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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

**JOSEPH HILTON MCDONALD,**

Petitioner,

v.

**E. B. HAAWS,** Warden,

Respondent.

CASE NO. 08cv652 L (PCL)

**ORDER:**

**GRANTING MOTION TO SEAL  
DOCUMENTS (Docs. 11 and 20);**

**DENYING MOTION TO  
APPOINT GUARDIAN AD  
LITEM (Doc. 16); and**

**SETTING BRIEFING  
SCHEDULE.**

**INTRODUCTION**

On January 1, 2009, Petitioner Joseph Hilton McDonald (“Petitioner”), a state prisoner proceeding pro se, filed a Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”). (Docs. 15 and 16.) Through the assistance of a fellow prisoner, Petitioner also filed a renewed motion requesting a guardian ad litem. (Doc. 16.) Respondent filed a response requesting that the Court deny Petitioner’s motion based on two exhibits, Exhibit A and Exhibit 1, containing Petitioner’s medical history.<sup>1</sup> (Docs. 11 and 20.)

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<sup>1</sup> Respondent requested that Exhibit A and Exhibit 1 be filed under seal. The motion is GRANTED.

1 As set forth below, the Court DENIES the motion to appoint a guardian ad litem and SETS the  
2 briefing schedule for Petitioner’s Second Amended Petition.

3 **BACKGROUND**

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5 Petitioner was convicted of three counts of first degree burglary (Cal. Pen. Code, §§ 459, 460);  
6 attempted first degree burglary (§§ 459, 460, 664); petty theft with a prior (§§ 484, 666); possession of  
7 stolen property (§ 496(a)); and possession of a firearm by a felon (§12021(a)(1)). (Doc. 1-3, at 26.)  
8 Petitioner filed a direct appeal to the California Court of Appeal, arguing that reversal was required  
9 because the photographic lineup used to identify him was impermissibly suggestive; because the court  
10 erred in admitting impeachment evidence; because of ineffective assistance of counsel in failing to  
11 object to the impeachment evidence; because an enhancement should have been stricken; and because  
12 the abstract of judgment needs to be corrected. (Id. at 27.) The state appellate court found merit in the  
13 last two contentions but otherwise affirmed the judgment. (Id.) Petitioner then filed a Petition for  
14 Review in the California Supreme Court, which was summarily denied on March 28, 2007. (Doc. 1-3,  
15 at 49.) The judgment became final on June 27, 2007, and AEDPA’s one-year statute of limitations  
16 expired on June 27, 2008.

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19 Petitioner filed the Petition together with a request to proceed in forma pauperis (“IFP”) in the  
20 United States District Court for the Central District of California on April 1, 2008. (Doc. 1.)  
21 Thereafter, the case was transferred to the United States District Court for the Southern District of  
22 California on April 9, 2008. In his Petition, Petitioner presented ten grounds for judicial review. This  
23 Court denied the IFP motion and dismissed the Petition with leave to amend. (Doc. 3.) On May 19,  
24 2008, Petitioner filed his FAP, presenting two grounds for federal relief: 1) that the trial court erred in  
25 allowing an impermissibly suggestive lineup photograph used to identify the Petitioner; and 2) that the  
26 trial court erred in allowing use of letters to impeach his witness in violation of Brady v. Maryland, 373  
27 U.S. 83 (1963), and Evidence Code section 352. (Doc. 4, at 6-7.) Petitioner filed an IFP, which was  
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1 granted by this Court on May 21, 2008. (Doc. 7.) On July 7, 2008, Petitioner filed a motion to stay  
2 proceedings while Petitioner exhausted his remedies in state court and a motion to appoint a guardian ad  
3 litem. (Doc. 10.) The Court granted the motion to stay and denied the motion to appoint a guardian ad  
4 litem as untimely. (Doc. 13.)

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6 Following exhaustion in the California Supreme Court, Plaintiff filed his Second Amended  
7 Petition on January 12, 2009. (Docs. 15 and 16.) In it, he makes a total of 11 claims: 1) that the trial  
8 court erred in allowing use of letters to impeach his witness in violation of Brady v. Maryland, 373 U.S.  
9 83 (1963), and Evidence Code section 352; 2) that there was insufficient evidence to convict him re: the  
10 Havern burglary; 3) that there was insufficient evidence to convict him re: the Borrego burglary; 4) that  
11 his consecutive sentence for his ex-felon in possession of a firearm conviction was in error and in  
12 violation of Penal Code section 654; 5) that the admission of inflammatory gang evidence violated his  
13 due process rights; 6) that his right to due process was violated due to the prosecutor's cross  
14 examination of defense witnesses; 7) that his rights were violated due to the revelation of his  
15 incarceration status to the jury by the prosecutor and the trial judge; 8) ineffective assistance of counsel;  
16 9) that errors resulting from ineffective assistance of defense counsel contributed to the cumulative  
17 effect of prosecutorial misconduct in the use of said errors; 10) that the trial court failed to provide sua  
18 sponte instruction regarding the lack of any substantial evidence connecting Petitioner with the crimes;  
19 and 11) that the trial court erred in not conducting a Marsden hearing and not reappointing Public  
20 Defender Stacy Gulley. (Docs. 16, 16-2, 16-3, 16-4.)

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24 Petitioner also asked the Court to appoint a guardian ad litem because he contends that he is  
25 mentally incompetent, that he is unable to maintain the petition on his own without assistance due to  
26 having the intellectual capacity of a first grader, and that being on the antipsychotic drug Abilify to treat  
27 hearing voices inside his head renders him incapable of understanding his legal options. (Doc. 16, at 6-  
28 7.) In support of this motion, Petitioner submitted the declaration of fellow prison inmate M. Lindsey, a

1 school-trained paralegal, who stated that Petitioner was incapable of litigating his own case. (Doc. 16,  
2 at 10-11.) Petitioner also submitted his own declaration stating that he is under the care of a psychiatrist  
3 and that he is mentally unstable and incapable of litigating his case. (Id. at 8.) Respondent argued that  
4 Petitioner failed to produce substantial evidence of incompetence sufficient to warrant an incompetency  
5 hearing and appointment of a guardian ad litem. (Doc. 20.) Respondent filed two large documents  
6 under seal that contain Petitioner’s medical records received from California State Prison, Los Angeles  
7 County. (Doc. 11, Exhibit 1; Doc. 20, Exhibit A.)

9           Based on information residing in Exhibit 1 which was submitted in Petitioner’s original motion  
10 for guardian ad litem, Respondent argued that although Petitioner claimed that he has a low reading  
11 level, the mental health interdisciplinary progress notes indicate otherwise. For example, on February  
12 14, 2008, Petitioner was removed from Developmentally Disabled Placement (DDP) status because he  
13 had been observed reading, writing, typing, and working on legal papers and “revealed [to interviewer  
14 B. Betz, Ph.D] vocabulary, knowledge base, and verbal reasoning skills well in excess of DDP  
15 qualifying inmate.” (Doc. 11, Exhibit 1, at 288.) In the decision, Dr. Betz noted that Petitioner received  
16 a high school diploma without special education classes, “worked culinary at RJDCF, [] had a driver’s  
17 license, and [] occupied a ‘position of leadership’ in his controlling case.” (Id. at 288, 289.) His  
18 psychologist noted that Petitioner, who had in the past at least one episode of schizophrenia, had  
19 appropriate effect, good insight and judgment, oriented, normal speech, no suicidal or homicidal  
20 ideation, and no evidence of acute psychosis. (Id. at 343.) Respondent also submitted as Exhibit A  
21 Petitioner’s mental health records updated since the original motion for guardian ad litem was filed.  
22 (Doc. 20, Exhibit A.) The updated records indicated that Petitioner had been prescribed Abilify (an  
23 antipsychotic) on January 28, 2009 and subsequent times thereafter. (Id. at 1.) According to his  
24 psychologist following the start of treatment, Petitioner “appeared less sad and confused than prior  
25 meetings. His eyes and face were clear. He made appropriate eye contact. His speech was soft and  
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1 conversation reciprocal.” (Id. at 5.) However, the psychologist noted that he remained depressed and  
2 “appear[ed] to be suffering from the sequelae of trauma he reportedly experienced earlier in his life.”  
3 (Id.) Petitioner nonetheless assured the psychologist, “I’ll be alright.” (Id.) The following week,  
4 Petitioner was seen by a psychiatrist, Dr. Robert Elstad. (Id. at 5.) Petitioner asked him, “Can I get  
5 some Abilify for my depression?” (Id. at 6.) Petitioner also said that he feels depressed each day lasting  
6 until dinnertime. (Id.) Dr. Elstad explained to him that Abilify is not an antidepressant and noted that  
7 he was cooperative, rational, personable, well groomed, and more animated with no tremor. (Id.) His  
8 symptoms were described as “mild.” (Id.) He diagnosed him with a psychosis not otherwise specified  
9 and continued his prescription of Abilify and added Prozac, an antidepressant. (Id.) The week after  
10 that, Petitioner attended a prison program activity on understanding behavior. (Id. at 3.) Traci Springs,  
11 a licensed psychologist, noted that he “attended and participated appropriately in group.” (Id.)  
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#### 14 **STANDARD OF REVIEW**

15 The Ninth Circuit has held that where a petitioner submits “substantial evidence” of his  
16 incompetence, the District Court should hold a competency hearing to determine whether a petitioner is  
17 “competent under an appropriate standard for habeas petitioners.” Allen v. Calderon, 408 F.3d 1150,  
18 1153-54 (9th Cir. 2005). Although the Ninth Circuit did not specify what constitutes “substantial  
19 evidence” of incompetence, it did give some guidance. In Allen, the petitioner submitted his own sworn  
20 declaration and a declaration from a fellow inmate which stated that Allen was mentally impaired and  
21 did not understand the Court’s orders. Id. at 1151. He also submitted a letter from a prison psychiatrist  
22 who stated that Allen was in the Enhanced Outpatient Program at the prison, had been “diagnosed with  
23 Chronic Undifferentiated Schizophrenia and [was] taking two psychotropic medications.” Id. at 1151-  
24 52. In support of a motion for appointment of counsel filed approximately two weeks later, the  
25 petitioner explained that he suffers from a ““debilitating mental illness that requires a course of  
26 treatment that includes the use of various psychotropic medications”” and that “[h]is mental condition  
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1 and the side-effects associated with the prescribed medications severely [hinder] his ability to  
2 comprehend or correctly respond to the determinations and Orders made by the Court.” Id. at 1152.  
3 The Ninth Circuit concluded that this was sufficient to require the District Court to make a  
4 determination as to Allen’s competency by appointing counsel and conducting a competency hearing.  
5 Id. at 1153-54. However, the Ninth Circuit has also signaled that showing a history of serious mental  
6 illness is not enough by itself to constitute substantial evidence of incompetence requiring a court to  
7 conduct a competency hearing on that issue. See West v. Brown, 197 Fed. Appx. 625, 628 (9th Cir.  
8 2006); Travalini v. People of California, 2006 WL 842435, at \*3 (E.D. Cal. March 28, 2006).

### 11 DISCUSSION

12 Here, Petitioner has not shown substantial evidence of incompetence to justify holding a  
13 competency hearing. Unlike in Allen, Petitioner has not demonstrated that he suffers from a debilitating  
14 mental illness like Chronic Undifferentiated Schizophrenia that would hinder severely his ability to  
15 comprehend or correctly respond to the Court. Although Petitioner has been prescribed an  
16 antidepressant drug and an antipsychotic drug to help deal with hearing voices inside his head stemming  
17 from trauma experienced earlier in his life, he has been diagnosed with a psychosis not otherwise  
18 specified and his symptoms are described as “mild.” Petitioner has admitted to his psychiatrist that his  
19 depression only lasts until dinnertime. He has been observed by his psychiatrist as being cooperative,  
20 rational, personable, animated, and well groomed while on the drug Abilify. Petitioner’s psychologist  
21 has noted that following the start of treatment Petitioner “appeared less sad and confused than prior  
22 meetings. His eyes and face were clear. He made appropriate eye contact. His speech was soft and  
23 conversation reciprocal.” He has continued to participate in group activities with the prison. Although  
24 Petitioner, both in his original motion for guardian ad litem and in the instant motion, claims that he has  
25 the intellectual capacity of a first grader, he has graduated from high school and has been removed from  
26 Developmentally Disabled Placement (DDP) status in prison because he had been observed reading,  
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1 writing, typing, and working on legal papers and revealed vocabulary, knowledge base, and verbal  
2 reasoning skills well in excess of DDP qualifying inmate. Even while taking medication for his  
3 psychosis, Petitioner has appeared to be rational and coherent. In sum, Petitioner has not provided any  
4 evidence that his mental instability or his drug treatment have rendered him unable to litigate this case.  
5 The evidence put forward by Petitioner and his medical records made available by Respondent do not  
6 establish substantial evidence of incompetence.  
7

### 8 **CONCLUSION**

9 The Court GRANTS Respondent's motion that Exhibit A and Exhibit 1 be filed under seal. The  
10 Court DENIES Petitioner's Motion for a guardian ad litem. In accordance with Rule 4 of the rules  
11 governing petitions from a writ of habeas corpus pursuant to 28 U.S.C. § 2254, **IT IS FURTHER**  
12 **ORDERED** that:  
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14 1. The Clerk of this Court shall promptly (a) serve a copy of the Second Amended Petition and a  
15 copy of this Order on the Attorney General for the State of California, or his authorized agent; and (b)  
16 serve a copy of this Order on Petitioner.  
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18 2. If Respondent contends the Petition can be decided without the Court's reaching the merits of  
19 Petitioner's claims, Respondent shall file a motion to dismiss pursuant to Rule 4 of the Rules Governing  
20 § 2254 Cases no later than **July 15, 2009**. The motion to dismiss shall not address the merits of  
21 Petitioner's claims, but rather shall address all grounds upon which Respondent contends dismissal  
22 without reaching the merits of Petitioner's claims is warranted. At the time the motion to dismiss is  
23 filed, Respondent shall lodge with the Court all records bearing on Respondent's contention in this  
24 regard. A hearing date is not required for the motion to dismiss.  
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26 3. If Respondent files a motion to dismiss, Petitioner shall file his opposition, if any, to the  
27 motion no later than **August 12, 2009**. At the time the opposition is filed, Petitioner shall lodge with the  
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1 Court any records not lodged by Respondent which Petitioner believes may be relevant to the Court's  
2 determination of the motion.

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4 4. Unless the Court orders otherwise, Respondent shall not file a reply to Petitioner's opposition  
5 to a motion to dismiss. If the motion is denied, the Court will afford Respondent adequate time to  
6 respond to Petitioner's claims on the merits.

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8 5. If Respondent does not contend that the Petition can be decided without the Court reaching  
9 the merits of Petitioner's claims, Respondent shall file and serve an answer to the Petition, as well as  
10 points and authorities in support of such answer, no later than **August 7, 2009**. At the time the answer is  
11 filed, Respondent shall lodge with the Court all records bearing on the merits of Petitioner's claims.  
12 The lodgments shall be accompanied by a notice of lodgment which shall be captioned "**Notice of**  
13 **Lodgment in 28 U.S.C. § 2254 Habeas Corpus Case – To Be Sent to Clerk's Office.**" Respondent  
14 shall not combine separate pleadings, order or other items into a combined lodgment entry. Each item  
15 shall be numbered separately and sequentially.

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17 6. Petitioner may file a traverse to matters raised in the answer no later than **September 11,**  
18 **2009**. Any traverse by Petitioner (a) shall state whether Petitioner admits or denies each allegation of  
19 fact contained in the answer; and (c) shall not raise new grounds for relief that were not asserted in the  
20 FAP. Grounds for relief withheld until the traverse will not be considered. No traverse shall exceed ten  
21 (10) pages in length absent advance leave of Court for good cause shown.

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23 7. A request by a party for an extension of time within which file any of the pleadings required  
24 by this Order should be made in advance of the due date of the pleading, and the Court will grant such a  
25 request only up on showing of good cause. Any such request shall be accompanied by a declaration  
26 under penalty of perjury explaining why an extension of time is necessary.

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28 8. Unless otherwise ordered by the Court, this case shall be deemed submitted on the day  
following the date Petitioner's opposition to a motion to dismiss and/or his traverse is due.

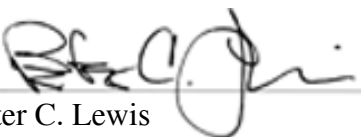


1           9. Every document delivered to the Court must include a certificate of service attesting that copy  
2 of such document was served on opposing counsel (or on the opposing party, if such party is not  
3 represented by counsel). Any document delivered to the Court without a certificate of service will be  
4 returned to the submitting party and disregarded by the Court.  
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6           10. Petitioner shall immediately notify the court and counsel for Respondent of any change of  
7 Petitioner's address. If Petitioner fails to keep the Court informed of where Petitioner may be contacted,  
8 this action will be subject to dismissal for failure to prosecute.

9           IT IS SO ORDERED.

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11 DATED: June 15, 2009

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14 Peter C. Lewis  
15 U.S. Magistrate Judge  
16 United States District Court

17 cc: Judge Lorenz; all parties  
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