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Due Process or "Some Process"? Restoring Pate v. Robinson's Guarantee of Adequate Competency Procedures

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DUE PROCESS OR "SOME PROCESS"?[†] RESTORING *PATE V. ROBINSON*'S GUARANTEE OF ADEQUATE COMPETENCY PROCEDURES

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[†] *Medina v. California*, 505 U.S. 437, 463 (1992) (Blackmun, J., dissenting) (reasoning that "[b]ecause the *Due Process Clause* is not the *Some Process Clause*," procedural due process rights require adequate procedural safeguards to protect those rights).

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INTRODUCTION

On March 30, 1996, the State of Nevada executed Richard Allan Moran by lethal injection; he was still appealing his case when he died.¹ Nearly twelve years earlier, Moran pled guilty to several offenses, including three capital murders.² When he stood before the judge to enter his guilty plea, Moran declared that he wanted to plead guilty to avoid the presentation of evidence that could prevent imposition of the death penalty.³ By precluding this evidence, Moran essentially decided to end his own life. During his plea, Moran's wounds from a suicide attempt were still healing, he was under the influence of four medications, and he could only express himself in one-syllable words as he responded to the judge's leading questions.⁴ The judge accepted Moran's plea without questioning his competency.⁵

Criminal defendants have two rights under the Fourteenth Amendment's Due Process Clause⁶ regarding competency.⁷ First,

1. ROBERT G. MEYER & CHRISTOPHER M. WEAVER, LAW AND MENTAL HEALTH: A CASE-BASED APPROACH 111 (2006).

2. *Moran v. State (Moran I)*, 734 P.2d 712, 713 (Nev. 1987) (per curiam).

3. *Moran v. Godinez (Moran II)*, 972 F.2d 263, 265 (9th Cir. 1992), *rev'd*, 509 U.S. 389 (1993).

4. *Id.* at 264.

5. *Id.*

6. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

7. *James v. Singletary*, 957 F.2d 1562, 1569 (11th Cir. 1992); *see also* *Lokos v. Capps*, 625 F.2d 1258, 1261-62 (5th Cir. 1980) (distinguishing between the

defendants have the substantive due process right not to be tried, convicted, or sentenced while incompetent.⁸ Second, defendants have the procedural due process right to have the State provide adequate procedures for determining competency.⁹ This procedural right was defined by *Pate v. Robinson*,¹⁰ where the Court held that a trial court judge has a sua sponte duty to inquire into a defendant's competency when faced with evidence raising a "bona fide doubt" that the defendant is in fact competent.¹¹ In Moran's case, the judge failed to order a hearing sua sponte despite his perception of Moran's self-inflicted wounds, medicated demeanor, and belabored, monosyllabic responses.¹² Such observations should have given the judge reasonable doubt as to Moran's competency to plead.¹³ The court deprived Moran of an essential constitutional protection, his procedural due process right to adequate procedures, by failing to order a competency hearing in the face of Moran's questionable mental state.¹⁴ Such a procedural error is called a "*Pate* violation."¹⁵

Due to this violation, a Nevada post-conviction court required an evidentiary hearing to determine whether Moran had, in fact, been competent to enter a guilty plea four years earlier.¹⁶ The remedy provided by the post-conviction court, and upheld by the Ninth Circuit Court of Appeals, required no more than an evidentiary hearing to retrospectively determine competency.¹⁷ At this hearing, the post-

substantive competency right and procedural guarantee to adequate procedures).

8. *James*, 957 F.2d at 1573.

9. *Lokos*, 625 F.2d at 1261; see also *Moran v. Godinez (Moran III)*, 57 F.3d 690, 695 (9th Cir. 1995) (holding that the State's failure to hold a competency hearing constituted deprivation of procedural due process).

10. 383 U.S. 375 (1966).

11. *Id.* at 385.

12. *Moran II*, 972 F.2d at 265.

13. *Id.*

14. *Id.*

15. *Miller-El v. Johnson*, 261 F.3d 445, 453 (5th Cir. 2001) ("If a *Pate* violation is established, the federal habeas court must consider whether a meaningful hearing can be held nunc pro tunc to determine retrospectively the petitioner's competency as of the time of trial."); *Moran III*, 57 F.3d at 701 ("It is clear that a *Pate* violation can only be cured by a post-conviction hearing in which the State bears the burden of proving that the defendant was competent to stand trial.").

16. See *id.* at 264.

17. *Moran III*, 57 F.3d at 696, 700.

conviction court presumed Moran to be competent as of the time of his original plea, and assigned to him the burden of proving that he was previously incompetent.¹⁸ Unfortunately, the only evidence available to Moran was two psychiatric reports completed two months before his plea—not relevant to his state of mind *at the time of his plea*.¹⁹ In the end, the State of Nevada took Moran's life while he continued to appeal his case.²⁰

The federal circuit courts conflict on the issue of what procedure to afford a petitioner who has established a *Pate* violation.²¹ The Supreme Court has never approved of a remedy for a *Pate* violation other than reversal of the conviction and remand for new trial.²² However, the Court has, in dicta, acknowledged the possibility of holding a retrospective competency hearing.²³ Without much guidance from the Court, the circuits have been left to determine the appropriate procedure for remedying a *Pate* violation. The circuit courts have created and adopted procedural remedies that allow for retrospective determinations of competency.²⁴ However, the circuit courts split with

18. *Id.* at 698 (“[T]he post-conviction court violated Nevada law when it placed the burden of proving competency on Moran. This violation of state law, however, did not result in the deprivation of a substantive right, because the State provided Moran with constitutionally adequate procedures to evaluate his competency . . .”) (citation omitted).

19. *Moran II*, 972 F.2d at 267 & n.7; *see also Moran III*, 57 F.3d at 696 (stating that the same judge who oversaw Moran's challenged change of plea also oversaw the post-conviction proceedings and that evidence also included the records of two hearings held within two months after the change of plea).

20. MEYER & WEAVER, *supra* note 1, at 111.

21. *Compare Moran III*, 57 F.3d at 697-98 (holding that the federal Constitution does not require states to assign the burden of proof to the prosecution in nunc pro tunc competency hearings), *and Lokos v. Capps*, 625 F.2d 1258, 1262 (5th Cir. 1980) (holding that the petitioner bears the burden of proof in nunc pro tunc competency hearings), *with James v. Singletary*, 957 F.2d 1562, 1570 (11th Cir. 1992) (stating, in dicta, that the State bears the burden of proof in a retrospective competency hearing because such a hearing constitutes harmless error analysis).

22. *See, e.g., Pate v. Robinson*, 383 U.S. 375, 386 (1966); *Drope v. Missouri*, 420 U.S. 162, 183 (1975).

23. *See, e.g., Pate*, 383 U.S. at 387; *Drope*, 420 U.S. at 183.

24. *See, e.g., Moran III*, 57 F.3d at 696 (approving retrospective competency hearings as a cure for *Pate* violations); *Lokos*, 625 F.2d at 1262 (same); *James*, 957 F.2d at 1571 (same).

respect to where the burden of proof lies in retrospective competency hearings.²⁵ Although the circuit courts have created procedures for retrospectively determining competency, "[r]eason exists to believe the United States Supreme Court would not approve the procedure[s]."²⁶

This Comment argues that the United States Supreme Court would not approve of retrospective competency determinations in the context of *Pate* violations because the procedure violates due process. Instead, the only adequate remedy for a *Pate* violation is the reversal of the underlying conviction and remand of the case for retrial. Any attempt to retrospectively determine competency violates the procedural due process right guaranteed by *Pate*. The trial court violates a defendant's constitutional rights by failing to provide adequate procedures for determining competency—i.e., a competency hearing at the time of trial. Retrospective competency hearings rely on more limited and less reliable evidence than a contemporaneous hearing.²⁷ Hence, a retrospective competency hearing denies the defendant the adequate procedures guaranteed by *Pate*. In short, providing a defendant any less than the adequate procedures guaranteed by *Pate* not only fails to remedy the violation, it completely vitiates the rights guaranteed by *Pate*.²⁸

25. See *supra* note 21.

26. *People v. Ary*, 246 P.3d 322, 330 (Cal. 2011) (Werdegar, J., concurring).

27. Generally, in order to hold a retrospective competency hearing, the court must find sufficient evidence exists with which to hold a meaningful hearing, including "medical records and prior competency determinations . . . statements by the defendant in the trial record, and . . . the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant." *Clayton v. Gibson*, 199 F.3d 1162, 1169 (10th Cir. 1999). However, as in *Moran*, even if such records and witnesses exist, the evidence remains limited and unreliable compared to the evidence provided by a contemporaneous evaluation and hearing. See *Moran II*, 972 F.2d at 267 & n.7 (utilizing psychological evaluations not made during the relevant time frame of the defendant's change of plea). When a court holds a contemporaneous hearing, the defendant and prosecution each receive a full and fair opportunity to gather evidence of the defendant's then existing state of mind. See 18 U.S.C. § 4241(b) (2010) (authorizing the court to order an examination of the defendant prior to the hearing date).

28. Addressing retrospective competency hearings in the context of Due Process constitutes an important legal endeavor for two reasons. First, very little has been written by scholars regarding the remedies provided by reviewing courts. Hence, the circuit split regarding the proper remedy has eluded critical analysis.

Section I of this Comment will address the history of, and policy for, the right not to be tried while incompetent, and then outline the procedures enacted by federal and state governments to protect that right. Section II summarizes the Supreme Court's decision in *Pate v. Robinson*. It then addresses practical situations that give rise to a *Pate* claim. Section III first analyzes the scope of the procedural rights guaranteed by *Pate* through the Court's procedural due process standards. Section III then applies the due process requirements of *Pate* to the existing remedies afforded by reviewing courts to petitioners or appellants who have successfully raised a *Pate* claim. This Comment concludes by arguing that procedural due process demands all *Pate* violations be remedied by summary reversal and

Second, *Pate* violations often arise in criminal cases with very high stakes. More often than not, *Pate* violations are argued in criminal appeals where the defendant has been sentenced to life in prison or, as in Moran's case, death. Besides Richard Moran, other defendants have been executed after courts ordered retrospective competency hearings to avoid reversing the underlying conviction. In 2001, the State of Oklahoma executed Robert William Clayton. *Year's Executions Detailed*, TULSA WORLD, Aug. 30, 2001, available at 2001 WLNR 11776211. Although the trial court violated Clayton's constitutional rights under *Pate* by failing to hold a competency hearing, the conviction was upheld on appeal because a jury found the defendant had been competent in a retrospective competency hearing six years after the trial. *Clayton v. State*, 840 P.2d 18, 24 (Okla. Crim. App. 1992). Similarly, the Commonwealth of Kentucky found that a trial court had committed a *Pate* violation when it failed to hold a competency hearing during William Eugene Thompson's murder trial seven years earlier. *Thompson v. Commonwealth*, 56 S.W.3d 406, 408-09 (Ky. 2001). However, the Supreme Court of Kentucky remanded to the commonwealth's circuit court to determine if a retrospective competency hearing could be held, and, if so, to hold the hearing. *Id.* at 410. As of the publication of this Comment, Thompson remains on death row in Kentucky. Brett Barrouquere, *Death Row Inmate Says Jurors Biased*, KY. POST, Mar. 2, 2011, available at http://www.kypost.com/dpp/news/state/ExecutionThompson_90702846. Most recently, the California Supreme Court upheld the life sentence of James Ary, Jr. following a retrospective competency determination held five years after his trial. *People v. Ary*, 246 P.3d 322, 325-26, 329-30 (Cal. 2011). Regarding the fact that *Pate* violations are argued in high stakes cases, the Supreme Court announced, in the context of capital cases, the severity of the sentence imposed on a criminal defendant creates a heightened need for reliability in the underlying factfinding procedures. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded factfinding procedures aspire to a heightened standard of reliability."). Retrospective competency hearings cannot provide a remedy commensurate with the reliability needed in such criminal cases.

remand for a new trial, unless the violation arose via an ancillary error within a contemporaneous competency hearing.

I. THE RIGHT NOT TO STAND TRIAL WHILE INCOMPETENT

A. History

The right of a criminal defendant not to be tried while incompetent has well-established roots. In the nineteenth century, courts recognized that state statutes prohibiting the trial, sentencing, or punishment of incompetent defendants introduced no new legal principles beyond those established by the common law.²⁹ Further, "all the common-law authorities" agree that one who is currently incompetent cannot be arraigned, tried, sentenced, or executed.³⁰ This right shares its conceptual footing with the right not to be tried in absentia; both rights ensure a criminal defendant is provided an opportunity to present a defense.³¹ In addition to the common law's purpose for providing criminal defendants with the right not to be tried while incompetent, modern courts have determined this right plays an essential role in the criminal justice system.³²

Along with ensuring criminal defendants the ability to present a defense, modern courts have found additional reasons to uphold this right. The Supreme Court has held the conviction of a defendant while legally incompetent violates the United States Constitution as a deprivation of liberty without due process.³³ Because the fairness of a

29. *Freeman v. People*, 4 Denio 9, 19 (N.Y. Sup. Ct. 1847).

30. *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899).

31. *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (citing Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)); see also 4 WILLIAM BLACKSTONE, COMMENTARIES, *24-25 (comparing the practice of trying an incompetent defendant with the "savage and inhuman law" enacted during the reign of Henry VIII allowing those charged with treason to be tried in the defendant's absence when the defendant was insane).

32. See *Drope*, 420 U.S. at 171-72 ("[I]t suffices to note that the prohibition [against trying an incompetent defendant] is fundamental to an adversary system of justice.").

33. *White v. Estelle*, 459 U.S. 1118, 1121 (1983) ("Due process forbids a state to try or convict a defendant who is incompetent to stand trial."); see also *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (citing *Bishop v. United States*, 350 U.S. 961 (1956) ("[T]he conviction of an accused person while he is legally incompetent

criminal trial depends on a defendant's ability to make important decisions on his or her own and with the assistance of counsel,³⁴ the Court has deemed the right not to be tried while incompetent "fundamental to an adversary system of justice."³⁵ The Court established the current test for determining legal competency to stand trial in 1960, in *Dusky v. United States*³⁶: "[W]hether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."³⁷

As illustrated above, the Supreme Court has long held the conviction of an incompetent criminal defendant violates due process. However, the Court has provided a further right by holding that criminal defendants have a due process right to adequate procedures for protecting the substantive right.³⁸ Deprivation of this procedural due process right constitutes a *Pate* violation, for the Court first announced the right in *Pate v. Robinson*.³⁹ In order to adequately protect criminal defendants' due process rights under both *Bishop* and *Pate*, federal and state statutes establish robust criminal procedures imposing duties on parties and the court to raise the issue. A criminal defendant cannot waive his or her right not to stand trial while incompetent; a defendant may always claim a violation of that right on appeal or through habeas petition.⁴⁰

violates due process . . .").

34. *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996).

35. *Drope*, 420 U.S. at 171-72.

36. 362 U.S. 402 (1960).

37. *Id.* at 402.

38. *See Pate*, 383 U.S. at 385-86; *Drope*, 420 U.S. at 172. *Pate v. Robinson* is examined further in Section III.

39. *Pate*, 383 U.S. at 386.

40. *Id.* at 384 (reasoning that one cannot knowingly and voluntarily waive the issue of one's own competency because if one is incompetent, he or she lacks the ability to waive that very issue).

B. Federal and State Procedures Ensuring the Right Not to Stand Trial While Incompetent

Both the common law and the Supreme Court's interpretation of the United States Constitution compel federal and state governments to refrain from trying incompetent criminal defendants.⁴¹ Accordingly, Congress and state legislatures have established statutory criminal procedures for ensuring that right. Despite differences regarding which party bears the burden of proof in competency hearings at the time of trial, Supreme Court precedent makes it clear that these procedures are constitutionally sufficient to protect the due process right not to be tried while incompetent.⁴²

In 18 U.S.C. § 4241, Congress established the procedure for determining a criminal defendant's competency to stand trial in federal prosecutions during the time period between commencement of prosecution and determination of sentence.⁴³ At any time during the prescribed period, the statute requires the court to hold a hearing upon written motion by either party or on the court's motion *sua sponte*.⁴⁴ Evidence that raises a reasonable doubt as to the defendant's competency to stand trial entitles the defendant to a hearing on the issue.⁴⁵ If, by a preponderance of the evidence, the court finds the defendant incompetent, the prosecution cannot proceed and the government takes custody of the defendant for hospitalization and treatment.⁴⁶ Because Congress failed to articulate which party carries the burden of proof, courts have struggled to interpret the statute and have split on the issue.⁴⁷

41. *See supra* Section I.A.

42. *Medina v. California*, 505 U.S. 437, 453 (1992) (Kennedy, J., concurring).

43. 18 U.S.C. § 4241(a) (2010).

44. *Id.* (requiring a hearing if "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent").

45. *Id.*

46. 18 U.S.C. § 4241(d) (2010).

47. Steven R. Marino, Comment, *Are You Sufficiently Competent to Prove Your Incompetence? An Analysis of the Paradox of the Federal Courts*, 6 SETON HALL CIRCUIT REV. 165, 178-79 (2009); *see also* Brett F. Kinney, Comment, *An Incompetent Jurisdiction: The Burden of Proof in Competency Hearings*, 43 U.C. DAVIS L. REV. 683, 694 (2009).

Procedures for raising and determining the issue of a defendant's competency to stand trial have been established by statute in all fifty states.⁴⁸ California provides for a hearing whenever defense counsel requests one or when "doubt arises in the mind of the judge."⁴⁹ As they would under federal law, California trial judges have a *sua sponte* duty to provide criminal defendants a hearing to determine competency to stand trial. This duty arises when there is "substantial evidence of mental incompetence"—evidence raising a reasonable doubt—regardless of its source.⁵⁰ Other states' statutes provide for a similar *sua sponte* duty.⁵¹

As at the federal level, state courts are split on whether to (1) require the State to prove competence, or (2) require the defendant to prove *incompetence*. For instance, California places the burden of proof on defendants in section 1368 hearings to prove incompetency.⁵² The Supreme Court has permitted such an approach by holding that state laws requiring defendants to bear the burden of proving their own incompetency do not violate procedural due process.⁵³ However, some states (e.g., New York) provide criminal defendants with added protection by placing the burden on the State to prove competency.⁵⁴

Notwithstanding federal and state laws imposing a *sua sponte* duty on courts to hold hearings when doubt of a defendant's competency to stand trial arises, criminal defendants still face a risk of trial, conviction, and imprisonment despite mental incompetency.⁵⁵

48. Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259, 267 (2009).

49. CAL. PENAL CODE § 1368(a) (West 2010).

50. *People v. Howard*, 824 P.2d 1315, 1331 (Cal. 1992).

51. Quinn, *supra* note 48, at 267-68 & n.33.

52. CAL. PENAL CODE § 1369(f) (West 2010); *People v. Kaplan*, 57 Cal. Rptr. 3d 143, 150 (Ct. App. 2007) (citing *People v. Marshall*, 931 P.2d 262, 277 (Cal. 1997)).

53. *Medina v. California*, 505 U.S. 437, 453 (1992).

54. N.Y. CRIM. PROC. LAW § 730.30 (McKinney 2010); *People v. Christopher*, 482 N.E.2d 45, 49 (N.Y. 1985).

55. There are two distinct dangers presented regarding errors in competency determinations. First, failing to hold a competency hearing creates a danger of trying an incompetent criminal defendant in violation of the substantive guarantee against standing trial while incompetent. Second, failing to hold a competency hearing creates a danger of failing to comply with the Due Process requirement of providing adequate procedures when doubt exists as to the defendant's competency.

The current procedures for determining competency at the time of trial clearly comport with the Supreme Court's interpretation of adequate due process protection.⁵⁶ However, the procedures for reviewing and remedying the issue of competency to stand trial on appeal remain clouded.⁵⁷

Regarding the first danger, the number of criminal defendants who prevail on appeal regarding substantive claims of incompetency illustrates the danger of standing trial while incompetent. A study of substantive claims of incompetency and their prevalence lies outside the scope of this Comment. However, some legal scholars suggest that structural deficiencies in the test for competency to stand trial contribute to the danger. See Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 317 (2009) (examining "the flaws in the competency to stand trial standard: vagueness, lack of uniform testing criteria, and failure to consider the etiology and prognosis of serious mental illnesses"). In contrast, the results of empirical studies point to a high degree of agreement between the legal determinations made by courts and the clinical determinations of impartial mental health professionals. See Melissa L. Cox & Patricia A. Zapf, Ph.D., Comment, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions About Competency*, 28 LAW & PSYCHOL. REV. 109, 131 (2004).

The second danger produces an equally valid concern. The failure to hold a competency hearing offends the guarantee of Due Process rights provided under *Pate*. In addition, through a denial of adequate procedures, this danger includes the danger of trying a defendant while incompetent, thus folding the first danger into the second.

Assuming, *arguendo*, that the *Dusky* standard provides a valid and meaningful assessment of competency to stand trial, then the strong agreement between judicial and clinical determinations of competency suggests that taking the step of ordering a competency hearing, pursuant to *Pate*, will eliminate a significant risk of trying and convicting incompetent defendants.

56. *Medina*, 505 U.S. at 453 (Kennedy, J., concurring).

57. *Compare, e.g., Moran III*, 57 F.3d 690, 698, 700 (9th Cir. 1995) (holding that a retrospective competency hearing cures the procedural due process violation that results from a court's failure to hold a competency hearing sua sponte and placing the burden of proof on the defendant to prove incompetency), *with James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992) (holding that a retrospective competency hearing is a harmless error inquiry requiring the burden of proof be placed on the State to prove competency).

II. *PATE* GUARANTEES THAT CRIMINAL DEFENDANTS RECEIVE
ADEQUATE PROCEDURES FOR DETERMINING COMPETENCY

A. *Pate v. Robinson's Procedural Due Process Right*

In *Pate*, the Court held that criminal defendants have a procedural due process right to adequate procedures for determining competency.⁵⁸ Specifically, a criminal defendant has the right to a competency hearing whenever evidence before the court raises a reasonable doubt of the defendant's competency.⁵⁹

In *Pate*, defendant Robinson was tried and convicted of murdering his common-law wife.⁶⁰ Four defense witnesses testified at trial.⁶¹ Each witness provided personal knowledge and an opinion regarding Robinson's incompetency to stand trial.⁶² According to Robinson's mother, his mental illness began at the age of seven or eight when "a brick dropped from a third floor hit Robinson on the head."⁶³ Through these witnesses, the trial judge had evidence of a prolonged history of mental illness and "pronounced irrational behavior."⁶⁴ Despite this evidence, the trial judge convicted Robinson and sentenced him to life in prison.⁶⁵

The Supreme Court ordered the issuance of a writ of habeas corpus, remanding the case for retrial.⁶⁶ The Court held that the State violated Robinson's due process rights when the trial court failed to order a competency hearing *sua sponte*.⁶⁷ Under the applicable Illinois statute governing competency evaluations, the judge had a *sua sponte* duty to do so when evidence before the court raised a "bona fide doubt" of competency.⁶⁸

58. *Pate v. Robinson*, 383 U.S. 375, 386 (1966).

59. *Id.* at 385.

60. *Id.* at 376.

61. *Id.* at 378.

62. *Id.*

63. *Id.* at 378-79.

64. *Id.* at 385-86.

65. *Id.* at 384.

66. *Id.* at 386.

67. *Id.* at 385.

68. *Id.* (quoting *People v. Shrake*, 182 N.E.2d 754, 754 (Ill. 1962) (internal quotation marks omitted)). Although *Pate* turned on whether "bona fide doubt"

The Court determined the evidence *did* raise a bona fide doubt.⁶⁹ The Court reasoned that the trial judge could not rely on his own observation of Robinson's demeanor in court "to dispense with a hearing" to determine competency.⁷⁰ Neither could the judge rely on a single psychiatric report that failed to give an opinion regarding the ultimate issue of competency.⁷¹ Hence, Robinson had been tried and convicted without adequate procedures to determine his competency.⁷² The "adequate procedures" guaranteed by the Constitution consisted of the procedures needed to make a "*concurrent* determination" of Robinson's competency to stand trial.⁷³

Regarding whether Robinson had forfeited the issue of competency by not raising it at trial, the Court held that a criminal defendant cannot waive the right not to be tried while incompetent.⁷⁴ Because an incompetent defendant cannot waive the right unless he or she was competent, the Court reasoned that the concept of waiving the competency issue constituted a contradiction.⁷⁵ Thus, the defendant's own failure to raise the competency issue at the time of trial does not constitute a waiver and the issue is preserved for appeal.⁷⁶ In essence, *Pate* forces the trial judge to bear the responsibility of ensuring that no

existed under an Illinois statute, the Court has not determined the minimal "quantum of evidence necessary to require resort to an adequate procedure." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). Nevertheless, most lower courts apply the bona fide doubt standard "because it is no less helpful than any other standard that might be imagined." *Zapata v. Estelle*, 588 F.2d 1017, 1020 n.1 (5th Cir. 1979). Some courts apply a "reasonable ground" standard instead of the "bona fide doubt" standard. *Silverstein v. Henderson*, 706 F.2d 361, 369 (2d Cir. 1983) (quoting *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir. 1972) (internal quotation marks omitted)). It is doubtful, however, whether any meaningful difference lies between the two standards.

69. *Pate*, 383 U.S. at 385-86 (reasoning that "testimony of Robinson's history of pronounced irrational behavior" could not be ignored on the basis of rational "demeanor at trial" and an inconclusive psychiatric report).

70. *Id.* at 385.

71. *Id.* at 383-84.

72. *Id.* at 385.

73. *Id.* at 387 (emphasis added).

74. *Id.* at 384.

75. *Id.*

76. *Id.*

criminal defendants of questionable competency pass through the courtroom without a hearing to determine the issue.

Having established that the State violated Robinson's constitutional right to adequate competency procedures, the Court turned to the issue of what remedy to provide Robinson. The Court noted the State's argument on appeal that a retrospective hearing limited to the issue of competency could sufficiently vindicate Robinson's rights, thereby preserving the prior conviction.⁷⁷ However, citing *Dusky*,⁷⁸ the Court rejected that remedy because of "the difficulty in retroactively determining an accused's competence to stand trial."⁷⁹ The Court then ordered the issuance of a writ of habeas corpus, remanding the case to the state trial court for retrial.⁸⁰

*B. A Pate Violation Occurs When Reasonable Doubt
of Competency Exists at Trial*

Pate establishes a firm rule regarding when a trial court must order a competency hearing: whenever there is reasonable doubt as to the defendant's competency.⁸¹ Because the Court held a defendant cannot waive his or her right not to stand trial while incompetent, a *Pate* violation is preserved for appeal without any action by the defendant or his counsel.⁸² Thus, proving that a *Pate* violation occurred requires an appellant or habeas petitioner to show only facts sufficient to establish reasonable doubt regarding competency at the time of trial.

The initial substantive query for a *Pate* claim is objective—namely, "whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency

77. *Id.* at 387.

78. *Dusky v. United States*, 362 U.S. 402, 403 (1960) ("In view of . . . the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse . . . and remand the case to the District Court . . . for a new trial if petitioner is found competent.").

79. *Pate*, 383 U.S. at 387.

80. *Id.*

81. *Id.* at 385.

82. *See id.* at 384.

to stand trial.”⁸³ In ruling on this inquiry, the reviewing court should examine the “totality of the circumstances” insofar as they existed before the trial judge.⁸⁴ Although the reviewing court must consider any history of irrational behavior alongside the petitioner’s demeanor at trial and any medical opinions, any one factor alone may sufficiently raise a reasonable doubt in the mind of a reasonable trial judge.⁸⁵ If the petitioner establishes reasonable doubt as to his or her competency at the time of trial, the petitioner has proven that a *Pate* violation has occurred.⁸⁶

83. *De Kaplany v. Enomoto*, 540 F.2d 975, 983 (9th Cir. 1976); *accord Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983). When a *Pate* violation is raised in a federal habeas proceeding, this threshold burden may require the petitioner to show reasonable doubt by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (2010) (requiring habeas courts to give state court factual determinations a presumption of correctness, rebuttable by a showing of clear and convincing evidence to the contrary). The Supreme Court has held that a trial court’s failure to entertain a bona fide doubt as to competency of a defendant constitutes a factual finding, at least when the trial court explicitly makes a factual finding regarding the evidence before the court. *See Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (holding that a “factual conclusion,” ancillary to competency, constitutes a question of fact pursuant to 28 U.S.C. § 2254(d)), *aff’d by Demosthenes v. Baal*, 495 U.S. 731 (1990). *Fulford* and *Demosthenes* have created a circuit split regarding whether a competency determination constitutes a factual finding deserving a presumption of correctness. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 954-55 n.55 (5th ed. 2001); *Card v. Singletary*, 981 F.2d 481, 485 n.5 (11th Cir. 1992) (“In *Demosthenes*, the Court noted that state court *factual findings* regarding a petitioner’s competency are entitled to a presumption of correctness under 28 U.S.C. § 2254.” (emphasis added)). Despite the circuit split regarding whether a competency determination is a factual finding, it is reasonably clear that most circuit courts would hold that factual conclusions (such as evaluations of strength and credibility of evidence) underlying a trial judge’s decision to hold *or not to hold* a competency hearing deserve a presumption of correctness under 28 U.S.C. § 2254. *See Filiaggi v. Bagley*, 445 F.3d 851, 855-56, 859 (6th Cir. 2006). *But see Rivers v. Franzen*, 692 F.2d 491, 497 (7th Cir. 1982) (holding that no presumption of correctness attaches to a trial court’s failure to entertain bona fide doubt).

84. *McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001) (analyzing several categories of evidence before the trial judge, including petitioner’s history of mental illness, medications taken, demeanor at trial, and counsel’s stated concerns).

85. *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

86. *Moran III*, 57 F.3d 690, 695 (9th Cir. 1995); *accord Silverstein v. Henderson*, 706 F.2d 361, 369 (2d Cir. 1983).

C. Scenarios Where Pate Violations Occur

Although state and federal prosecutions occur pursuant to robust statutory procedures for protecting a criminal defendant's due process right not to be tried while incompetent,⁸⁷ numerous scenarios result in the wrongful conviction of incompetent defendants.

Defense attorneys play an integral role in raising (or failing to raise) competency issues.⁸⁸ This role likely arises because defense attorneys have greater access to their clients and increased control over how and what prosecutors and courts observe.⁸⁹ Defense attorneys almost universally coach their clients to act stoic and respectful in court, deterring clients from engaging in behavior that would otherwise suggest to a judge the possibility of incompetency.⁹⁰ Further, defense attorneys may recognize incompetency issues but fail to raise them when their client will likely receive a prison term that is relatively shorter than the potentially extended "sentence" in a state hospital.⁹¹ A defense attorney may also fail to raise the issue of competency because the attorney plans to utilize an insanity defense and fears raising incompetency at the pretrial stage would provide the prosecution with unlimited access to evidence of his or her client's mental state.⁹²

87. See *infra* Part I.B. (discussing 18 U.S.C. § 4241(a) (2010) and CAL. PENAL CODE § 1368(a) (West 2010)).

88. See generally Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65; Norma Schrock, Note, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO J. LEGAL ETHICS 639 (1996).

89. See Uphoff, *supra* note 88, at 68-69 (discussing the role defense attorneys play as counselors). Defense attorneys *may* have greater access and control only when their clients have been released from custody; however, it is also possible to argue that the State has greater access to criminal defendants through the jail system. See *Medina v. California*, 505 U.S. 437, 465 (1992) (Blackmun, J., dissenting) (noting that the State will have greater access to a defendant in custody).

90. See *Odle v. Woodford*, 238 F.3d 1084, 1088-89 & n.6 (9th Cir. 2001).

91. Uphoff, *supra* note 88, at 71-72. Under federal law, a criminal defendant may be committed to an institution for up to four months as well as "an additional reasonable period of time" if "there is a substantial probability" the defendant will become competent for trial. 18 U.S.C. § 4241(d) (2010).

92. Robert D. Miller & Edward J. Germain, *The Retrospective Evaluation of Competency to Stand Trial*, 11 INT'L J.L. & PSYCHIATRY 113, 114 (1988) (thoroughly examining the ways in which *Pate* claims arise via the actions of the

The court itself may also play a role in denying criminal defendants due process. Judges can fail to utilize their *sua sponte* power to order a competency hearing despite evidence of incompetency. For instance, problems may arise regarding the application of the *Dusky* standard because of the confusion surrounding the attorney-client relationship: whether a judge finds that a defendant's irrational belief or inability to communicate regarding a particular aspect of defense strategy constitutes incompetency will turn on whether the judge believes the attorney bears sole responsibility for making the decision in question.⁹³

Pate claims may also arise through ancillary procedural errors occurring during a competency hearing.⁹⁴ If such a procedural error causes prejudice or substantially affects the competency determination, it will render the competency determination procedurally inadequate under *Pate*.⁹⁵ Such errors occur when there is a failure to allow defendants to cross-examine witnesses⁹⁶ or to present evidence.⁹⁷ Finally, *Pate* violations occur when there is a failure to provide defendants legal representation during competency hearings.⁹⁸

court and counsel).

93. *Id.* at 115.

94. *See, e.g., Lewis v. Zon*, 573 F. Supp. 2d 804, 821 (S.D.N.Y. 2008) (holding that a *Pate* violation occurred during a contemporaneous competency hearing when defendant was denied an opportunity to cross-examine evidence).

95. *See, e.g., id.* (holding that a *Pate* violation was not harmless where depriving the defendant an opportunity to cross-examine evidence in a contemporaneous competency hearing substantially affected the outcome of the competency hearing).

96. *Id.* at 815 (holding that failure to allow defendant to respond to the prosecution's evidence of competency created a constitutionally inadequate competency hearing).

97. *See Greenfield v. Gunn*, 556 F.2d 935, 937 (9th Cir. 1977) (holding that a competency hearing was constitutionally adequate because (1) the hearing was adversarial, (2) defendant was represented by counsel, (3) defendant was present, and (4) defendant *had an opportunity to present evidence*), *cited with approval in Akhtar v. Knowles*, No. CIV S-03-2674, 2009 WL 57619, at *6 (E.D. Cal. Jan. 9, 2009).

98. *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990) (holding that a trial court cannot hold a competency hearing in which the court openly questions the defendant's competency while allowing the defendant to represent himself because allowing self-representations assumes the defendant was competent to waive his

As indicated above, numerous scenarios can create *Pate* violations. Alarming, remedies provided by the federal circuit courts are numerous (and diverse) as well.⁹⁹ When the Supreme Court finds a violation it consistently maintains that reversal of the underlying conviction and remand for retrial constitutes the only viable remedy because of the inherent difficulties posed by any attempt to retrospectively determine competency.¹⁰⁰ Because the Court has never ordered such a hearing, the Court has never expounded on the purpose or procedure for holding further proceedings to retrospectively determine competency. As a result, lower courts, both federal and state, have filled this void with conflicting views on how to remedy a *Pate* violation.

III. ANY REMEDY FOR A *PATE* VIOLATION MUST PROVIDE CONSTITUTIONALLY ADEQUATE PROCEDURES

If *Pate* guarantees a criminal defendant adequate procedures for determining competency under the Due Process Clause, then the remedy afforded to a criminal appellant or petitioner who has been the victim of a *Pate* violation cannot lead to affirmation of the conviction with less than the adequate procedural protection mandated by *Pate*. Starting from the simple proposition that the remedy for a *Pate* violation must provide equivalent procedural due process protection as that guaranteed at trial under *Pate*, each of the presently practiced remedies will be examined. The presently utilized remedies consist of (1) nunc pro tunc¹⁰¹ retrospective competency hearings,¹⁰² (2)

right to counsel).

99. Compare *Moran III*, 57 F.3d 690, 697 (9th Cir. 1995) (holding that the federal constitution does not require states to assign the burden of proof to the prosecution in nunc pro tunc competency hearings), and *Lokos v. Capps*, 625 F.2d 1258, 1262 (5th Cir. 1980) (holding that petitioner bears the burden of proof in nunc pro tunc competency hearings), with *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992) (stating, in dicta, that the State bears the burden of proof in retrospective competency hearings because such hearings constitute “harmless error inquiry”).

100. See, e.g., *Drope v. Missouri*, 420 U.S. 162, 183 (1975) (holding defendant’s competency could not be determined retrospectively and therefore remanding to state trial court for an opportunity to retry if defendant is found to be presently competent); *Pate v. Robinson*, 383 U.S. 375, 387 (1966) (same.);

101. Nunc pro tunc is a Latin phrase meaning “now for then” and refers to a legal device, such as an order or hearing, “[h]aving retroactive legal effect through a

harmless error retrospective hearings,¹⁰³ and (3) reversal of conviction and remand for retrial.¹⁰⁴ As discussed below, neither *nunc pro tunc* nor harmless error retrospective hearings provide the same procedural safeguards as a contemporaneous hearing. Only reversal and remand in all cases adequately protects a defendant's procedural due process rights under *Pate*.

Because this Comment examines the adequacy of remedies through comparison to the procedures guaranteed by *Pate* under due process, the adequate procedures guaranteed by *Pate* must first be given a substantive description. The substantive description of adequate procedures is derived from analysis of current Supreme Court jurisprudence regarding procedural due process. Section A below sets out the standard of adequate procedures derived from the Court's procedural due process analysis. Sections B, C, and D then evaluate current remedies for compliance with the procedural due process requirements of *Pate*.

court's inherent power." BLACK'S LAW DICTIONARY 1174 (9th ed. 2009).

102. *See, e.g.,* *Odle v. Woodford*, 238 F.3d 1084, 1090 (9th Cir. 2001) (remanding to the district court with directions to grant the petition for writ of habeas corpus unless the state trial court conducted a retrospective hearing within sixty days); *Silverstein v. Henderson*, 706 F.2d 361, 369 (2d Cir. 1983) (reversing district court's dismissal of habeas petition and directing issuance of the writ unless the State were to bring petitioner to trial "within a reasonable time," after determining no retrospective hearing was possible); *Zapata v. Estelle*, 588 F.2d 1017, 1022 (5th Cir. 1979) (remanding to district court for a retrospective hearing).

103. *See, e.g.,* *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992) (holding that retrospectively determining defendant's competency following a *Pate* violation constitutes harmless error inquiry); *Lewis v. Zon*, 573 F. Supp. 2d 804, 820-21 (S.D.N.Y. 2008) (holding that refusal to allow defendant an opportunity to respond to state evidence violates *Pate* as an inadequate procedure and subjecting that error to harmless error analysis).

104. *See, e.g., Pate*, 383 U.S. at 385-86 (reversing and remanding for new trial after noting that an adequate retrospective competency hearing could not be held); *Drope*, 420 U.S. at 172 (same).

A. Procedural Due Process Requires that Adequate Procedures Include the Right to an Adversarial Hearing and an Opportunity to Gather and Present Evidence

In *Medina v. California*,¹⁰⁵ the Court established the standard for evaluating due process claims regarding criminal procedure.¹⁰⁶ Under *Medina*, a state's discretion to provide criminal procedures for the prosecution of criminal defendants will not offend due process "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'"¹⁰⁷ However, the Court nevertheless recognized that criminal procedure cannot "transgress any recognized principle of 'fundamental fairness' in operation."¹⁰⁸ In the *Medina* Court's analysis of what procedure for determining competency accords with fundamental fairness, the Court illuminated what minimal procedural safeguards constitute the *adequate procedures* protected by *Pate*.¹⁰⁹

First, the Court stated that "it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a *reasonable opportunity to demonstrate* that he is not competent to

105. 505 U.S. 437 (1992).

106. *Id.* at 445.

107. *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977) (citations omitted)), *cited with approval* in *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2320 (2009).

108. *Id.* at 448; *see also id.* at 461 (Blackmun, J., dissenting). The Court's originalist position on procedural due process in criminal contexts presented in *Medina* has been criticized on grounds that the Court itself does not always respect such limitations. *See* Bruce J. Winnick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 827-28 (1993) (noting that the Court frequently relies on "contemporary conceptions of justice" when invalidating criminal justice practices).

109. The issue of what constitutes the necessary elements of an adequate competency hearing under *Pate* has not been directly answered by any court. The Ninth Circuit has held that a competency hearing was adequate because (1) the hearing was adversarial, (2) defendant was present at the hearing, (3) defendant was represented by counsel, and (4) defendant was allowed to present evidence. *Greenfield v. Gunn*, 556 F.2d 935, 937 (9th Cir. 1977). *Greenfield* has not had great influence on other courts. However, it has recently been cited by a federal district court. *See Akhtar v. Knowles*, No. CIV S-03-2674, 2009 WL 57619, at *6 (E.D. Cal. Jan. 9, 2009).

stand trial.”¹¹⁰ The Court described such an opportunity to demonstrate incompetence as including the right to assistance of counsel and the opportunity to bring “psychiatric evidence . . . to bear on the question of the defendant’s mental condition.”¹¹¹ Thus, *Medina* clearly provides that the constitutionally adequate procedural safeguards required by *Pate* include the right to an adversarial hearing and an opportunity to gather and present evidence.¹¹²

The Court’s due process jurisprudence also supports the incorporation of an adversarial hearing and an opportunity to gather and present evidence as constitutionally required elements of a competency determination. The Court has held that the Fourteenth Amendment guarantees liberty interests arising from either “the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’” or “from an expectation or interest created by state laws or policies.”¹¹³ Because state laws regarding competency proceedings entitle defendants to certain mandated psychiatric evaluations,¹¹⁴ this view of procedural due process incorporates the right to contemporaneous psychiatric examinations into the right to adequate procedures under *Pate*. Just as there is a due process right to access psychiatric experts when a defendant raises an insanity defense,¹¹⁵ one could infer a similar constitutional guarantee to psychiatric expert assistance when a competency issue arises.¹¹⁶

110. *Medina*, 505 U.S. at 451 (emphasis added).

111. *Id.* at 450 (citation omitted).

112. The right to an adversarial competency hearing has been explicitly upheld by lower federal courts as a necessary procedural requirement of fair competency determinations. See *Lewis v. Zon*, 573 F. Supp. 2d 804, 815 (S.D.N.Y. 2008) (holding that refusal to allow defendant’s response to prosecution’s evidence on the issue of competency deprived defendant of an adequate procedure).

113. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

114. See, e.g., CAL. PENAL CODE § 1369(a) (West 2010); cf. 18 U.S.C. § 4241(b) (2010) (providing federal judges discretion to order a psychiatric evaluation prior to a hearing).

115. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

116. One can also analogize to Supreme Court precedent regarding adequate procedures in capital cases, where the Court announced that “any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate.” *Ford v. Wainwright*, 477 U.S. 399, 414 (1986). Thus, insofar as a court’s failure to order a competency hearing and an opportunity to administer contemporaneous

Although the test established by *Medina* (requiring states to provide criminal defendants with only those procedures necessary to avoid offending traditional and fundamental principles of justice) is narrow, *Medina*'s concurring and dissenting opinions provide further support for incorporating the right to an adversarial hearing and an opportunity to gather and present evidence as adequate procedures under *Pate*.¹¹⁷

In her concurring opinion, Justice O'Connor disagrees with the majority regarding the selection of a restrictive, historic, right-based test for determining whether criminal procedures comport with procedural due process.¹¹⁸ Instead, O'Connor applies the standard balancing test established in *Matthews v. Eldridge*,¹¹⁹ noting that the same balancing test has been applied in previous criminal procedure settings.¹²⁰ In her analysis—which determines that the equities do not support the procedural right of freeing the defendant from bearing the burden of proving incompetency¹²¹—O'Connor focuses on what competency procedures will lead to accurate and reliable determinations.¹²² In comparing the procedure of placing the burden of proof on the State with “the requirement of a hearing or a psychiatric examination,” she notes that requiring hearings or psychiatric examinations would “necessarily increase the reliability of proceedings.”¹²³ In fact, she reasons that the State's lack of a “responsibility to gather evidence” supports holding that the State should not bear the burden of proof at contemporaneous hearings; thus implying the burden rests with the defendant because the defendant

psychiatric examinations deprives defendant of an opportunity to gather the most material evidence regarding competency, retrospective competency determinations under such circumstances should be disfavored.

117. See *Medina v. California*, 505 U.S. 437, 453-56 (1992) (O'Connor, J., concurring); *id.* at 456-68 (Blackmun, J., dissenting).

118. *Id.* at 453 (O'Connor, J., concurring).

119. 424 U.S. 319 (1976).

120. *Medina*, 505 U.S. at 453 (O'Connor, J., concurring) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985) (applying the *Matthews* balancing test in the context of criminal procedure and holding that criminal defendants have a due process right to access a competent psychiatrist when raising an insanity defense)).

121. *Id.* at 455 (O'Connor, J., concurring).

122. *Id.*

123. *Id.*

bears the responsibility of gathering evidence before a court-ordered competency hearing.¹²⁴ Based on this analysis, it is likely that a *Matthews* balancing analysis would find an adversarial hearing and required psychiatric examinations constitutionally protected as adequate procedures mandated by *Pate*.

Justice Blackmun's dissent begins by reasserting the fundamental necessity of the right not to be tried while incompetent in a fair system of criminal justice.¹²⁵ It then reiterates that *Pate* guarantees adequate procedures for determining competency.¹²⁶ According to Blackmun, due process "demands adequate *anticipatory, protective procedures* to minimize the risk that an incompetent person will be convicted."¹²⁷ Thus, the only analysis required to determine what procedures comport with due process involves whether the procedure "is necessary to protect adequately the underlying due process right"—the right not to be tried while incompetent.¹²⁸

Blackmun's view of procedural due process centers on the notion that the "primary right (the right not to be tried while incompetent)" cannot be examined separately from the "subsidiary [procedural] right" (in *Medina*, the right of the defendant to be free from the burden of proof in competency proceedings).¹²⁹ Thus, in determining whether the procedure at issue in *Medina* (allocating the burden of proof in contemporaneous competency proceedings to defendant) offended due process, Blackmun asked whether the alternative was required to protect the substantive right not to be tried while incompetent.¹³⁰ He answered this inquiry in the affirmative.¹³¹ Blackmun would have held that due process requires the burden of proof be placed on the State because of his concern with the defendant's opportunity to gather and present evidence regarding competency.¹³² There are several reasons

124. *See id.* at 456.

125. *Id.* at 457 (Blackmun, J., dissenting).

126. *Id.* at 458.

127. *Id.*

128. *Id.* at 458-59.

129. *Id.* at 459.

130. *Id.* at 458-59.

131. *Id.* at 459.

132. *Id.* at 465 (noting that the State will have greater access to a defendant in custody).

for this concern. First, the State generally has better access to the primary source of evidence: the defendant held in jail.¹³³ Second, Blackmun asserts that expert psychiatric opinion provides the strongest basis for most competency determinations.¹³⁴ Third, defense attorneys rarely find it appropriate to testify regarding their own observations of the defendant.¹³⁵ Thus, Blackmun asserts that the concern with gathering and presenting evidence renders the procedure (placing the burden of proof on the State) necessary to adequately protect the right not to be tried while incompetent.¹³⁶

All three opinions in *Medina* therefore support the assertion that the adequate procedures guaranteed by *Pate* necessarily require a meaningful opportunity for defendant to gather and present evidence on the issue of competency.¹³⁷ If *Pate* indeed requires such procedural safeguards, the remedies for vindicating a defendant's procedural due process rights must also include vindication of such safeguards. In other words, where the State has violated a defendant's constitutional rights by failing to hold a competency hearing, the remedy cannot be a competency hearing with less protection than the contemporaneous hearing guaranteed by *Pate*.

The three alternative remedies for the violation of a defendant's *Pate* rights include (1) holding a retrospective, nunc pro tunc competency hearing to "cure" the violation,¹³⁸ (2) allowing the State to argue the constitutional violation was harmless error by holding a retrospective competency hearing,¹³⁹ and (3) requiring the court to reverse the conviction and remand to the State for re-trial.¹⁴⁰ In order

133. *Id.*

134. *Id.*

135. *Id.* at 465-66.

136. *Id.* at 463.

137. Indeed, the Third Circuit takes the position that *Pate* positively guarantees the right to present evidence in a competency hearing as a constitutionally required adequate proceeding. *See Hull v. Kyler*, 190 F.3d 88, 111 (3d Cir. 1999).

138. *See Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) ("The state court can nonetheless cure its failure to hold a competency hearing at the time of trial by conducting one retroactively.").

139. *See James v. Singletary*, 957 F.2d 1562, 1570-71 & n.11 (11th Cir. 1992).

140. Although all circuit courts provide that retrospective determinations are permissible under Supreme Court precedent, no Supreme Court decision has found

for any of these remedies to comport with due process, the remedy must adequately protect the minimal procedural safeguards guaranteed by *Pate*. In particular, the remedy must protect one's right under *Pate* to (1) an adversarial hearing, and (2) an opportunity to gather and present evidence.

B. Nunc Pro Tunc Hearings Fail to Provide Adequate Procedures

The purpose of a nunc pro tunc hearing, as inferred from the Latin phrase meaning "now for then," is to hold a hearing that takes the place of a contemporaneous hearing as if it had been held at the earlier time.¹⁴¹ In order for the State to preserve the conviction through a nunc pro tunc cure, the State first must establish that a meaningful retrospective hearing can occur.¹⁴² If the State prevails at this threshold hearing, a further retrospective hearing will be provided where the appellant-petitioner must carry the burden of proof.¹⁴³

1. The State Bears the Initial Burden of Proving Sufficient Evidence Exists to Hold a Meaningful Nunc Pro Tunc Hearing

When a petitioner establishes a *Pate* violation, the State must prove that enough evidence exists to meaningfully determine *ex post*

such a determination appropriate. See *Pate v. Robinson*, 383 U.S. 375, 387 (1966) (holding on the narrow facts of the case that the need for a contemporaneous competency determination rendered a retrospective hearing inadequate); *Drope v. Missouri*, 420 U.S. 162, 183 (1975) (holding that the inherent difficulties of determining competency retrospectively rendered a retrospective determination inadequate).

141. See *Iouri v. Ashcroft*, 464 F.3d 172, 181-82 (2d Cir. 2006) (citing BLACK'S LAW DICTIONARY 1100 (8th ed. 2004)).

142. See *Zapata v. Estelle*, 588 F.2d 1017, 1020 (5th Cir. 1979) (placing the burden on the State to prove that sufficient evidence exists to hold a meaningful retrospective hearing because the State bore responsibility for the constitutional error); accord *Odle*, 238 F.3d at 1089-90 (holding that retrospective competency hearings are permissible only where sufficient evidence exists to make a reasonable determination of competency).

143. Compare *Lokos v. Capps*, 625 F.2d 1258, 1262 (5th Cir. 1980) (placing the burden of proof on the petitioner), and *Moran III*, 57 F.3d 690, 697 (9th Cir. 1995) (holding that the Constitution does not prohibit placing the burden of proof on petitioners in retrospective competency hearings), with *James*, 957 F.2d at 1571 (placing the burden of proof in retrospective competency hearings on the State).

facto the petitioner's competency in a retrospective hearing.¹⁴⁴ Courts have held that the burden shifts to the State to prove the meaningfulness of a retrospective hearing because the State has violated the petitioner's rights.¹⁴⁵ The requirement protects a petitioner who raises a *Pate* claim¹⁴⁶ by reversing the conviction unless the State carries this burden.¹⁴⁷ However, the standard often utilized allows for retrospective determinations so long as evidence exists that a determination would be "more than mere speculation"¹⁴⁸—such a low threshold that one must question the reliability of such retrospective competency determinations.

The State discharges its obligation of proving a meaningful and adequate retrospective hearing by establishing that sufficient evidence exists of the petitioner's mental state at the time of the alleged due process violation.¹⁴⁹ Typically, the State meets its burden upon compiling evidence that includes declarations prepared by "[e]xpert witnesses who testified at trial, . . . experts who have since examined [the petitioner], . . . [and] defense counsel" as well as "medical

144. See *McGregor v. Gibson*, 248 F.3d 946, 962 (10th Cir. 2001); *James*, 957 F.2d at 1570-71. It has also been argued that unless the State raises the "disfavored remedy" of a retrospective competency hearing, a reviewing court has no sua sponte duty to order one, resulting in the issuance of a writ of habeas corpus. See *United States v. Bergman*, 599 F.3d 1142, 1160-61 (10th Cir. 2010) (Holmes, J., dissenting).

145. See *Zapata*, 588 F.2d at 1020.

146. This requirement is absent when a petitioner raises a substantive claim of incompetency because the State has not committed any error. The petitioner who raises a substantive claim of incompetency must proceed and attempt to prove his prior incompetency based on whatever evidence happens to exist.

147. See *Martin v. Estelle*, 583 F.2d 1373, 1377 (5th Cir. 1978) ("[T]he question which the court must ask itself, and must answer [is] 'Do there appear to be presently available to the court tools of principled decision that will produce a retrospective determination of trial competency sufficiently accurate to be judicially available?'").

148. *Bruce v. Estelle*, 536 F.2d 1051, 1057 (5th Cir. 1976); accord *Wheat v. Thigpen*, 793 F.2d 621, 630 (5th Cir. 1986); see also *Thompson v. Commonwealth*, 56 S.W.3d 406, 409 (Ky. 2001) (adopting the "more than mere speculation" standard).

149. See *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) ("[R]etrospective competency hearings may be held when the record contains sufficient information upon which to base a reasonable psychiatric judgment.").

records, psychiatric reports and jail records.”¹⁵⁰ The Tenth Circuit has established a four-factor test enumerating the type of evidence to be considered:

(1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials.¹⁵¹

If the State proves enough evidence exists to hold a meaningful retrospective hearing, the court must hold an evidentiary hearing to determine the petitioner’s competency at the time of trial.¹⁵² While the practice in some jurisdictions allows the reviewing court to determine whether a retrospective competency hearing is possible, other jurisdictions favor remand, so that the trial court (where such a hearing would take place) can make the threshold determination itself.¹⁵³

2. *Venue for Nunc Pro Tunc Hearings*

Venue for a retrospective competency hearing depends on both the jurisdiction and the court where the matter lies. When an appellant raises a *Pate* violation in an appeal or post-conviction proceeding within the state court system, common practice requires remand to the

150. *Id.* at 1090.

151. *Clayton v. Gibson*, 199 F.3d 1162, 1169 (10th Cir. 1999). Some states have also adopted the four factor *Clayton* test for use in state appellate court procedures regarding *Pate* violations. *E.g.*, *People v. Robinson*, 60 Cal. Rptr. 3d 102, 109-10 (Ct. App. 2007); *State v. Sanders*, 549 S.E.2d 40, 54 (W. Va. 2001).

152. *Lokos v. Capps*, 625 F.2d 1258, 1262 (5th Cir. 1980).

153. *Compare* *United States v. Renfroe*, 825 F.2d 763, 767 (3d Cir. 1987) (“The district court is in the best position to determine whether it can make a retrospective determination of Renfroe’s competency during his trial and sentencing.”), *and* *State v. Snyder*, 750 So. 2d 832, 855 (La. 1999), *with* *McGregor v. Gibson* 248 F.3d 946, 963 (10th Cir. 2001) (holding that insufficient evidence exists to hold a retrospective competency hearing and not remanding for the district court to make that determination), *and* *Maxwell v. Roe*, 606 F.3d 561, 577 (9th Cir. 2010).

State's trial court for a retrospective hearing.¹⁵⁴ In federal habeas corpus proceedings, most circuits require the district court to remand to the state court for a retrospective competency hearing.¹⁵⁵ In contrast to this majority practice, some federal circuits have provided habeas petitioners with retrospective competency hearings in a federal district court.¹⁵⁶ In *James v. Singletary*,¹⁵⁷ the Eleventh Circuit suggested, in dicta, that proper procedure requires holding a retrospective competency hearing in a federal district court because (1) a *Pate* violation involves a federal constitutional question, and (2) remand to state court for a limited evidentiary hearing could create "a virtually unappealable proceeding caught in the never-never land between criminal and civil procedure."¹⁵⁸ Furthermore, state trial courts may favor findings of competency because of a bias toward preserving convictions and avoiding the burden of retrying the case.¹⁵⁹

3. *Burden of Proof at Nunc Pro Tunc Hearings*

Initially, the placement of the burden of proof in a retrospective competency hearing depends on the placement of the burden of proof applied at contemporaneous competency hearings in the trial court where the petitioner was convicted. For instance, in federal prosecutions, circuit courts interpreting 28 U.S.C. § 4241 as placing the burden of proof on the government in a contemporaneous hearing likewise place the burden of proof on the government in retrospective

154. See, e.g., *People v. Ary*, 13 Cal. Rptr. 3d 482, 494 (Ct. App. 2004); *Snyder*, 750 So.2d at 855.

155. See, e.g., *Odle v. Woodford*, 238 F.3d 1084, 1090 (9th Cir. 2001); *Zapata v. Estelle*, 585 F.2d 750, 752 (5th Cir. 1979). In *Pate*, no retrospective hearing could be held, but the Court considered remanding to the state court for a retrospective competency hearing. *Pate v. Robinson*, 383 U.S. 375, 387 (1966).

156. E.g., *Martin v. Estelle*, 546 F.2d 177, 180 (5th Cir. 1977).

157. 957 F.2d 1562 (1992).

158. *Id.* at 1571 n.14.

159. Robert D. Miller & Edward J. Germain, *The Retrospective Evaluation of Competency to Stand Trial*, 11 INT'L J.L. & PSYCHIATRY 113, 120 (1988). Some courts will remand to the specific trial judge before whom the constitutional error occurred, a practice that leads to an even stronger danger of bias, as few trial judges readily and happily overturn convictions that they personally oversaw. See *id.* at 124.

hearings.¹⁶⁰ Similarly, if an appellant challenges a conviction within the State's appellate courts, the State will bear the burden of proof in a retrospective competency hearing if the State would bear the burden in a contemporaneous hearing.¹⁶¹ Generally, appellate and habeas courts place the burden of proving incompetency on the petitioner when the petitioner would have bore that burden at a contemporaneous hearing.¹⁶²

Circuit courts that have adopted the *nunc pro tunc* approach to remedying *Pate* violations place the burden of proof in the retrospective competency hearing on the defendant. The Fifth Circuit was the first to widely approve of the procedure.¹⁶³ Subsequently, other circuit courts adopted a similar position. For instance, the Ninth Circuit, in *Moran v. Godinez*,¹⁶⁴ placed the burden on the petitioner, holding that the petitioner has no right to be free from the burden of proof in retrospective *nunc pro tunc* hearings because the petitioner has no right to be free from the burden of proof in contemporaneous competency determinations.¹⁶⁵ A year later, the Eighth Circuit independently adopted the same holding and the same rationale.¹⁶⁶

160. See *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (citing *Lowenfield v. Phelps*, 817 F.2d 285, 294 (5th Cir. 1987) (holding that Congress placed the burden of proof in contemporaneous competency hearings on the government)).

161. *Commonwealth v. Simpson*, 704 N.E.2d 1131, 1136 (Mass. 1999) (holding the State has an opportunity to prove defendant was competent at the time of trial in a retrospective hearing held after the defendant files a motion for new trial).

162. See *Moran III*, 57 F.3d 690, 697 (9th Cir. 1995) (holding that the Constitution does not prohibit placing the burden of proof on petitioners in retrospective competency hearings); *Lokos v. Capps*, 625 F.2d 1258, 1261-62 (5th Cir. 1980) (placing the burden of proof on the petitioner).

163. *Id.* at 1262.

164. *Moran III*, 57 F.3d at 690.

165. *Id.* at 697; see also *People v. Ary*, 246 P.3d 322, 329 (Cal. 2011) (adopting *Moran's* holding that the State may place the burden of proof in a *nunc pro tunc* competency hearing on defendant raising a *Pate* violation).

166. *Rhode v. Olk-Long*, 84 F.3d 284, 288 (8th Cir. 1996).

4. *The Failures of Nunc Pro Tunc Hearings*

The Ninth Circuit's holding in *Moran* reasons that nunc pro tunc competency hearings appropriately remedy *Pate* violations because they *cure* the violation by holding a substitute proceeding.¹⁶⁷ In *Moran*, the court considered whether a reviewing court may allocate the burden of proof in retrospective competency hearings to the petitioner or appellant.¹⁶⁸ The court reasoned that what constitutes an adequate procedure in a contemporaneous hearing also constitutes an adequate procedure in a retrospective hearing.¹⁶⁹ Therefore, following the Supreme Court's holding in *Medina*, the Ninth Circuit held that a petitioner may constitutionally bear the burden of proof in retrospective hearings.¹⁷⁰

The *Moran* court cannot be criticized for concluding that the adequate procedures required for a contemporaneous hearing must also be the adequate procedures required for a retrospective hearing: the conclusion is inherent in the definition of a nunc pro tunc proceeding. But, the full application of that conclusion, requiring the adequate procedures for contemporaneously determining competency to be equally present in a retrospective hearing, uncovers the insufficiencies intrinsic to nunc pro tunc determinations of competency.

Circuit Judge Pregerson's dissent in *Moran* highlights the deficiencies of retrospective competency determinations.¹⁷¹ Pregerson dissented because he believed the burden of proof in nunc pro tunc hearings should fall on the State to protect the petitioner from those deficiencies. Pregerson reasoned that the State should bear the burden because, in most cases, evidence becomes stale or unavailable by the time a retrospective hearing is held and requiring the petitioner to bear

167. See *Moran III*, 57 F.3d at 695-96.

168. *Id.* at 697.

169. *Id.*

170. *Id.* *Moran* actually went further, holding that a Nevada law assigning the burden of proof to the State in retrospective competency hearings does not create "a federally protected state liberty interest in such a right." *Id.* at 697-98. Thus, Richard Allan Moran's conviction and death sentence were upheld in a Nevada postconviction court despite the incorrect application of Nevada law; nevertheless, federal courts offered Moran no relief. *Id.* at 697-98, 700.

171. See *id.* at 701 (Pregerson, J., dissenting).

the burden of proving incompetency under such conditions "would result in affirmance in *every* case where the record has become stale."¹⁷² However, Pregerson's dissent rests on the suggestion that the *Medina* standard for allocating the burden of proof in contemporaneous competency hearings should *not* equally apply in retrospective hearings.¹⁷³ This proposition cuts against the notion that a nunc pro tunc competency hearing, as an equivalent stand-in, cures the failure to hold a contemporaneous hearing.

Instead of requiring a nunc pro tunc hearing to provide procedural safeguards equivalent to those found in a contemporaneous hearing (the adequate procedures guaranteed by *Pate*), Pregerson would require the procedures of a nunc pro tunc hearing to independently satisfy the due process "fundamental fairness" analysis.¹⁷⁴ For Pregerson, a nunc pro tunc hearing constitutes a fundamentally fair proceeding if the State bears the burden of proof, despite the remainder of the deficiencies he himself noted.¹⁷⁵

Therefore, it seems that even if the burden of proof were shifted to the State, nunc pro tunc competency determinations do not adequately protect the rights guaranteed by *Pate*. Of the two procedural rights identified by *Pate* as essential elements of a fundamentally fair contemporaneous competency hearing (an adversarial hearing and an opportunity to gather evidence), nunc pro tunc competency hearings adequately protect only the right to an adversarial hearing.

The primary failure of nunc pro tunc hearings results from the utter lack of protection for the right to gather and present evidence. In fact, Pregerson finds the primary failure of fundamental fairness occurs when the State benefits from defendant's failure to gather evidence of his or her relevant mental condition at the time of trial—a result caused by the State's failure to order a contemporaneous hearing.¹⁷⁶ In other words, a nunc pro tunc competency hearing fails the fundamental fairness test announced in *Medina* because it is unfair to determine competency to stand trial when the defendant had no opportunity to gather evidence of his incompetency.

172. *Id.* at 703.

173. *See id.* at 702-03.

174. *See id.* at 703.

175. *See id.* at 702.

176. *See id.* at 703.

Based on existing evidence in the record, a nunc pro tunc competency hearing could lead to a finding of competency when ample evidence of incompetency could have been gathered by contemporaneous psychiatric evaluations. When the court fails to order a hearing, the defendant has no notice of an adversarial proceeding and no purpose for gathering such evidence.

Because nunc pro tunc competency hearings fail to protect the rights guaranteed by *Pate*, the remedy generally afforded by reviewing courts faced with a successful *Pate* claim should be held unconstitutional. It offends fundamental fairness to determine competency with procedures inadequate to protect the right to a contemporaneous and adversarial proceeding, regardless whether the determination is made at the time of trial or on appeal. Whenever the determination is made, the procedures used to make the competency determination must protect those rights.

*C. Harmless Error Retrospective Hearings Fail to
Provide Adequate Procedures*

Generally, a trial court's failure to order a competency hearing when reasonable doubt exists constitutes a per se prejudicial constitutional error and "is not subject to harmless error review."¹⁷⁷ Nevertheless, the general practice allows courts to *cure* the violation with a nunc pro tunc hearing. In contrast to the general practice, the Eleventh Circuit, in *James v. Singletary*,¹⁷⁸ described the practice of retrospectively determining competency as "harmless error analysis in disguise."¹⁷⁹ Analysis of the Eleventh Circuit's reinterpretation of retrospective competency hearings' purpose requires an understanding of the purpose and function of harmless error analysis. Thus, a short synopsis of Supreme Court harmless error analysis follows below. Then, the Eleventh Circuit's use of harmless error retrospective hearings is criticized for failing to meet the requirements of due process.

177. *See* *People v. Ary*, 13 Cal. Rptr. 3d 482, 492 (Ct. App. 2004).

178. 957 F.2d 1562 (11th Cir. 1992).

179. *Id.* at 1571 n.14.

1. Supreme Court Jurisprudence on Harmless Error Analysis

In general, appellate courts reviewing a state conviction on direct appeal apply the standard established in *Chapman v. California*¹⁸⁰: to preserve the conviction the State must prove the error was harmless beyond a reasonable doubt.¹⁸¹ When a state court conviction is challenged in a federal habeas corpus review, courts generally apply the standard established in *Brecht v. Abrahamson*¹⁸²: the conviction must be reversed if “the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”¹⁸³ Under both standards, the burden of proof lies with the State and the error is presumed to be prejudicial, thus favoring reversal.¹⁸⁴

While reviewing courts may inquire whether most constitutional errors constitute harmless violations, the Court has consistently held that some errors require automatic reversal.¹⁸⁵ The Court requires automatic reversal when an error is *structural*—that is, when “the error ‘necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’”¹⁸⁶ Contrast structural errors with trial errors: a structural error “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.”¹⁸⁷ In between errors amenable to harmless error analysis and structural errors requiring automatic reversal, one finds errors that require a showing of prejudice in order to demonstrate a constitutional violation.¹⁸⁸ In such cases, a sufficient

180. 386 U.S. 18 (1967).

181. *Id.* at 24.

182. 507 U.S. 619 (1993).

183. *Id.* at 623 (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

184. See 2 HERTZ & LIEBMAN, *supra* note 83, at 1514-15; O’Neal v. McAninch, 513 U.S. 432, 436-37 (1995).

185. See *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (holding that conviction before a partial judge is not made harmless by the fact that the defendant was guilty); *Neder v. United States*, 527 U.S. 1, 7 (1999) (recognizing the Court’s long-standing rule requiring automatic reversal where an error’s inherent harmfulness precludes harmless error analysis).

186. *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)).

187. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

188. See, e.g., *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that suppression of evidence favorable to the defense by the prosecution constitutes

showing of prejudice by the appellant defeats a harmless error argument by the State.¹⁸⁹

Harmless error analysis may apply when a criminal defendant raises and proves a *Pate* violation in two different contexts: (1) when the *Pate* violation consists of a court's failure to sua sponte order a competency hearing despite evidence of incompetency, or (2) when the violation consists of some ancillary violation within a contemporaneous competency hearing rendering the proceedings procedurally inadequate.

2. *James and Retrospective Competency Determinations as Harmless Error Analysis*

In *James v. Singletary*,¹⁹⁰ the Eleventh Circuit broke from precedent established in the Fifth Circuit¹⁹¹ by holding that the State should bear the burden of proof in retrospective competency hearings.¹⁹² *James's* reasoning radically reinterprets the meaning of retrospective hearings—retrospective hearings no longer “cure” and “stand in for” the missing contemporaneous hearing.¹⁹³ Instead, under *James*, a retrospective competency hearing establishes the *Pate* violation was harmless error because the defendant was nevertheless competent.¹⁹⁴ Although some courts consider this “holding” to constitute dicta, *James* has been followed by the Eleventh Circuit and

constitutional error only if a reasonable probability of prejudice exists).

189. See *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (holding that harmless error analysis should not be used where an appellant has made a successful *Bagley* claim, because the claim itself requires a showing of a reasonable probability of prejudice). Used in this sense, a *Bagley* claim is synonymous with a *Brady* claim, which targets violations of the right to have the prosecution turn over favorable evidence to the defendant. See *id.* at 432-47.

190. 957 F.2d 1562 (11th Cir. 1992).

191. The Eleventh Circuit was created on October 1, 1981 by dividing the Fifth Circuit. In its first published opinion, the Eleventh Circuit held that the decisions made by the Fifth Circuit before the close of September 30, 1982 constituted binding precedent on the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

192. *James*, 957 F.2d at 1571.

193. See *id.* at 1570-72 & n.11.

194. See *id.*

many states regarding its reallocation of the burden of proof in competency hearings.¹⁹⁵

James concluded that a retrospective competency hearing following a *Pate* violation constitutes harmless error analysis due to its interpretation of *Pate*.¹⁹⁶ Because the Supreme Court in *Pate* (and in *Dusky* and *Drope*) reversed convictions and remanded for new trials where the State could not establish sufficient evidence existed to make a meaningful competency determination, the *James* court inferred a petitioner's showing of a *Pate* violation produced a rebuttable presumption of incompetency.¹⁹⁷ If the Court had presumed Robinson to be competent and thus placed the burden of proof in a retrospective hearing on petitioner Robinson, the correct remedy when a hearing could not be held would be affirmance of the conviction.¹⁹⁸ Therefore,

195. See *Moore v. Campbell*, 344 F.3d 1313, 1324 (11th Cir. 2003) (citing *James* for proposition that a *Pate* violation consisting of failure to hold a competency hearing at trial constitutes harmless error if the defendant was competent at that time). The Eleventh Circuit has not treated the allocation of the burden of proof in retrospective hearings to the State or the treatment of such hearings as harmless error analysis as dicta. A later Eleventh Circuit decision describes retrospective competency hearings as "nunc pro tunc" proceedings, but nevertheless retains the shifted burden of proof established in *James*. See *Watts v. Singletary*, 87 F.3d 1282, 1287 n.6 (11th Cir. 1996). The most recent federal district court treatment of *Pate* claims in the circuit follows *James* in holding that a *Pate* violation "establishes a rebuttable presumption of incompetency." See, e.g., *White v. Crosby*, No. 8:04-cv-2651-T-30TGW, 2008 WL 540771, at *3 (M.D. Fla. Feb. 25, 2008).

Many state high courts have approved of the reasoning in *James*, adopting the burden shifting practice established by the Eleventh Circuit. See *Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010) (citing *James*, 957 F.2d at 1570) (holding that defendant is presumed incompetent after successfully raising *Pate* claim); *State v. Snyder*, 750 So. 2d 832, 855 n.16 (La. 1999) (quoting *James*, 957 F.2d at 1570, 1571 n.14) (adopting Eleventh Circuit's reasoning that retrospective competency determination constitutes harmless error analysis); *State v. Sanders*, 549 S.E.2d 40, 54 n.10 (W.Va. 2001) (quoting *James*, 957 F.2d at 1570, 1571 n.14) (adopting *James*' conclusion that retrospective competency hearings constitute harmless error analysis and that *Pate* creates a presumption of incompetency). Before *James*, the Nevada Supreme Court independently shifted the burden of proof in retrospective competency hearings to the State. See *Doggett v. Warden, Nev. State Prison*, 572 P.2d 207, 210 (Nev. 1977).

196. See *James*, 957 F.2d at 1570-71 & n.11.

197. *Id.*

198. *Id.* at 1570 n.11.

the *James* court concluded that providing the State with an opportunity to “rectify the trial court’s error by means of a *nunc pro tunc* competency hearing can only be interpreted as a harmless error analysis.”¹⁹⁹

The shift in the burden of proof in retrospective competency hearings constitutes the one reason to applaud the Eleventh Circuit’s practice, because of the following: First, the *Pate* violation occurred because of the State’s failure to hold a competency hearing. The State benefited from this error, thus, it should bear the burden of proof.²⁰⁰ Second, the error occurred because the evidence regarding competency was, at best, deadlocked; thus, forcing petitioner to prove incompetency, even by a preponderance of the evidence, would result in the resolution of close cases in favor of the State—the party who committed the original constitutional violation.²⁰¹ Third, the State’s failure to order a contemporaneous hearing led to defendant’s failure to gather evidence regarding his mental state at the time of trial; the State’s error led to an evidentiary gap. Consequently, *James* partially affords defendants justice by appropriately shifting the burden of proof onto the State and favoring the petitioner or appellant by presuming incompetency.

However, treating a retrospective competency hearing as a harmless error analysis instead of a *nunc pro tunc* substitute for a contemporaneous hearing does not eliminate the inherent unreliability and inadequacy of all retrospective hearings. Therefore, *James* and its progeny also fail to protect the rights of criminal defendants. The remedy afforded by reviewing courts must provide at least the same adequacy as a contemporaneous hearing to satisfy the rights guaranteed by *Pate*. In this regard, a *Pate* violation would only be harmless if the State could prove that a retrospective competency determination could be held with equivalent indicia of reliability and procedural adequacy—an impossible burden to bear because of the inherent loss of reliability in any *ex post* determination of competency.

Under Supreme Court precedent, a *Pate* violation should be considered a structural, *per se* error because the failure to hold a

199. *Id.*

200. *Chapman v. California*, 386 U.S. 18, 24 (1967).

201. *See Moran III*, 57 F.3d 690, 703 (9th Cir. 1995).

contemporaneous competency hearing deprives defendant of the notice required to gather evidence regarding his competency.²⁰² A *Pate* violation constitutes a structural error in the procedure of gathering and presenting evidence that permeates any subsequent attempts to retrospectively determine competency. Such an error is not amenable to the harmless error analysis established in *Brecht*: it is nonsensical to ask whether "the error 'had substantial and injurious effect or influence in determining the jury's verdict'" when no proceeding was held in which a jury was asked to determine competency.²⁰³

The Eleventh Circuit's attempt to utilize retrospective competency hearings as harmless error analyses fails to comply with the due process guarantee of adequate procedures under *Pate*. The approach contains the same structural deficiencies as nunc pro tunc competency hearings: they proceed on limited evidence making them inherently less reliable than the contemporaneous hearings guaranteed by *Pate*. As neither form of retrospective competency hearings currently in practice complies with *Pate's* own due process guarantee of adequate

202. Although the prototypical *Pate* violation involves a complete failure to hold a competency hearing despite bona fide or reasonable doubt of defendant's competency, a *Pate* violation also may involve a procedural error occurring during a contemporaneous competency hearing. *See, e.g., Lewis v. Zon*, 573 F. Supp. 2d 804, 821 (S.D.N.Y. 2008); *State v. Boorigie*, 41 P.3d 764, 771-72 (Kan. 2002). Because such an ancillary constitutional error (such as the right to confront witnesses) could render a contemporaneous hearing an inadequate procedure, these errors give rise to *Pate* claims. However, unlike *Pate* claims consisting of a failure to hold a contemporaneous hearing, this subset of *Pate* claims *can* be subject to harmless error analysis. *See State v. Davis*, 130 P.3d 69, 77 (Kan. 2006) (holding that a *Pate* violation cannot be subject to harmless error analysis when the error consists of the failure to hold a competency hearing, although errors within a competency hearing may be subject to harmless error analysis). If the ancillary constitutional error did not have an effect on the court or jury's ultimate determination of whether defendant was competent, then the constitutional error is deemed harmless. *See, e.g., Lewis*, 573 F. Supp. 2d at 821 (holding *Pate* violation was not harmless where depriving defendant of the opportunity to cross examine evidence in a contemporaneous competency determination substantially altered the competency hearing); *Boorigie*, 41 P.3d at 771-72 (utilizing harmless error analysis to determine that failure to suspend all proceedings after a competency hearing was ordered constituted harmless error because no trial court made prejudicial decisions during the relevant proceedings).

203. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

procedures to determine competency, courts should look to another remedy.

D. The Appropriate Remedy: Reversal of the Conviction and Remand for New Trial

The only appropriate remedy for a *Pate* violation, not including *Pate* violations consisting of harmless, ancillary constitutional violations, is the only remedy that the Supreme Court has ever granted: reversal of the conviction and remand for new trial.²⁰⁴ Because *Pate* guarantees adequate procedures, including the right to present evidence, the right to cross-examine, and the right to an adversarial hearing,²⁰⁵ retrospective competency hearings of any kind fail to vindicate a defendant's *Pate* rights.²⁰⁶ Remedying a *Pate* violation with a procedurally inadequate competency determination completely vitiates the rights guaranteed by *Pate* because such a remedy affirms the conviction without ever holding a procedurally adequate competency hearing. The conviction should be reversed. Only then may the State hold a new competency hearing to determine if defendant is competent to stand trial at the new proceedings. Any

204. The United States Supreme Court has never allowed a *Pate* violation to be cured by a retrospective determination, either as a nunc pro tunc proceeding or as harmless error analysis. *See Pate v. Robinson*, 383 U.S. 375, 385-86 (1966); *Drope v. Missouri*, 420 U.S. 162, 172 (1975). Immediately subsequent to the *Pate* decision, some state high courts interpreted Supreme Court precedent as implying that *Pate* violations *could not* be cured by any further proceeding, but rather required reversal. *See Hayden v. Commonwealth*, 563 S.W.2d 720, 723 (Ky. 1978), *overruled by Thompson v. Commonwealth*, 56 S.W.3d 406, 409-10 (Ky. 2001). Only after the circuit courts established procedures for holding retrospective competency hearings did those state high courts reverse course. *See Thompson*, 56 S.W.3d at 409-10. Most recently, a California Supreme Court Justice wrote, in a concurring opinion, that “[r]eason exists to believe that the United States Supreme Court would not approve the procedure” of retrospectively determining competency following a *Pate* violation. *People v. Ary*, 246 P.3d 322, 330 (Cal. 2011) (Werdegar, J., concurring). The concurring opinion supported the assertion on the same grounds given here: the Supreme Court has consistently denied the adequacy of the procedure because of its “inherent difficulties.” *Id.*

205. *See supra* Part III.A.

206. *See Evans v. Raines*, 800 F.2d 884, 888 (9th Cir. 1986) (When the state court fails [to sua sponte order a competency hearing under *Pate*], it often may be impossible to repair the damage retrospectively.”).

other remedy is inadequate to protect the right not to stand trial while incompetent.

Although treating *Pate* violations as un-curable, per se prejudicial constitutional errors appears to be a harsh rule,²⁰⁷ such a treatment would change only a small fraction of the cases where a *Pate* claim is raised.²⁰⁸ Furthermore, the *Dusky* standard of incompetency poses a very high threshold because the defendant must lack a factual and rational understanding of the proceedings and the ability to communicate with counsel.²⁰⁹ A criminal defendant must therefore display symptoms of a severe mental disorder to create reasonable doubt that his or her incompetence comes within that standard.²¹⁰ The cost of retrying this small number of cases should be borne by the State because the judge, as a state actor, failed to provide the defendant with due process.²¹¹

CONCLUSION

In his dissenting opinion in *Medina*, Justice Blackmun wrote, "Because the *Due* Process Clause is not the *Some* Process Clause, I remain convinced that it requires careful balancing of the individual and governmental interests at stake to determine what process is due."²¹² The Supreme Court has considered and decided the issue of

207. See *Drope v. Missouri*, 420 U.S. 162, 181-82 (1975) (noting that forcing the State to retry a defendant constitutes a "hard reality").

208. See *Drope*, 420 U.S. at 183 ("Given the inherent difficulties of such a nunc pro tunc determination under the most favorable of circumstances . . . we cannot conclude that such a procedure would be adequate here."); *People v. Ary*, 13 Cal. Rptr. 3d 482, 493 (Ct. App. 2004) ("We emphasize, however, that it is the rare case in which a meaningful retrospective competency determination will be possible."). Thus, it appears rare that sufficient evidence will exist with which to hold a retrospective hearing, and the majority of *Pate* violations result in reversal and remand under present law.

209. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

210. See *Pate v. Robinson*, 383 U.S. 375, 388-89 (1966) (Harlan, J., dissenting) (suggesting that the evidence before the trial judge in *Pate* did not create doubt of an impairment sufficient to satisfy the *Dusky* standard).

211. See, e.g., *Drope*, 420 U.S. at 181-82 ("That this might have aborted the trial is a hard reality, but we cannot fail to note that such a result might have been avoided by prompt psychiatric examination before trial, when it was sought by petitioner.").

212. *Medina v. California*, 505 U.S. 437, 463 (1992) (Blackmun, J.,

whether criminal defendants have a due process right to adequate procedures for determining competency: *Pate* guarantees this right.²¹³ The remedy for a *Pate* violation cannot affirm the conviction without providing the adequate procedures guaranteed by *Pate*; otherwise, the *Pate* rights are completely vitiated. Thus, when considering what procedures appropriately remedy a *Pate* violation, utmost concern must first be given to protecting the individual's interest in the due process rights guaranteed by *Pate* and the Due Process Clause.

Any attempt to retrospectively determine the competency of a criminal defendant is inherently less reliable than a contemporaneous hearing. Retrospective hearings also lack the procedural safeguards provided by a contemporaneous hearing—most importantly, the right and ability to gather and present evidence. All such remedies must be avoided.

In order to best protect the substantive right not to be tried while incompetent, the due process requirements of *Pate* demand the State bear the burden of retrying defendants who have been convicted without an adequate hearing.²¹⁴ *Pate* guarantees adequate procedures to determine competency to protect incompetent defendants from

dissenting).

213. See *Pate*, 383 U.S. at 385-86; *Drope*, 420 U.S. at 172.

214. The additional administrative burden of retrying all cases involving a *Pate* violation would likely not be excessive because the majority of *Pate* violations result in remand anyway. See *People v. Ary*, 13 Cal. Rptr. 3d 482, 493 (Ct. App. 2004) (“We emphasize, however, that it is the rare case in which a meaningful retrospective competency determination will be possible.”) The burden of retrying all cases involving a *Pate* violation, at least those cases where defendant received no contemporaneous hearing, would likely not be excessive. Recognizing the challenge *Pate* poses to federal magistrates and district judges (requiring a sua sponte assessment of defendants' mental capacity in every appearance before the court), several scholars and practitioners have called for better mental health education for legal professionals. See Jeffrey Manske & Mark Osler, *Crazy Eyes: The Discernment of Competency by a Federal Magistrate Judge*, 67 LA. L. REV. 751, 782-83 (2007) (arguing, from the standpoint of a practicing federal magistrate judge, for the necessity of training judges as well as attorneys to “identify[] competency issues” in order to reduce erroneous competency determinations); Richard E. Redding, *Why it is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How to Do it)*, 14 WASH. U. J.L. & POL'Y 407, 416-17 (2004) (arguing that first year legal education curriculums should teach the identification of competency issues). Hopefully, by improving knowledge of mental health issues, judges may increase the accuracy of their competency assessments and decrease the number of *Pate* violations.

being tried without the required mental capacity. When *Pate* is violated, potentially incompetent defendants are tried and convicted. Indeed, some of these potentially incompetent defendants are incompetent. When retrospective hearings unfairly uphold those convictions, the bedrock principle prohibiting the trial and conviction of incompetent defendants is demolished. Because retrospective hearings deny criminal defendants their last opportunity for due process, American courts continue to try and convict potentially incompetent defendants without appellate relief. Reversing and remanding these cases presents the only opportunity to ensure that only defendants who are competent, and guilty, are convicted.

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