now, wouldn't -- I wouldn't put all
3 the people through another trial. I'd just go up there, plead guilty. There's no
4 sense to it. That's what I mean. I've already been lawfully convicted.
5 Everything's like little procedural errors. It doesn't come down to whether I
6 did it or not. What, K.C. Skull called me a monster-

7 Q. Let me see if I understand. You're saying a lot of different things
8 now. It seems to me that what you're saying is that the possibility's not very
9 strong that you could be found not guilty?

10 A. No, no, I figure I'd probably have just as good a chance then as I did
11 the first time around. Maybe even a little bit better.

12 (R.T. 3/28/02 at 727-30.) Mr. Comer's testimony makes clear that he is aware that he may
13 have a good chance for reversal of the death sentence and perhaps even the conviction, but
14 he concludes this possibility is no consolation because he will still be facing 300 years of
15 incarceration, and his values have changed. (R.T. 3/28/02 at 724-31.) It is also apparent
16 from his testimony that Mr. Comer is fully cognizant of his legal options including that he
17 can change his mind but that if he drops his appeal, he may not be allowed to later reinstate
18 it. (Id. at 703-04.)

19 In the beginning the Court was naturally perplexed with and skeptical of Mr. Comer's
20 decision to end his appeal and accept execution. Dr. Johnson also grappled with it because
21 as she explained, it is "an odd thing to assess, not to assess so much as to explain." (R.T.
22 3/28/02 at 821.) Despite the Court's original hesitation to accept as rational Mr. Comer's
23 chosen course, it is now clear to the Court that his decision is a rational one.

24 Mr. Comer has consistently given everyone who inquired of him, though sometimes
25 using immoderate terminology, the same reason for his decision. Although not immediately
26 apparent, his decision is a consequence of an evolution in his thinking over a period of years
27 which thought process was greatly influenced by his friend, Amy Young. Dr. Johnson
28 emphatically described Amy and her effect on Mr. Comer as: she is "not a criminal. She's
very, you know, mainstream in society, and she has shared her values and he's incorporated
many of those and the kind of values of other people in society." (Id. at 798.)

Throughout his testimony including the colloquy with the Court, Mr. Comer

1 consistently gave the same reason for his decision. He explained that it was a developing
2 process and that Amy introduced him to another way of life. He testified, “I started thinking
3 about my victims, thinking about everything. It’s just time to end it now. And, you know, I
4 never expected we’d have to do this here.” (R.T. 3/27/02 at 727.) With the passage of time
5 he also came to conclude that he should be punished for his crime and emphasized “I’ve been
6 saying for a year--for, you know, the last couple of years, at least, I killed this guy. I’m
7 sentenced to death” and he is now prepared to accept the punishment. (Id. at 731.) The
8 Court questioned Mr. Comer about whether he could reconcile his statement in a letter to
9 habeas counsel that “We gave up the right to kill when we became human beings,” Tr. Ex. 25,
10 with his decision to seek his own execution by the government. He explained that though he
11 does not believe in the death penalty, it is the punishment assessed by society, and he now
12 accepts that assessment.

13 Perhaps more elegantly, Dr. Johnson confirmed that Mr. Comer’s decision was a
14 mature one that has come from introspection. She testified that he regrets what he did; he
15 realizes that he has hurt many people in his life; and he’s made the decision that the
16 punishment awarded for the crime is just and he’s ready to participate in it. She stated that
17 “from the time I began seeing him, to seeing him again [the day before he testified] he has
18 grown and evolved tremendously.” (R.T. 3/28/02 at 798.) Concomitantly, though he
19 expressed the same reason for his choice at her first meeting with him, he had

20 gone on and begun to deal even more with his eventual demise. He’s thought
21 it through. He’d sought out more information. He talked to Amy. He realized
22 before he died he wanted to touch base with significant family members. He’d
 begun the process. He was thinking about all the loose ends that he wanted to
 tie up.

23 (Id.)⁶³ Importantly, she remarked that the “remorse, and the feeling of justice, were there
24 from the day [I] started talking to him about this. But they have become, I think, clearly, the

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26 ⁶³ He purposefully took the time to learn about death by lethal injection, and he
27 made funeral plans. (R.T. 3/27/02 at 459-65.) Dr. Johnson discussed these matters with
28 him as recently as the day before he testified. (Id. at 574-75, 666; R.T. 3/28/02 at 822.)

1 predominant reasons,” which are “more prosocial . . . he’s able to place himself in the larger
2 group, both within his environment and within society, and make some decisions.” (*Id.*) She
3 concluded that he wants “to die a common, peaceful death . . . [and now] he doesn’t want to
4 go out in a blaze of glory or hurting anyone.” (*Id.* at 825.) Significantly, she stated that he
5 repeatedly empathized that this is *his* choice and “what’s most important [to him] is that he
6 has the opportunity to choose.” (*Id.* at 822.)

7 The Court finds that Mr. Comer fully understood at the time he made his decision,
8 and he understands now, the legal options and consequences of his decision. Further, the
9 Court finds that his decision to waive his habeas appeal and accept execution is credible and
10 rational in accordance with the law.

11 **IV. Voluntariness**

12 The Ninth Circuit also directed this Court to determine “the separate question of
13 whether [Mr. Comer’s] purported decision to waive further legal review is voluntary if [this
14 Court] finds him competent. Mr. Comer’s habeas counsel assert that their client’s
15 conditions of confinement have extinguished his desire or will to live, thus rendering his
16 apparent decision to withdraw this appeal involuntary.” *Comer*, 215 F.3d at 917. The Ninth
17 Circuit noted that:

18 The Supreme Court has held that a waiver of a petitioner’s “right to proceed”
19 is not valid unless, among other factors, it is “knowing, intelligent, *and*
20 *voluntary.*” *Whitmore v. Arkansas*, 495 U.S. 149, 165, 110 S.Ct. 1717, 109
21 L.Ed.2d 135 (1990)(emphasis added). “A waiver is voluntary if, under the
22 totality of the circumstances, [it] was the product of a free and deliberate
23 choice rather than coercion or improper inducement.” *United States v. Doe*,
24 155 F.3d 1070, 1074 (9th Cir. 1998). Put differently, a decision is
25 involuntary if it stems from coercion—either mental or physical. *See, e.g.,*
26 *Brady v. United States*, 397 U.S. 742, 754, 90 S.Ct. 1463, 25 L.Ed.2d 747
27 (1970). Indeed, courts have recognized that a decision to waive the right to
28 pursue legal remedies is involuntary if it results from duress, including
conditions of confinement. *See, e.g., Smith v. Armontrout*, 812 F.2d 1050,
1058-59 (8th Cir. 1987)(reviewing for error the district court’s
determination on whether petitioner’s particular conditions of confinement
rendered his decision to waive appeals involuntary), *cert. denied*, 483 U.S.
1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Groseclose ex rel. Harries v.*
Dutton, 594 F.Supp. 949, 961 (M.D. Tenn.1984)(“In the judgment of this
Court, the conditions of confinement inflicted on Mr. Harries are so adverse
that they have caused him to waive his post-conviction remedies

1 involuntarily.”). Mr. Comer describes the conditions of his confinement in
2 nothing short of Orwellian terms. He tells us that he is in “sensory
3 deprivation,” has no access to legal materials, is permitted nothing in his cell,
4 and must walk continuously for fear of becoming a “veggie.” Mr. Comer’s
5 choice between execution at the State’s hands and remaining in the particular
6 conditions of his confinement may be the type of “Hobson’s choice” that
7 renders his supposed decision to withdraw his appeal involuntary. Cf. Gilbert
8 v. Lockhart, 930 F.2d 1356, 1360 (8th Cir. 1991)(recognizing that providing
9 defendant with “Hobson’s choice” between incompetent lawyer or no lawyer
10 violates right to counsel). The record is incomplete as it bears on Mr.
11 Comer’s prison conditions and the effect they are having on his purported
12 decision to abandon his desire to live. Faced with this record, we cannot
13 determine the voluntariness of Mr. Comer’s decision and we must, of course,
14 remand to the district court for a decision on this critical issue. The issue is
15 whether Mr. Comer’s conditions of confinement constitute punishment so
16 harsh that he has been forced to abandon a natural desire to live.

17 Id. at 917-18. It further directed this Court “to make an individualized determination as to
18 whether Mr. Comer’s particular conditions of confinement have rendered his decision to
19 withdraw this appeal involuntary[,]” rather than to assess whether the conditions on Arizona’s
20 death row violate the Eighth Amendment in general. Id. at 918.

21 As noted by the Ninth Circuit, the voluntariness of a waiver of legal review is
22 necessary. In the context of the waiver of the right to counsel or to stand trial, a waiver is
23 voluntary if the defendant is fully aware of the direct consequences, including the actual
24 value of any commitments made to him by the court, prosecutor, or his own counsel, and he
25 was not induced by threats or promises to discontinue improper harassment,
26 misrepresentation, or improper inducements. See Johnson v. Zerbst, 304 U.S. 458, 468
27 (1938); Brady v. United States 397 U.S. 742, 755 (1970); Parke v. Raley, 506 U.S. 20, 28-
28 29 (1992)(guilty plea); Faretta v. California, 422 U.S. 422 U.S. 806, 835 (1975)(waiver of
counsel).

29 Courts have similarly required that waivers of legal review by condemned inmates be
30 voluntary. See Mata v. Johnson, 210 F.3d 324, 330 (5th Cir. 2000); Franklin v. Francis, 144
31 F.3d 429, 433 (6th Cir. 1999); In re Zettlemyer, 53 F.3d 24, 27 (3d Cir. 1995); Wilson v.
32 Lane, 870 F.2d 1250 (7th Cir. 1989). For example, in O’Rourke v. Endell, 153 F.3d 560,
33 567 (8th Cir. 1998), the Eighth Circuit held that without a knowing, intelligent and voluntary

1 waiver of an inmate’s right to proceed and “without the appointment of a ‘next friend’ to
2 advocate the position that the prisoner is incompetent,” a state court competency hearing is
3 not full and fair and does not comport with due process so as to be entitled to a presumption
4 of correctness on federal habeas review. The court went on to observe that:

5 The two questions--the competency to waive a right and whether the waiver
6 was knowing and voluntary--are distinct, although we have noticed in
7 reviewing the record in this case and researching the applicable law that the
8 distinction is not always made clear.

9 The focus of a competency inquiry is the defendant’s mental
10 capacity; the question is whether he has the *ability* to
11 understand the proceedings. The purpose of the “knowing and
12 voluntary” inquiry, by contrast, is to determine whether the
13 defendant actually *does* understand the significance and
14 consequences of a particular decision and whether the decision
15 is uncoerced.

16 Id. at 567-68 (quoting Godinez v. Moran, 509 U.S. 389, 401 n. 12 (1993)(citation
17 omitted)). The Eighth Circuit agreed that the record of the state court evidentiary hearing
18 failed to demonstrate that the inmate had appreciated the consequences of his waiver of state
19 appeals where no one represented the position that the inmate was incompetent and/or that
20 his waiver was not knowing and voluntary. Id. at 568. Specifically:

21 O’Rourke’s statement that he wished to be executed falls far short of
22 demonstrating that he fully understood the consequences if he voluntarily
23 short-circuited his state postconviction challenges to his conviction and
24 sentence. The court never explained to O’Rourke the significance of his
25 decision to waive his postconviction appeal. No one questioned him as to his
26 understanding of the possible results of a successful appeal, which might have
27 included not only a lesser sentence but a new trial with a potentially different
28 outcome.

* * * *

29 Even allowing for the state circuit court’s ability to observe
30 O’Rourke’s demeanor and his apparent capacity to argue cogently about his
31 right to represent himself, this record falls short of demonstrating that
32 O’Rourke was able to “understand his position or make a rational decision
33 concerning” his waiver. Anderson v. White, 32 F.3d 320, 321-22 (8th Cir.
34 1994). Instead, the record as a whole demonstrates that it cannot be said with
35 any satisfactory degree of confidence that O’Rourke’s waiver of his Rule 37
36 appeal was knowing and voluntary.

37 Id. at 568-69. The Eighth Circuit went on to reverse the district court’s determination that

1 O'Rourke had nevertheless not been prejudiced.⁶⁴ See id. at 570.

2 While numerous cases have held that a waiver of legal review by a condemned inmate
3 must be voluntary, few cases have addressed whether a condemned inmate's conditions of
4 confinement have rendered the inmate's decision to waive legal review involuntary. Those
5 cases are discussed next.

6
7 A. Groseclose v. Dutton

8 The question whether a condemned inmate's waiver of state and federal review has
9 been rendered involuntary by his conditions of confinement appears to have first been
10 addressed in Groseclose v. Dutton, 594 F. Supp. 949, 951 (W.D. Tenn. 1984). In
11 Groseclose, third-party petitioners filed a next-friend habeas corpus petition on behalf of a
12 condemned inmate, Ronald Harries, who had waived state post-conviction review and
13 declined to sign the federal habeas petition. See id. The district court stayed Harries's
14 execution pending an evidentiary hearing to determine whether the administration of drugs
15 to Harries by respondents had interfered with his ability to appreciate the gravity of his
16 decision to waive post-conviction review so as to establish standing of the petitioners. See
17 id.

18 Harries subsequently clarified that while he had intelligently decided to waive further
19 judicial review, he had done so as a result of his conditions of confinement. See id. The
20 district court granted Harries leave to proceed as a party plaintiff to assert he involuntarily
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23 ⁶⁴ The district court determined that the state court hearing was not entitled to a
24 presumption of correctness and concluded that O'Rourke had been incompetent at the time
25 of the waiver for purposes of assessing whether O'Rourke's waiver constituted cause to
26 excuse procedural default of claims as a consequence of his waiver. The Eighth Circuit
27 reversed the district court finding that even if O'Rourke was incompetent at the time of
28 waiver and his incompetence constituted cause, he had failed to establish prejudice, and
therefore, was not entitled to federal habeas relief. See id.

1 waived post-conviction review due to allegedly inhumane prison conditions.⁶⁵ See id. The
2 court also permitted the presentation of evidence regarding the conditions of confinement
3 on Tennessee’s death row for the purpose of determining whether those conditions rendered
4 Harries’s waiver involuntary. See id. The district court determined that the petitioners bore
5 the burden of proving next-friend standing for purposes of establishing the jurisdiction of
6 the court. See id. at 952, 953.

7 At the evidentiary hearing, the petitioners argued the court had jurisdiction because
8 Harries suffered from a mental disease and because his conditions of confinement made his
9 waiver of post-conviction remedies involuntary. See id. at 952. The court found that a
10 preponderance of the evidence supported that Harries suffered from a serious mental
11 disease, disorder or defect (bipolar disorder). It also found that Harries’s conditions of
12 confinement had rendered his waiver of state (and federal) post-conviction remedies
13 involuntary. The court analogized the waiver decision to a decision to plead guilty, which
14 had to be voluntary, *i.e.*, not the product of force, threat or improper inducement, so as to
15 comport with due process. See id. at 956-57. To evaluate Harries’s conditions of
16 confinement, the court considered whether, under the totality of the circumstances,
17 Harries’s waiver was the “product of a rational intellect and unconstrained will” and not the

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19 ⁶⁵ The district court bifurcated the death row conditions issue from petitioners’
20 habeas claims and certified a class of condemned inmates regarding the death row
21 conditions allegations. See Groseclose v. Dutton, 788 F.2d 356, 358 (6th Cir. 1986). The
22 district court permitted Harries to join the death row conditions action as a plaintiff and
23 declined to consolidate the condemned inmates’ class action with an on-going class action
24 brought by Tennessee inmates regarding the conditions of confinement generally in
25 Tennessee prisons, Grubbs v. Bradley, 552 F.Supp. 1052 (M.D. Tenn. 1982). See id.;
26 see also Groseclose v. Dutton, 829 F.2d 581, 583 (6th Cir. 1987). The district court
27 subsequently found the conditions of confinement on Tennessee’s death row
28 unconstitutional. See Groseclose v. Dutton, 609 F. Supp. 1432 (M.D. Tenn. 1985). The
Sixth Circuit vacated the judgment holding that the district court erred by not consolidating
the condemned inmates’ conditions action with Grubbs and by applying the incorrect legal
standard to find the death row conditions unconstitutional. See Groseclose, 829 F.2d at
585.

1 result of “an overborn will or the product of an impaired self-determination brought on by
2 the exertion of any improper influences.” Id. at 957. The court found that the petitioners
3 had proven that Harries’s “failure to join in the next friend petition and seek post-conviction
4 relief was the result of [his] coercive conditions of his confinement,”⁶⁶ that those conditions
5 had been so adverse that they rendered his decision to waive involuntary, and that petitioners
6 had “established that the next friend petition filed on behalf of Mr. Harries [was] needed to
7 protect [Harries] due process interests [against an involuntary waiver].” Id. at 958, 961.

8 B. Smith ex rel. Smith v. Armontrout

9 In Smith ex rel. Smith v. Armontrout, 632 F.Supp. 503, 506 (W.D. Mo. 1985), the
10 district court, following an evidentiary hearing, found that condemned inmate Gerald Smith
11 was competent to decide “to abandon all further attacks on his conviction and death
12 sentence” and dismissed the action, which had been initiated by the inmate’s brother,
13 Eugene, for lack of standing.⁶⁷ In finding Smith competent, the district court also addressed
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15 ⁶⁶ The evidence of adverse conditions in Harries’s unit was uncontradicted by
16 the respondents. See id. at 958. That evidence demonstrated that cells in the unit measured
17 forty-four or thirty-five square feet (Harries had a forty-four square foot cell); death row
18 inmates were confined to their cells for twenty-three hours a day; exercise was limited to
19 forty-five minutes during clement weather in a small area without recreational equipment
20 except weights; no windows in the cells and poor ventilation which failed to vent humidity
21 (and sewage odors) from the showers to the outside and resulted in rivulets of condensation
22 running down cell walls to the floor and the growth of fungus on the walls; only one sixty
23 watt bulb for light; an average temperature of 80° to 85° Fahrenheit; no religious or
24 psychological programming; and the provision of cold meals. Id. at 959-61.

25 ⁶⁷ The district court determined that the State bore the burden of persuasion and
26 “endeavored to resolve all doubts in favor of finding Smith incompetent. Id. at 515, n.34.
27 Smith had previously filed a motion to dismiss his state post-conviction proceeding, which
28 was granted without hearing on Smith’s competency. The Missouri Supreme Court held a
hearing at which Smith was summoned to appear. At the hearing, Smith informed the judges
that he wished to abandon further appeals. The Missouri Supreme Court granted his wish
and set his execution. Smith’s brother, Eugene, filed a next-friend petition for writ of
federal habeas corpus and the district court found a legitimate issue regarding Smith’s
competency to abandon his post-conviction proceeding and stayed his execution pending

1 whether Smith’s decision was voluntary in light of his conditions of confinement on
2 Missouri’s death row. See id. at 515. The court found that it was voluntary despite
3 “considerable evidence showing that life on [Missouri’s] death row is dismal.” Id. The court
4 based its determination on Smith’s adherence to his decision to abandon his appeals even
5 after he was transferred to a unit with “much better conditions” than death row, and on the
6 opinions of two experts who concluded that it was the fact of confinement, rather than
7 Smith’s conditions of confinement, that prompted him to forego further litigation rather
8 than seek a new trial where, at best, he would be sentenced to life imprisonment.⁶⁸ Id. The
9 district court thus found that, “while the deplorable conditions on death row undoubtedly . . .
10 had some effect on Smith, they [did] not render his decision to abandon his appeals
11 involuntary.” Id.

12 The Eighth Circuit affirmed.⁶⁹ Smith v. Armontrout, 812 F.2d 1050 (8th Cir. 1987).

14 that determination. Smith decided that he wanted to pursue his state post-conviction
15 proceedings, so the district court dismissed his federal habeas action so that Smith could
16 exhaust his claims. In the meantime, Smith again announced that he wanted to abandon all
17 further attacks on his conviction and sentence. The Missouri Supreme Court again set an
18 execution date. Eugene filed a next friend petition in state court, which the Missouri
19 Supreme Court subsequently ruled was a “legal nullity” because the state court had
20 determined that Smith was competent approximately a year and half before. Eugene then
21 filed a second next-friend petition in federal court arguing his brother was not competent to
22 decide whether to abandon further litigation. The district court stayed Smith’s execution
23 and held an evidentiary hearing to assess whether Smith was then competent to abandon all
24 further attacks on his conviction and sentence. See generally, Smith, 632 F. Supp. at 505-
25 507.

22 ⁶⁸ The court endorsed the view that Smith found physical confinement
23 intolerable “under any circumstances.” Id. at 515.

24 ⁶⁹ During the pendency of the appeal, Eugene asked to be relieved of his duties
25 as next friend and the public defender was appointed in his stead. 812 F.2d at 1052 n.1. In
26 addition, by the time of its decision, Smith had again changed his mind and notified the
27 Eighth Circuit that he wanted to prosecute his habeas petition. Notwithstanding Smith’s
28 change of heart, the Eighth Circuit determined that the appeal was not moot. It noted that:

1 On appeal, the Eighth Circuit identified two questions at issue:

2 first, whether [the defendant] had the capacity to appreciate his position and
3 make a rational decision, or was suffering from a mental disease, disorder, or
4 defect that substantially affected his capacity, see Rees v. Peyton, 384 U.S. at
5 314 [86 S.C. at 1506], ... and second, *whether the conditions of his*
6 *confinement rendered his decision involuntary*. See Johnson v. Zerbst, 304
7 U.S. 458 [58 S.C. 1019, 82 LED. 1461] ... (1938).

8 Smith, 812 F.2d at 1053 (emphasis added). With respect to the voluntariness question, the
9 Eighth Circuit observed that:

10 The record, particularly the testimony of Dr. Foster, Tr. 2:124-26, supports
11 the District Court's conclusion that conditions on SMU [the unit to which
12 Smith was transferred with much better conditions than death row] were not
13 coercive. We think that the District Court was justified in concluding that,
14 even if death row's conditions were in violation of the Eighth Amendment, the
15 fact that Smith continued to adhere to his decision over the months between
16 his transfer to SMU and the District Court hearing negated any inference of
17 coercion.

18 The petitioners make much of Smith's recent letter to this Court, in
19 which he asserts that, notwithstanding his District Court testimony, the
20 conditions of his confinement did affect his decision. However, this letter
21 obviously was not before the District Court, nor is it properly part of the
22 record here; the statements in it were not made under oath, nor have they been
23 subjected to cross-examination. Moreover, we are not convinced that Smith's
24 letter alters matters; the evidence concerning the actual conditions that obtain
25 in the SMU remains unchanged, and the District Court found them not
26 coercive. We therefore affirm the District Court's conclusion that Smith's
27 decision was voluntary.

28 notwithstanding Smith's new stance, the controversy over his competency
remains live, in that, were it accepted that he is incompetent, the petitioners
would be prejudiced if they were deprived of the opportunity to vindicate
their position in this Court. Incompetence could cause Smith to prosecute
his case in a manner that would actually subvert his claims. Indeed, it is
conceivable that Smith's recent statements were a ploy through which Smith,
seeking to effectuate an incompetent decision to forego post- conviction
proceedings, hoped to ensure that this case was dismissed.

In any case, it is also our view that Smith's past inconstancy on this
question indicates that it is likely that Smith will change his mind yet again
and resume his opposition to post-conviction proceedings. Consequently, we
conclude that Smith's frequent about faces bring this case within the "capable
of repetition, yet evading review" exception to the mootness doctrine.

812 F.2d at 1056.

1 812 F.2d at 1058-59.

2 C. Wilson v. Lane

3 In Wilson v. Lane, third parties filed a federal habeas petition on behalf of Illinois
4 death row inmate Charles Walker as individuals and next friends.⁷⁰ Wilson v. Lane, 697 F.
5 Supp. 1489, 697 F. Supp. 1500 (S.D. Ill. 1988); aff'd 870 F.2d 1250 (7th Cir. 1989). The
6 district court determined the petitioners lacked individual (*jus tertii*) or citizen standing to
7 bring a habeas petition on Walker's behalf. See Wilson, 697 F. Supp. at 1492, 1494-97.

8 With respect to next-friend standing, the petitioners alleged that Walker's conditions
9 of confinement on death row had "impeded and violated [his] ability to freely and
10 voluntarily exercise his constitutional rights, including his right to pursue state post-
11 conviction and federal habeas corpus remedies." Id. (quoting next-friend petition at ¶ 11,
12 pp. 6-7). Citing the standard to determine "capacity" set forth in Rees, the district court
13 found that:

14 the sole determination is whether Walker has the capacity to make a rational
15 choice in his decision to forego further review of his sentence, [because i]f
16 his capacity is challenged, it must be, under the terms of Rees, challenged by a
17 showing that Walker suffers from a "mental disease, disorder or defect."
Following the analysis of Rees, this Court will discuss the issue in terms of
Walker's "capacity," although other courts have used the term "competency"

18 ⁷⁰ Walker pleaded guilty to two counts of murder and one count of armed
19 robbery. He asked for a jury sentencing, which he received, and was sentenced to death.
20 Wilson, 697 F.Supp. at 1491. Walker sought leave to terminate all further review
21 following the affirmance of his convictions and sentences by the Illinois Supreme Court
22 and opposed the filing of a certiorari petition in the United States Supreme Court. See id.
23 After certiorari was denied, the Illinois Supreme Court remanded the case to the trial court
24 to determine whether Walker (1) was "mentally competent to waive further legal actions;"
25 (2) had "made a knowing and intelligent waiver of any such further legal actions;" and (3)
26 was "fit to be executed." Wilson, 870 F.2d at 1252. The lower court found Walker
27 competent to waive further appeals following a hearing; however, the Illinois Supreme
28 Court directed the lower court to hold another hearing on Walker's mental condition
because court-appointed counsel at the first hearing had not opposed the state's position
that Walker was competent and fit for execution. See id. Following a second hearing, the
lower court again found Walker competent and fit for execution. See id. The Illinois
Supreme Court affirmed. See id.

1 in their reviews.

2 697 F. Supp. at 1498.

3 The district court held that Walker’s lack of capacity or competency was a requisite
4 for petitioners to establish next-friend standing. See id. It determined that to the extent that
5 the conditions of confinement/voluntariness inquiry in Smith v. Armontrout, 812 F.2d 1050
6 (8th Cir. 1987), was a part of the capacity question, it fell within the standard articulated in
7 Rees: “That is, was the defendant’s decision to abandon further review made voluntarily,
8 [because] the threshold for standing as next-friends is a successful attack on the capacity to
9 make a voluntary decision.” 697 F.Supp. at 1499. The court determined that Walker’s
10 conditions of confinement was not before it, rather its inquiry was “directed only to
11 Walker’s mental state, not the specific cause thereof.” Id. Further, the court noted that the
12 petitioners had conceded the question of Walker’s competency to the extent that they had
13 not asserted that he suffered from a mental disease or defect. Id. Instead, the petitioners
14 “limit[ed] their argument to the claim that Walker’s decision to abandon his rights to further
15 review demonstrate[d] a flawed mental state resulting from an ‘overborne will.’” Id. The
16 court determined that, “[t]he issue of flawed mental state or overborne will is properly
17 addressed under the capacity test set forth in Rees.” Id. Therefore, the court limited its
18 inquiry to “whether Walker suffers from an overborne will which substantially affects his
19 capacity, thereby rendering his decision to abandon further relief involuntary.”⁷¹ Id. at 1500.

20 At the subsequent evidentiary hearing, the petitioners argued that Walker’s conditions
21 of confinement on Illinois’ death row “coupled with the chronic effects of Walker’s
22 alcoholism,” had caused Walker to involuntarily waive further legal efforts on his behalf.

23

24

25 ⁷¹ The district court held that the state court hearing failed to “address the issue
26 of whether Walker suffered from a flawed mental state due to an overborne will.” Wilson,
27 697 F. Supp. at 1500. However, it determined other than the issue of a potentially
28 overborne will, the state court determinations of Walker’s capacity were sufficient. 697 F.
Supp. at 1504.

28

1 Wilson, 870 F.2d at 1252. Finding that the petitioners bore the burden of proof, Wilson,
2 697 F. Supp at 1502, the district court found that Walker’s will had not been overborne by
3 his conditions of confinement and concluded that his “waiver of the right to further review
4 was made freely and rationally” and that “[u]nder the totality of the circumstances, [his]
5 decision [was] the product of both rational intellect and unconstrained will.” Id. at 1504.
6 Further, the court found that “Walker [had] the capacity to knowingly waive his right to
7 further review of his death sentence, and the same [was] done voluntarily,” and dismissed the
8 petition for lack of next-friend standing of the petitioners. Id.

9 On appeal, the petitioners argued that by limiting the scope of its inquiry to whether
10 Walker lacked the capacity to voluntarily waive his constitutional right to post-conviction
11 review of his guilty plea and sentence, the district court failed to recognize that mental
12 competency or capacity were issues separate and distinct from the issue of voluntariness.
13 Wilson, 870 F.2d at 1253. They argued that the district court’s standard failed ““to account
14 for waiver decisions that are involuntary because they are unduly influenced by improper
15 factors when the mental competency or capacity of the individuals making those decisions is
16 not otherwise in dispute,”” relying on Smith, 812 F.2d at 1053. Id. (quoting petitioners’
17 briefs).

18 The Seventh Circuit disagreed, finding that the district court “did exactly what
19 appellants asked it to do” by assessing whether Walker’s decision to forego legal review was
20 the result of an “overborne will.” Id. at 1254. It further observed that the petitioner’s
21 “notion that Walker’s conditions of confinement rendered his decision involuntary seem[ed]
22 to fall within [the experts’] stated concepts of ‘overborne will,’” which the district court
23 “found properly [focused] on the voluntary nature of Walker’s decision.” Id. at 1254. In
24 addition, neither expert had found Walker’s capacity to make a voluntary waiver affected by
25 any environmental factor and that Walker himself had not expressed any “serious concerns”
26 about his conditions of confinement. Id. The Seventh Circuit found the district court did
27 not clearly err by finding that Walker’s decision was ““in part based on the quality of his life
28

1 due to the fact, not conditions, of confinement and the sheer lack of possibility of freedom
2 during his lifetime.” Id.

3 D. Mr. Comer’s Decision

4 The Court finds that Mr. Comer’s decision to waive his right to habeas appeal and to
5 accept execution is voluntary. In particular, it is the product of a rational intellect and an
6 unconstrained will; it is not the result of an overborne will or the product of an impaired
7 self-determination brought on by the exertion of any improper influences. See Smith, 812
8 F.2d at 1058-59; Groseclose v. Dutton, 594 F. Supp at 951.

9 The Court finds that Mr. Comer’s conditions of confinement have improved over the
10 past six months but those changes have not prompted Mr. Comer to forego the decision he
11 has consistently asserted and pursued acceptance of for over two years. The Court finds that
12 though his conditions have had some effect on his decision, they have not had a substantial
13 effect nor have they rendered his decision involuntary. See Smith, 632 F. Supp. at 506. The
14 Court’s findings are supported by the credible and reliable evidence presented at the
15 competency hearing.

16 Dr. Johnson testified that she has

17 been unable to identify any coercion in his decision making. If anything,
18 people have been trying to push him in the other direction. I mean, there’s
19 been a lot of encouragement for him not to make this choice. And I don’t call
20 it pressure, but there’s been strong forces, you know, recommending that, and
identifying that as an option for him. I have not seen anyone from the
correctional side, where his attorneys, or anyone else, have not identified that
there are any other coercive forces.

21 (Id. at 821.) She concluded with the judgment: “I do think that this is a voluntary decision on
22 his part.”

23 When asked to comment on Dr. Johnson’s findings, Mr. Comer testified that he
24 believed that “[s]he got it right.” (R.T. 3/27/02 at 478.) He expounded and said:

25 No, she said it right there. I live in a harsh conditions. Okay. I stay out of
26 trouble, now they’re getting unharsh. But I was competent to pull my appeals
there and everything was voluntary.

27 I just --I have a hard time seeing that cell making me [do] anything. Trust me, I

1 was in that cell with the Plexiglas, they stuck me on the death watch pod for,
2 what, two months? No Plexiglas? Look at the cell, it's the same damn cell. I
3 go back, I don't have a--don't have a desk and I don't have a stool. Okay. Is that
4 bad? In your eyes is it bad? In my eyes it's not, 'cause now I have more room
5 to run around there. I don't need a damn thing. Never--I never ate there,
6 anyway. I'd go over and eat on my bed. Matter of fact, that thing's barked me
7 in the--in the hip a whole lotta times when I run around there, so it's a blessing
8 to have gone.

9 (Id.)

10 The Court finds Mr. Comer's decision to waive his right to habeas appeal and proceed
11 with execution is voluntary and he has not been overborne by his conditions of confinement.

12 CONCLUSION

13 The Court's own judgment that the decision to choose to accept execution is ill-
14 conceived, and that it is unlikely that anyone would freely abandon his right to appeal a death
15 sentence, has been brought to bear by the compelling evidence that Mr. Comer's decision is
16 competent and has been voluntarily made.

17 It is obvious that what is most important to Mr. Comer "is that he has the opportunity
18 to choose." (R.T. 3/28/02 at 822.) He has made a competent and free choice, which "is
19 merely an example of doing what you want to do, embodied in the word liberty." Adkins v.
20 Children's Hosp., 261 U.S. 525, 568 (1923) (Holmes, J., dissenting). He should be afforded
21 that choice.⁷²

22 Accordingly,

23 **IT IS ORDERED** finding Petitioner Robert Charles Comer competent to terminate

24 ⁷² On July 23, 2002, special counsel filed the affidavit of Mr. Comer in which
25 he avers that he has read and discussed in detail with special counsel the possible
26 implications of Ring v. Arizona, 122 S. Ct. 2428 (2002), on his sentence and appeal. (Dkt.
27 437.) Mr. Comer also avers that Ring's potential effects on his sentence have not altered
28 his decision to waive further legal review. (Id.)

The Court is persuaded that Mr. Comer both understands the potential effects of
Ring on his sentence and appeal and that he knowingly, intelligently and voluntarily waives
any potential benefit of Ring on his sentence or appeal.

1 representation by habeas counsel, subject to review on appeal, and to waive further legal
2 review of his habeas claims.

3 **IT IS FURTHER ORDERED** finding Petitioner Robert Charles Comer's decisions
4 to terminate representation by habeas counsel and to waive further legal review, subject to
5 review on appeal, voluntary.

6 **IT IS FURTHER ORDERED** denying as moot Respondents' motion to reconsider
7 the grant of use immunity. (Dkt. 401).

8 **IT IS FURTHER ORDERED** denying as moot habeas counsel's continuing motion
9 to strike. (Dkt. 429).

10 **IT IS FURTHER ORDERED** granting the motion of habeas counsel for a copy of
11 the ADOC master file filed by special counsel. (Dkt. 430).

12 **IT IS FURTHER ORDERED** denying the motion of special counsel to terminate
13 habeas counsel pending appeal of this decision. (Dkt. 436).

14 **IT IS FURTHER ORDERED** entering judgment regarding the issues remanded to
15 this Court and closing the district court's file in this matter, subject to appeal.

16 DATED this 15th day of October, 2002.

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18

/s/ Roslyn O. Silver
ROSLYN O. SILVER
United States District Judge

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