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# Letting One Fly Over the Cuckoo's Nest: Why Automatic Reversal Is the Only Effective Remedy for Denial of Counsel at a Mental Competency Hearing

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# COMMENT

## Letting One Fly over the Cuckoo's Nest: Why Automatic Reversal Is the Only Effective Remedy for Denial of Counsel at a Mental Competency Hearing

### *I. Introduction*

"I am crazier than anything you've ever seen."[1] This was Edward Robinson's announcement to a California court immediately before he was permitted to waive his right to counsel and proceed pro se.[2] Robinson had previously been examined by a psychiatrist who concluded his self-diagnoses of Bipolar 2 and ADHD were "probably accurate."[3] Notwithstanding further evidence of alcohol dependency and a "core layer of an anti-social character structure," he was declared competent to stand trial and to waive his right to an attorney.[4] Later on in the proceedings, competency again became an issue when Robinson himself suggested he was mentally unstable, and he requested the court provide another psychiatric evaluation.[5] Despite the court's concerns, Robinson was allowed to represent himself at a subsequent competency hearing where he was again deemed fit to stand trial and to continue pro se.[6] For the next two months, Robinson continued his self-representation until, finally, the court convinced him to allow court-appointed counsel to represent him through the remainder of the trial.[7]

The Sixth Amendment, incorporated against the states through the Fourteenth Amendment,[8] provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[9] The United States Supreme Court has deemed the right to counsel fundamental, explaining that of all a defendant's rights, the right to

1. People v. Robinson, 60 Cal. Rptr. 3d 102, 105 (Ct. App. 2007).
2. *Id.*
3. *Id.* at 104.
4. *Id.* at 104-05.
5. *Id.* at 105.
6. *Id.*
7. *Id.*
8. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).
9. U.S. CONST. amend. VI.

representation "is by far the most pervasive for it affects his ability to assert any other rights he may have."[10]

This fundamental right attaches to all critical stages of criminal prosecution.[11] Such "critical stages" include preliminary hearings, arraignments, and postindictment interrogations.[12] Counsel is required because these are "proceedings that hold significant consequences for the accused."[13] Without an attorney's assistance, a defendant may be substantially prejudiced by the outcome of these proceedings.[14] Mental competency hearings—proceedings in which courts assess a defendant's ability to rationally consult with his lawyer and understand the trial process[15]—also have these characteristics.[16] And although the Supreme Court has not yet decided whether a competency hearing is a critical stage, every circuit court to confront the issue has held it is.[17]

Once a defendant's right to counsel has attached, that right can be either actually or constructively denied.[18] Actual denial of counsel most commonly occurs when an incompetent defendant is allowed to proceed pro se, effectively denying his right to counsel, as occurred in the California case, *People v. Robinson*.[19] Because the Sixth Amendment guarantees a criminal defendant's right to an attorney, as well as the right to proceed pro se,[20] issues of autonomy arise when a court attempts to force counsel upon a defendant.[21] Nonetheless, the Supreme Court has held courts may require a higher level of competency for self-representation.[22] Therefore, even though a defendant may be competent to stand trial, a court may find he

10. United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

11. United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005).

12. *Right to Counsel*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 517, 518 (2012).

13. *Collins*, 430 F.3d at 1264 (citing Bell v. Cone, 535 U.S. 685, 695-96 (2002)).

14. *Id.* (citing Coleman v. Alabama, 399 U.S. 1, 9 (1970)).

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

16. *See* Ronald A. Parsons, Jr., *Being There: Constructive Denial of Counsel at a Competency Hearing as Structural Error Under the Sixth Amendment*, 56 S.D. L. REV. 238, 241-42 (2011).

17. Raymond v. Weber, 552 F.3d 680, 684 (8th Cir. 2009); *Collins*, 430 F.3d at 1264; Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001); United States v. Klat, 156 F.3d 1258, 1262 (D.C. Cir. 1998); United States v. Barfield, 969 F.2d 1554, 1556 (4th Cir. 1992); Sturgis v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1986)).

18. *See* Parsons, *supra* note 16, at 241.

19. People v. Robinson, 60 Cal. Rptr. 3d 102, 105 (Ct. App. 2007).

20. Faretta v. California, 422 U.S. 806, 834 (1975).

21. *See* Indiana v. Edwards, 554 U.S. 164, 176-77 (2008).

22. *Id.* at 178.

does not have the mental capacity to waive counsel and conduct his own defense.[23] Some lower courts have gone so far as to insist "it is 'contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel.'"[24] Thus, when a potentially incompetent defendant is permitted to proceed pro se, this amounts to an actual denial of counsel.[25]

A defendant's right to counsel can also be constructively denied. Constructive denial of counsel is judged against the standard announced by the Supreme Court in *United States v. Cronic*: "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of *meaningful adversarial testing*."[26] This standard is invoked when "counsel has entirely failed to function as the client's advocate."[27]

Circuits are split regarding the proper remedy for denial of counsel at a mental competency hearing. Disagreement primarily centers on whether this Sixth Amendment violation contaminates the remainder of the trial.[28] The Third and Sixth Circuits hold that deprivation of counsel warrants automatic reversal of any conviction.[29] By contrast, the D.C. and Tenth Circuits employ retrospective hearings to decide if the absence of counsel impacted the outcome of the trials; however, the purpose of each circuit's retrospective hearing is different.[30] The D.C. Circuit seeks to determine if counsel's assistance could have changed the outcome of the competency

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23. *Id.* at 176-78.

24. United States v. Ross, 703 F.3d 856, 870 (6th Cir. 2012), *reh'g denied* (Apr. 16, 2013) (quoting United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998)).

25. *E.g.*, *Klat*, 156 F.3d at 1260; People v. Lightsey, 279 P.3d 1072, 1091-92 (Cal. 2012); People v. Robinson, 60 Cal. Rptr. 3d 102, 105 (Ct. App. 2007).

26. 466 U.S. 648, 656 (1984) (emphasis added).

27. Parsons, *supra* note 16, at 240.

28. *Compare* United States v. Bergman, 599 F.3d 1142, 1148 (10th Cir. 2010) (stating that the Sixth Amendment violation only contaminates the entire proceeding "if the defendant stands trial while incompetent"), *and Klat*, 156 F.3d at 1264 (holding that if counsel could not have changed the competency hearing result, reversal was not required because the error did not contaminate the entire proceeding), *with Ross*, 703 F.3d at 874 (holding that automatic reversal is required without any requirement that the defendant show prejudice; the constitutional violation was complete upon deprivation of counsel at the competency hearing), *and* Appel v. Horn, 250 F.3d 203, 217 (3d Cir. 2001) (citing prior circuit case law noting that deprivation of counsel at a competency hearing contaminated the whole proceeding).

29. *Ross*, 703 F.3d at 874; *Appel*, 250 F.3d at 218.

30. *Bergman*, 599 F.3d at 1148-49; *Klat*, 156 F.3d at 1264.

hearing.[31] On the other hand, the Tenth Circuit asks if the violation resulted in an erroneous competency determination by retrospectively examining the defendant's competency.[32]

This Comment will address the current circuit split and argue that the Third and Sixth Circuits' rule of automatic reversal is the only remedy that fully protects a defendant's fundamental Sixth Amendment right to counsel. Part II presents necessary background information regarding competency procedures, examines Supreme Court decisions shedding light on this area, and outlines the federal statute governing competency proceedings. Part III explores the current circuit split. Finally, Part IV analyzes the merits and flaws of each approach and advocates for the adoption of the Third and Sixth Circuits' rule of automatic reversal.

## *II.Substantive and Procedural Safeguards: Protecting a Defendant's Right Not to Stand Trial While Incompetent*

A defendant's right to not stand trial while mentally incompetent is deeply entrenched in history with roots dating back at least to the eighteenth century.[33] The origin of this right has been attributed to the prohibition of trials *in absentia*: "The mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."[34] Blackstone wrote that a court could not try a defendant who became "mad" after pleading "for how can he make his defense?"[35] This common-law understanding made its way into modern American law, and the United States Supreme Court has deemed the right not to stand trial while incompetent fundamental.[36] Established procedures and a guiding substantive standard now protect defendants.[37] Inadequate efforts to safeguard this fundamental right deprive defendants of their right to a fair trial[38] and undercut the integrity of the verdict.[39]

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31. *Klat*, 156 F.3d at 1264.

32. *Bergman*, 599 F.3d at 1148-49.

33. Drope v. Missouri, 420 U.S. 162, 171 (1975).

34. Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960).

35. 4 WILLIAM BLACKSTONE, COMMENTARIES *24.

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

37. *See* Pate v. Robinson, 383 U.S. 375, 385-86 (1966); Dusky v. United States, 362 U.S. 402, 402 (1960).

38. *See Pate*, 383 U.S. at 385.

39. Steven R. Marino, Comment, *Are You Sufficiently Competent to Prove Your Incompetence? An Analysis of the Paradox in the Federal Courts*, 6 SETON HALL CIRCUIT REV. 165, 167 (2009).

*A. Mental Competency Procedures: How Courts Determine a Defendant's Competency*

Competency proceedings are widely employed in the United States. Approximately sixty thousand evaluations are ordered each year with roughly 20% leading to findings of incompetence.[40] The primary purpose of these hearings is to ensure defendants are not tried while incompetent.[41] The Supreme Court has held it unconstitutional to try, convict, or sentence an incompetent defendant, and adequate procedures must exist to ensure this does not occur.[42] A court's failure to provide sufficient procedures to safeguard a criminal defendant's right to not stand trial while incompetent "deprives him of his due process right to a fair trial."[43]

Competency proceedings are initiated in several ways. The prosecutor or defense attorney may raise the issue by filing a motion for a hearing any time after the commencement of prosecution and prior to sentencing.[44] Alternatively, the trial court may order a hearing sua sponte.[45] Regardless of the procedure employed, however, once the judge has "'reasonable cause to believe' that the defendant 'may presently be' incompetent," the court must conduct a hearing.[46]

Prior to the defendant's competency hearing, a licensed or certified psychiatrist or psychologist may conduct a psychological examination.[47] A variety of tests "ranging from informal checklists to structured, criterion-based scoring instruments" may be utilized to measure the defendant's competency.[48] In making his assessment, the evaluator considers factors including mental disability, behavior and mood, disorientation, memory impairment, hallucination or delusion, and impaired thought process.[49] The evaluator then submits a report to the court outlining his conclusions

40. *Introduction*, MENTAL COMPETENCY: BEST PRACTICES MODEL, http://www.mentalcompetency.org/index.php (last visited Feb. 10, 2014).

41. *See* Marino, *supra* note 39, at 166.

42. *See* David W. Beaudreau, Comment, *Due Process or "Some Process"? Restoring* Pate v. Robinson*'s Guarantee of Adequate Competency Procedures*, 47 CAL. W. L. REV. 369, 370-71 (2011) (discussing Pate v. Robinson, 383 U.S. 375 (1966)).

43. Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing *Pate*, 383 U.S. at 385).

44. 18 U.S.C. § 4241(a) (2012).

45. *Id.*

46. 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 208 (4th ed. 2008) (quoting 18 U.S.C. § 4241(a)).

47. 18 U.S.C. §§ 4241(b), 4247(b).

48. Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 PSYCHOL. PUB. POL'Y & L. 1, 3 (2011).

49. 40 AM. JUR. 2D *Proof of Facts* 171, 186 (1984).

regarding the defendant's competency, along with information about the defendant's mental history, symptoms, and psychological test results.[50] The psychological report is not controlling on the court, but it is unlikely to be arbitrarily rejected.[51]

Although defendants do not typically have the right to have counsel present at the evaluation,[52] they do have the right to consult with their attorney about submitting to the examination and about consequences that may result from statements made to the examiner.[53] While it appears courts will initially protect statements regarding guilt from being admitted into evidence, it is possible they may be admissible for impeachment or rebuttal.[54] Moreover, even if the evidence is improperly admitted, it will only be subject to review for harmless error, and this deferential standard is unlikely to result in an overturned conviction.[55]

A defendant at a competency hearing is entitled to the full range of procedural safeguards including the right to notice, to call witnesses, cross-examine opposing witnesses, present evidence, and to seek the counsel of an attorney.[56] Defendants are presumed competent at the outset of trial; however, there is a split in authorities concerning which party bears the burden of proof.[57] Without statutory guidance or a binding Supreme Court decision on point, the circuits disagree about whether the defendant must prove his own incompetence or whether the government must prove the defendant is competent to stand trial.[58]

The judge makes the competency determination based on whether, by a preponderance of the evidence, 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

50. 18 U.S.C. § 4247(c).

51. WRIGHT & LEIPOLD, *supra* note 46, at § 208.

52. United States v. Klat, 156 F.3d 1258, 1264 (D.C. Cir. 1998).

53. *See* Estelle v. Smith, 451 U.S. 454, 470-71 (1981); *see also* WRIGHT & LEIPOLD, *supra* note 46, at § 208.

54. WRIGHT & LEIPOLD, *supra* note 46, at § 208.

55. *See id.*

56. 18 U.S.C. § 4247(d) (2012).

57. WRIGHT & LEIPOLD, *supra* note 46, at § 208; *see also* Brett F. Kinney, Comment, *An Incompetent Jurisprudence: The Burden of Proof in Competency Hearings*, 43 U.C. DAVIS L. REV. 683, 685 (2009) (noting the current split between the Third, Fifth, and Ninth Circuits, which place the burden of proof upon the government, and the Fourth and Eleventh Circuits, which place the burden upon the defendant); Marino, *supra* note 39, at 165.

58. Marino, *supra* note 39, at 178-79; *see* 18 U.S.C. § 4241.

understanding of the proceedings against him."[59] Competence is ultimately a question of law decided on the basis of expert testimony from the psychological report as well as other evidentiary materials presented, possibly including lay witness testimony.[60] The competency determination ultimately hinges on the defendant's ability to understand (1) the charges against him, (2) the role of the parties and court, (3) that he is being tried in a court of law, and (4) that he may face punishment if convicted.[61]

If the court finds the defendant competent, the trial moves forward. Upon a finding of incompetence, however, the proceedings are stayed and the defendant is remanded to the Attorney General's custody.[62] The defendant is then hospitalized in a suitable facility for treatment for up to four months while a decision is made about whether or not he is likely to become competent.[63] This four-month period may be extended if the court finds it substantially probable that he may become competent within a reasonable period of time.[64] If the facility's director determines during the hospital stay that the defendant has recovered, he will notify the court.[65] There will then be another competency hearing.[66] If the defendant is found competent, the court will order the defendant discharged from the facility and the case placed back on the court's docket.[67] However, if after four months there is no likelihood the defendant will attain competence in the foreseeable future,

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59. Dusky v. United States, 362 U.S. 402, 402 (1960). Twenty-four years after the Supreme Court's articulation of its two-prong standard in *Dusky*, Congress promulgated its standard for incompetency. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified as amended at 18 U.S.C. § 4241 (2012)). Upon finding "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense[,]" the court must grant a motion to determine the competency of a defendant, or order such a motion via *sua sponte*. 18 U.S.C. § 4241(a). The statute incorporated ideas from the Supreme Court standard, but also added the requirement of a mental disease or defect. Emily Stork, Note, *A Competent Competency Standard: Should It Require a Mental Disease or Defect? A Debate Sparked by the Circuit Split over Axis II Personality Disorders and Competency to Stand Trial*, 44 COLUM. HUM. RTS. L. REV. 927, 936-37 (2013) (asserting that the Supreme Court's *Dusky* standard remains the principal federal competency test).

60. *Proof of Facts*, *supra* note 49, at 186-87.

61. *Id.* at 189.

62. 18 U.S.C. § 4241(d)(1).

63. *Id.*

64. *Id.* § 4241(d)(2)(A).

65. *Id.* § 4241(e).

66. *Id.*

67. *Id.*

the defendant becomes subject to further civil commitment procedures by the State.[68]

### *B. Supreme Court Precedent: Evolution of the Right to Counsel at a Competency Hearing and Remedies for Deprivation of Counsel*

It is well settled that the right to counsel attaches to critical stages of prosecution,[69] which are those presenting significant consequences for a defendant.[70] But, although the Supreme Court has determined a trial is unfair if a defendant is denied counsel at a critical stage,[71] it has never specifically addressed whether a competency hearing qualifies as one.[72] Of course, this may be because those circuit courts that have confronted the issue have unanimously agreed it does.[73]

Although the Supreme Court has not decided whether a competency hearing is a critical stage, it has recognized the importance of counsel at competency proceedings since the early 1980s.[74] In *Estelle v. Smith*, the Court held that a defendant charged with a capital crime had a Sixth Amendment right to consult with counsel before submitting to a psychiatric examination.[75] The district court had ordered Smith to undergo a psychiatric examination to determine his competency to stand trial, and he was subsequently examined without an opportunity to consult with his attorney.[76] The Supreme Court recognized that Smith's psychiatric interview was a critical stage because information obtained in the examination concerning Smith's criminal propensities was later introduced

68. *Id.* §§ 4241(d), 4246, 4248.

69. *E.g.*, Kirby v. Illinois, 406 U.S. 682, 690 (1972).

70. *E.g.*, Bell v. Cone, 535 U.S. 685, 695-96 (2002).

71. United States v. Cronic, 466 U.S. 648, 659 (1984).

72. Parsons, *supra* note 16, at 242.

73. Raymond v. Weber, 552 F.3d 680, 684 (8th Cir. 2009); United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005); Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001); United States v. Klat, 156 F.3d 1258, 1262 (D.C. Cir. 1998); United States v. Barfield, 969 F.2d 1554, 1556 (4th Cir. 1992); Sturgis v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1986).

74. *See* Estelle v. Smith, 451 U.S. 454 (1981).

75. *Id.* at 469.

76. *Id.* at 456-57, 471. The district judge ordered the psychiatric examination despite the lack of any signs of incompetence or any request for a hearing by either party. *Id.* at 457 n.1. The judge explained that he routinely ordered psychiatric examinations for every defendant facing capital charges to ensure there was no doubt about the competency of a defendant who was put to death. *Id.*

at sentencing to secure the death penalty.[77] Smith's right to consult with counsel in this case was "'literally a life or death matter.'"[78]

Seven years later in *Satterwhite v. Texas*, the Supreme Court considered the remedy for the introduction of psychiatric testimony obtained in an *Estelle*-like examination where the defendant had no prior opportunity to consult with counsel.[79] The Court determined there was a Sixth Amendment violation but noted, "[n]ot all constitutional violations amount to reversible error."[80] A verdict may stand if the government can prove beyond a reasonable doubt that the constitutional error did not affect the verdict.[81] This "harmless error rule 'promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'"[82] But pervasive Sixth Amendment violations—those that contaminate the entire trial—merit remedial measures.[83] Rejecting Satterwhite's request for automatic reversal, the Court decided the harmless error rule applied in this case because the violation was limited to admission of psychiatric testimony.[84] The court reasoned that testimony from the uncounseled psychiatric examination did not affect or contaminate the entire proceeding in order to merit automatic reversal of conviction.[85]

Harmless error analysis was appropriate—instead of automatic reversal—because the error's scope was readily identifiable.[86] On remand, the trial court could make a meaningful inquiry into whether the violation impacted the jury's deliberations and ultimately affected the trial's outcome.[87] The Court distinguished this from past cases meriting automatic reversal because in those, the trial court could only speculate about the violation's impact as the error pervaded the entire proceeding.[88]

The Supreme Court provided the framework for a rule of automatic reversal in its 1984 case *United States v. Cronic*.[89] Cronic argued he was

77. *Id.* at 458-59, 470-71.
78. *Id.* at 471 (quoting Smith v. Estelle, 602 F.2d 694, 708 (1979)).
79. 486 U.S. 249, 254 (1988).
80. *Id.* at 256.
81. *Id.* at 256, 258 (citing Chapman v. California, 386 U.S. 18, 24 (1967)).
82. *Id.* at 256 (quoting Rose v. Clark, 478 U.S. 570, 577 (1986)).
83. *Id.* at 256-57.
84. *Id.* at 257-58.
85. *Id.* at 257.
86. *Id.* at 256.
87. *Id.* at 256-57 (quoting Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)).
88. *Id.*
89. 466 U.S. 648 (1984).

denied counsel because his attorney was given only twenty-five days to prepare for his $9.4 million check fraud trial even though the prosecution had investigated and prepared for over four years.[90] The Court did not determine Chronic was denied effective assistance of counsel but, instead, reversed and remanded the case for further review. [91] It stated, however, that the circumstances surrounding the case could support the unlikelihood for effective assistance.[92]

The Court noted that technical appointment of counsel was not enough to satisfy the constitutional guarantee, and holding otherwise would "convert the appointment of counsel into a sham."[93] Expounding on the fundamental importance of the Sixth Amendment right to counsel, the Court explained that an attorney is crucial to ensuring all of a criminal defendant's rights are protected.[94] When a defendant is completely denied counsel, denied counsel at a critical stage of trial, or constructively denied counsel, these situations "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[95] Under these circumstances, the defendant is not required to make any showing of prejudice because "the adversary process itself [is] presumptively unreliable."[96]

Finally, in 2008, the Supreme Court handed down its opinion in *Indiana v. Edwards*.[97] Wrestling with limitations on the right to self-representation, the Court held lower courts may insist a defendant be represented by counsel based on their mental inability to provide self-representation, even though they may be competent to stand trial.[98] The Court reasoned that granting mentally incompetent defendants these rights could lead to erroneous convictions and improper sentences.[99] Allowing an incompetent defendant's right of self-representation would not further any sense of dignity or autonomy, "but rather would compromise the ultimate objective of providing a fair trial, as well as the concurrent aspiration that 'proceedings must not only be fair, they must appear fair to all who observe them.'"[100] *Indiana v. Edwards* thus created two tiers of competency

90. *Id*. at 649.
91. *Id.* at 666-67.
92. *Id*. at 666.
93. *Id.* (citing Avery v. Alabama, 308 U.S. 444, 446 (1940)).
94. *Id.* at 653.
95. *Id*. at 658-60.
96. *Id.* at 659.
97. 554 U.S. 164 (2008).
98. *Id.* at 174, 177-78.
99. *Id.* at 176-77.
100. Parsons, *supra* note 16, at 243 (quoting *Edwards*, 554 U.S. at 177).

whereby it is permissible for a court to find a defendant competent to stand trial but not competent to waive counsel and provide his own representation.[101]

Based on the Supreme Court's demonstrated concern for a defendant's right to counsel during competency proceedings, it is likely the Court would join the federal circuits in holding that a competency hearing is a critical stage of trial. But until the Court takes up the issue and answers the remedial question the lower courts are likely to remain divided on the proper remedy.

### *C. The Federal Statutes: Codified Procedural Safeguards for Defendants in Competency Hearings*

Congress has also expressed concern for incompetent defendants by creating a statutory scheme full of protective procedures. Found at 18 U.S.C. §§ 4241-4248, these statutes describe the proper processes for courts to follow when dealing with potentially incompetent defendants. This subsection will examine the origins of the statutes and outline their requirements.

The Comprehensive Crime Control Act of 1984 (CCCA)[102] modernized federal criminal law and has been referred to as "the most radical change in federal criminal law in the history of our Nation."[103] As part of the CCCA, Congress passed the Insanity Defense Reform Act (IDRA)[104] in response to public outrage over John Hinkley's not-guilty-by-reason-of-insanity verdict for his assassination attempt on President Reagan.[105] The outcry stirred Congress to modify the legal procedures for determining insanity and incompetency.[106] The IDRA updated the process for determining a defendant's competency to stand trial in order to comply with Supreme Court standards.[107]

With this federal statutory scheme, Congress aimed to ensure that defendants are not tried while incompetent. The statute "provide[d] a committing court with a strict process to which it must adhere for a

101. *Edwards*, 554 U.S. at 174.

102. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

103. Marino, *supra* note 39, at 170 (quoting KENNETH R. FEINBERG, COMPREHENSIVE CRIME CONTROL ACT OF 1984: A NEW APPROACH TO FEDERAL CRIMINAL LAW 249 (Practicing Law Institute 1985)).

104. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057.

105. Kinney, *supra* note 57, at 692-93.

106. *Id.* at 693.

107. *See id.* at 693-94; *see also* sources cited *supra* note 59.

competency determination to be valid."[108] It also amended the outdated competence standard to conform to the Supreme Court's more recent standard set out in *Dusky v. United States*.[109] The standard established by *Dusky* concerns "whether [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."[110]

The federal statutes also require that defendants receive a full range of procedural safeguards at competency hearings. Title 18 U.S.C. § 4247(d) provides that the defendant "shall be represented by counsel . . . . The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing."[111]

Notwithstanding all of the statutory and common-law protections for defendants in competency hearings, "defendants still face a risk of trial, conviction, and imprisonment despite mental incompetency" due to procedural flaws.[112] Most importantly for this Comment, the federal statute and every circuit court to consider the issue requires the right to counsel at a competency hearing. But this requirement is not always met, and without direct guidance from the Supreme Court, courts of appeal have split on the proper remedy for denial of counsel at a competency hearing.

### *III. The Circuit Split*

Two major remedies have emerged from the courts of appeal regarding deprivation of counsel at a competency hearing. The D.C. and Tenth Circuits have decided the proper remedy is to order a retrospective hearing to determine whether the violation impacted the result of the competency hearing and thus affected the result of the trial.[113] The Third and Sixth Circuits hold differently. In these circuits, violation of a defendant's Sixth

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108. United States v. White, 887 F.2d 705, 707 (6th Cir. 1989).

109. *See id.* at 707-08; Kinney, *supra* note 57, at 692-93; Stork, *supra* note 59, 936-37.

110. Dusky v. United States, 362 U.S. 402, 402 (1960). Under the federal statute, the standard of incompetence is defined as whether the "defendant may presently be suffering from a mental disease or defect rendering him *mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense*." 18 U.S.C. § 4241(a) (2012).

111. 18 U.S.C. § 4247(d).

112. Beaudreau, *supra* note 42, at 378-79.

113. United States v. Bergman, 599 F.3d 1142, 1148-49 (10th Cir. 2010); United States v. Klat, 156 F.3d 1258, 1264 (D.C. Cir. 1998).

Amendment right to counsel at a competency hearing warrants automatic reversal.[114]

*A. The Remand Approach: D.C. and Tenth Circuits*

The D.C. and Tenth Circuits' remedy for denial of counsel at a mental competency hearing is to remand the case and order an evidentiary hearing to retrospectively determine if the absence of counsel impacted the competency hearing.[115] While both circuits utilize retrospective hearings, the purpose of each circuit's hearing is different. The D.C. Circuit utilizes the retrospective hearing to decide whether an attorney could have made arguments or urged decisions that could have changed the outcome of the competency hearing.[116] This is done without any attempt to retrospectively measure the defendant's competency.[117] By contrast, the Tenth Circuit instructs its trial courts to determine if the lack of counsel, in fact, resulted in an erroneous finding of competency.[118] These trial courts must use the trial record and any available witnesses to ascertain whether or not the defendant was competent to stand trial.[119]

*1. The D.C. Circuit: Could Assistance of Counsel Have Changed the Outcome?*

The D.C. Circuit set forth its remedy for denial of counsel at a competency hearing in *United States v. Klat*.[120] In October 1996, Susan Klat was indicted for threatening to assault Chief Justice Rehnquist and a Supreme Court clerk.[121] Before her indictment, Klat filed a motion requesting removal of her appointed attorney and asking that she be allowed to proceed pro se.[122] Klat was later arraigned, where she again requested removal of her appointed counsel.[123] The district court denied her motion and instead granted counsel's motion to withdraw, which was filed in response to Klat's filing a civil lawsuit against him.[124] The court

114. United States v. Ross, 703 F.3d 856, 874 (6th Cir. 2012); Appel v. Horn, 250 F.3d 203, 218 (3d Cir. 2001).
115. *Bergman*, 599 F.3d at 1148-49; *Klat*, 156 F.3d at 1264.
116. *Klat*, 156 F.3d at 1264.
117. *Id.*
118. *Bergman*, 599 F.3d at 1148.
119. *Id.* at 1148-49.
120. 156 F.3d at 1260.
121. *Id.*
122. *Id.* at 1260-61.
123. *Id.* at 1261.
124. *Id.*

simultaneously ordered Klat to undergo a competency evaluation due to her bizarre behavior at the hearing, but she was not appointed new counsel.[125]

Klat spent approximately one month in a hospital during which a forensic psychologist examined her mental state.[126] Despite "strong evidence of a narcissistic personality disorder," possible bipolar disorder, and "excessive suspiciousness that verged on paranoia," the psychologist concluded Klat was competent to stand trial and submitted his findings to the court.[127]

The court held a competency hearing at which Klat appeared pro se.[128] Based on the psychologist's report and the court's own observation of her behavior at the hearing, the district court concluded she was competent both to stand trial and to represent herself.[129] However, Klat did agree to the appointment of standby counsel who appeared with her throughout the remainder of the trial.[130]

On appeal to the D.C. Circuit, Klat argued the district court erred in allowing her to appear pro se at her competency hearing.[131] The court first noted that a competency hearing is a critical stage of trial at which a defendant has the right to counsel.[132] It then observed Klat was without counsel from the withdrawal of her appointed attorney at the arraignment hearing until her competency hearing when she was deemed competent both to stand trial and waive counsel.[133] The court also acknowledged the importance of the right to self-representation.[134] But, based on Supreme Court precedent stating that an incompetent defendant could not knowingly and intelligently waive his right to a competency hearing, the court reasoned it would be contradictory to argue a defendant could knowingly and intelligently waive her right to counsel when she may be incompetent.[135] The D.C. Circuit concluded that when a defendant's competency is in question, "a court may not allow that defendant to waive her right to counsel and proceed *pro se* until the issue of competency has

125. *Id.*
126. *Id.*
127. *Id.* at 1261-62.
128. *Id.* at 1262.
129. *Id.*
130. *Id.*
131. *Id.* at 1260.
132. *Id.* at 1262.
133. *Id.*
134. *Id.*
135. *Id.* at 1263 (citing Pate v. Robinson, 383 U.S. 375, 384, 386 (1966)).

been resolved."[136] Consequently, Klat's Sixth Amendment right to counsel was violated when the district court ordered the competency evaluation without reappointing her an attorney.[137]

To remedy this error, the court held it was necessary to remand the case for an evidentiary hearing to decide if counsel's presence could have changed the outcome of Klat's competency hearing.[138] In making this determination, the district court was tasked with determining what, if any, strategic decisions or arguments counsel could have made that might have affected the outcome.[139] These could have included the decision to retain another expert for a second evaluation, the ability to question the expert's report at the competency hearing, as well as the ability for counsel to advise the defendant on the significance of the examination and the consequences of the evaluator's findings.[140] Recognizing the Supreme Court's aversion to retrospective hearings regarding mental competency, the court expressly stated the purpose was not to retrospectively determine "whether [Klat] was or was not in fact incompetent to stand trial."[141]

Upon a determination that the competency hearing's outcome would have been the same regardless of counsel's presence, the conviction would stand "because the effects of the violation would be effectively confined to the competency hearing—that is, they would not serve to contaminate the entire criminal proceeding."[142] On the other hand, if counsel could have affected the result, the defendant's conviction must be reversed because the constitutional violation would contaminate the entire criminal proceeding.[143]

*2. Tenth Circuit: Did Denial of Counsel Cause an Erroneous Competency Determination?*

Like the D.C. Circuit, the Tenth Circuit also utilizes retrospective competency hearings to remedy the deprivation of counsel at a competency hearing.[144] The Tenth Circuit's hearing has a different goal, however. Here,

136. *Id.*
137. *Id.*
138. *Id.* at 1264.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. United States v. Bergman, 599 F.3d 1142, 1148-49 (10th Cir. 2010).

the trial court was directed to retrospectively determine if the defendant was competent.[145]

The Tenth Circuit most recently considered its remedy in *United States v. Bergman*.[146] Gwen Bergman had a "long and complicated history before [the Tenth Circuit] and the District [Court] of Colorado."[147] Immediately following her successful appeal of a Travel Act conviction, Bergman was indicted on various new charges, including the use of interstate commerce to facilitate murder for hire.[148]

In October 2006, Bergman's public defender filed a motion for a competency hearing and moved for the appointment of a special attorney to represent her at the hearing.[149] The motions were granted and, in February 2007, Bergman was found incompetent to stand trial and ordered hospitalized.[150]

During her hospitalization, Bergman filed a pro se notice of appeal, and while her appeal was pending, the government moved for involuntary administration of psychotropic medication.[151] Prior to the hearing on the government's motion, Bergman's public defender withdrew from the case and a new attorney entered his appearance.[152] Later, at the forced medication hearing, the district court advised the parties of a Bureau of Prisons report opining that Bergman was competent to stand trial.[153] Yet, the court lacked jurisdiction to proceed due to Bergman's pending pro se appeal.[154] Relying on counsel's statement that she would voluntarily dismiss her appeal due to the Bureau of Prisons report, the district court declared Bergman competent to stand trial based solely on that report.[155]

After she was found competent, Bergman received a bench trial and was convicted.[156] Following her conviction, the district court learned Bergman's new counsel was not a licensed attorney.[157] Thereafter, despite the court's own statement "that it was considering ordering a mistrial and vacating the

145. *Id.*
146. *Id.* at 1142.
147. *Id.* at 1145.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 1145-46.
154. *Id.* at 1146.
155. *Id.*
156. *Id.*
157. *Id.*

verdict," none of Bergman's subsequent attorneys moved for a new trial.[158] Consequently, the district court continued with Bergman's case, ultimately sentencing her to over one hundred months' imprisonment.[159]

On appeal of those convictions, the Tenth Circuit determined the forced medication hearing—when Bergman was found competent—was a critical stage of trial.[160] Even though it was not a full competency hearing, Bergman was declared competent at that hearing.[161] Furthermore, the government did not contest its characterization as a critical stage.[162] As a result, Bergman was entitled to counsel.[163] The court subsequently adopted a "*narrow* per se rule of ineffectiveness" where a defendant is unknowingly represented by someone who has never been licensed to practice law based on their lack of qualification.[164]

The Tenth Circuit's remedy for this violation was to remand the case for an evidentiary hearing to decide if a retrospective competency determination could be made.[165] The court noted that although retrospective competency hearings are generally disfavored, they are not forbidden.[166] Four factors were laid out for the district court to consider:

> (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.[167]

The court instructed that trial courts should use these factors when deciding if a retrospective determination is proper.[168]

The Tenth Circuit directed the trial court to use the evidentiary hearing to determine whether the denial of counsel resulted in an erroneous competency finding.[169] Rejecting Bergman's request for reversal of

158. *Id.*
159. *Id.*
160. *Id.* at 1147.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 1148.
165. *Id.* at 1148-49.
166. *Id.* at 1148.
167. *Id.* (quoting McGregor v. Gibson, 248 F.3d 946, 962-63 (10th Cir. 2001)).
168. *Id.* at 1149.
169. *Id.*

conviction, the court reasoned that automatic reversal is required only if the Sixth Amendment violation pervades the entire criminal proceeding.[170] The court determined that "[d]eprivation of the right to counsel at a competency hearing affects the entire proceeding only if the defendant stands trial while incompetent."[171]

Therefore, in the Tenth Circuit, if a trial court finds the defendant was incompetent, or if a retrospective competency determination cannot be made at all, the district court must vacate the judgment.[172] In such cases, the court must hold a competency hearing wherein the defendant is represented by counsel, and a new trial must proceed only when the defendant is competent.[173] Interestingly, the Tenth Circuit also gives district courts complete discretion to vacate the conviction and order a new trial regardless of a determination that the defendant was competent to stand trial.[174]

The dissent in *Bergman* urged that the proper remedy was to vacate the defendant's conviction and order a new trial.[175] Judge Holmes' disagreement with the majority centered primarily on the fact the government had not affirmatively asked for a retrospective competency hearing.[176] Therefore, he was opposed to the court's sua sponte order of this disfavored remedy.[177] He argued against the majority's use of the retrospective competency hearing, which the court had "previously . . . permitted 'only in limited circumstances'" due to the inherent difficulty in conducting them "in a meaningful manner."[178] Despite the dissent's misgivings, the Tenth Circuit has not amended its remedy since *United States v. Bergman*.

### *B. The Automatic Reversal Approach: Third & Sixth Circuits*

In contrast to the D.C. and Tenth Circuits, the Third and Sixth Circuits have determined that because the Sixth Amendment violation contaminates the entire criminal proceeding, the only proper remedy is automatic reversal

170. *Id.* at 1148.
171. *Id.*
172. *Id.* at 1149.
173. *Id.*
174. *Id.*
175. *Id.* at 1152 (Holmes, J., dissenting).
176. *Id.*
177. *Id.*
178. *Id.*

of the defendant's conviction.[179] This section will explore the cases that led to the Third and Sixth Circuits' adoption of a rule of automatic reversal.

*1. Third Circuit: Appel v. Horn*

In 2001, the Third Circuit considered its remedy for deprivation of counsel at a competency hearing in *Appel v. Horn.*[180] There the court determined the proper remedy was to vacate the defendant's conviction and order a new trial.[181]

In June 1986, Martin Appel was arrested after he and an accomplice were charged with robbing a bank and killing three employees.[182] While detained, he requested a public defender, and two attorneys were appointed to represent him.[183] However, during their next day's visit with him, Appel told the two he had only applied for an attorney to receive visitors in prison, and he did not want their help defending the case.[184] Nonetheless, the public defenders still appeared with Appel at a hearing the following day.[185] At the hearing, Appel requested to proceed pro se, but before the judge would accept his waiver, he ordered Appel to undergo a psychiatric evaluation to determine his mental fitness.[186]

A psychiatrist examined Appel and found him competent to waive counsel after only an hour of observation.[187] Included in his report to the court was the observation that "Mr. Appel appears to have made a rational and well thought out decision that he would like to receive the death penalty and would like this to occur as soon as possible."[188] Neither of Appel's public defenders provided the psychiatrist with any information regarding his competency.[189] At the competency hearing, the two reiterated they had nothing to add when the judge deemed Appel competent and accepted his waiver of counsel.[190] The two public defenders were, however,

179. United States v. Ross, 703 F.3d 856, 874 (6th Cir. 2012); Appel v. Horn, 250 F.3d 203, 218 (3d Cir. 2001).
180. 250 F.3d at 217-18.
181. *Id.*
182. *Id.* at 205.
183. *Id.* at 206.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*

appointed as standby counsel.[191] Appel ultimately pled guilty to his crimes and was sentenced to death.[192] Then, nearly nine years later, after his death warrant was signed and his execution date set, Appel requested counsel and began his appeal, arguing he had been mentally ill and incompetent during the initial proceedings.[193]

On appeal to the Third Circuit, the court determined Appel's competency hearing was a critical stage of trial at which he was entitled to assistance of counsel.[194] Appel's public defenders were counsel of record from the time of their appointment until waiver of counsel was accepted, and this included Appel's competency hearing.[195] Although the two were technically Appel's counsel, the court found no evidence to the contrary that they utterly failed to "subject the crucial competency determination in this capital case to *any* adversarial testing."[196] Other than one conversation with Appel's parents,[197] they made no effort to look into Appel's health or employment records or investigate his background in order to assist in determining their client's competency.[198] Finding that Appel's attorneys failed to meet the "meaningful adversarial testing" standard from *United States v. Cronic*, the court held Appel was constructively denied counsel when the district court found him competent to waive counsel.[199]

In determining the proper remedy, the Third Circuit rejected the government's argument for a retrospective competency hearing, citing Supreme Court and prior circuit case law as disapproving of such a remedy.[200] Instead, the court found the Sixth Amendment violation contaminated the entire proceeding and, therefore, rendered it unfair.[201] Explaining that the Supreme Court had "consistently held that there should be a new trial if there has been some constitutional defect regarding the

191. *Id.*
192. *Id.* at 207.
193. *Id.* at 207-08.
194. *Id.* at 215.
195. *Id.* at 213.
196. *Id.* at 216 (citing Brief of Appellee at 8-9, *Appel*, 250 F.3d 203 (2001) (No. 99-9003)).
197. *Id.* at 215. "[T]hese conversations concerned paying bills and handling property, not Appel's competency." *Id.*
198. *Id.*
199. *Id.* at 217.
200. *Id.* (citing Pate v. Robinson, 383 U.S. 375 (1966); Henderson v. Frank, 155 F.3d 159 (3d Cir. 1998)).
201. *Id.* at 218.

defendant's competency,"[202] the Third Circuit affirmed the district court's finding that the proper remedy was to vacate the defendant's conviction and order a new trial.[203]

Accordingly, courts in the Third Circuit will automatically vacate a defendant's conviction and grant him a new trial upon finding he was deprived of representation at a competency hearing. This result follows the Third Circuit's holding that this Sixth Amendment violation contaminates the entire proceeding.[204]

*2. Sixth Circuit:* United States v. Ross

The Sixth Circuit joined the Third Circuit in holding that deprivation of counsel at a competency hearing warrants automatic reversal in *United States v. Ross*.[205] In October 2007, Bryan Ross was indicted as the ringleader in a multidefendant counterfeit-check scheme in which the defendants used bogus checks to purchase and quickly resell vehicles.[206] Prior to trial, Ross's bizarre and paranoid behavior caused three court-appointed attorneys to withdraw from his case.[207] While represented by his third attorney, Ross filed a motion to waive counsel.[208] Three days later, the government filed for a competency evaluation and hearing.[209] The court denied both parties' motions.[210] A week following denial of his first motion, Ross again requested substitute counsel and was again denied.[211] Instead, the court found Ross competent both to waive counsel and to represent himself, and it appointed his current counsel as standby.[212] The court subsequently granted the government's second motion for a competency evaluation and hearing.[213] However, Ross was never reappointed full-time counsel prior to his competency hearing, at which he

202. *Id.* at 217-18 (citing Drope v. Missouri, 420 U.S. 162, 183 (1975); *Pate*, 383 U.S. at 386-87; Dusky v. United States, 362 U.S. 402, 403 (1960)).

203. *Id.* at 218.

204. *Id.*

205. 703 F.3d 856 (6th Cir. 2012).

206. *Id.* at 865.

207. *Id.* For example, Ross' first attorney alleged Ross exhibited "paranoid ideations," was in a "delusional state," and thought there were "conspiracy theories" against him such that the attorney and the prosecutor were "in cahoots." *Id.* at 867.

208. *Id.* at 865.

209. *Id.*

210. *Id.*

211. *Id.* at 865-66.

212. *Id.* at 866.

213. *Id.*

was deemed fit to stand trial.[214] Ross was ultimately convicted of conspiracy and several other charges.[215]

On appeal, the Sixth Circuit held the district court did not err in granting Ross's initial waiver of counsel, but it did err in failing to reappoint full-time counsel once the government's motion for a competency hearing was granted.[216] The court determined Ross should not have been allowed to proceed pro se at his competency hearing based on mandatory federal statutory language requiring that "'the person whose mental condition is the subject of the hearing *shall* be represented by counsel.'"[217]

Along with the statutory violation, the Sixth Circuit held "Ross's Sixth Amendment right to counsel was violated when the court allowed him to proceed without counsel despite having questions about his competency."[218] Although Ross was initially deemed competent to represent himself when the court accepted his waiver of counsel, questions about his competency arose later when the court granted the government's motion for a competency examination and hearing.[219] Courts are under a continuing duty to be aware of circumstances suggesting a defendant's incompetence.[220] In this case, the court found reasonable cause to believe Ross was incompetent to stand trial when it ordered the competency examination.[221] Because the level of competency required to stand trial is lower than that to represent oneself, the district court violated the Sixth Amendment when it did not provide counsel for Ross's competency hearing.[222]

In determining the proper remedy for this violation, the court first decided a competency hearing is a critical stage of a criminal proceeding.[223] Based on that determination and referencing prior circuit case law, the court stated, "'[i]t is settled that a complete absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error.'"[224] In a previous case, the Sixth Circuit had

214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 868 (quoting 18 U.S.C. § 4247(d)).
218. *Id.* at 869.
219. *Id.*
220. *Id.* (quoting United States v. White, 887 F.2d 705, 709 (6th Cir. 1989)).
221. *Id.*
222. *Id.* at 869-71.
223. *Id.* at 874.
224. *Id.* at 873-74 (quoting Van v. Jones, 475 F.3d 292, 311-12 (6th Cir. 2007)).

engaged in an extensive analysis of Supreme Court and other circuit court decisions that it interpreted as requiring this result.[225] Noting the current circuit split on the remedy, the court found "no reason to create an exception to our established rule" of automatic reversal for such Sixth Amendment violations.[226]

Because Ross had standby counsel at his competency hearing, the Sixth Circuit remanded the case and instructed the trial court to hold an evidentiary hearing to determine whether standby counsel provided adequate representation or if Ross was unconstitutionally deprived of representation at his competency hearing.[227] The court's remedy was decided based on the Supreme Court's "meaningful adversarial testing" standard from *Cronic*.[228] Therefore, on remand, if the trial court found standby counsel did not provide meaningful adversarial testing at Ross's competency hearing, his conviction and sentence should be vacated.[229] If standby counsel did provide adequate representation, however, "Ross was not unconstitutionally deprived of counsel and his conviction is affirmed."[230] Accordingly, in the Sixth Circuit, courts will automatically reverse a criminal defendant's conviction upon complete or constructive denial of counsel at a critical stage of trial.

### *C. The State Split: How State Supreme Courts are Confronting Competency*

State courts have also split on the appropriate remedy for deprivation of counsel at a competency hearing. The crux of the states' disagreement mirrors the federal split: whether the Sixth Amendment deprivation of counsel violation pervades the entire criminal proceeding.

The California Supreme Court considered the issue in 2012 in *People v. Lightsey*.[231] There the court held that although the absence of counsel was

225. *See Van*, 475 F.3d at 311-12.
226. *Ross*, 703 F.3d at 874.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. 279 P.3d 1072 (Cal. 2012). It appears that the Supreme Court of California is the only state Supreme Court to affirmatively order a retrospective hearing to remedy a Sixth Amendment violation in a competency hearing. *See id.* at 1097. However, the vast majority of other states including Kansas, Montana, Oklahoma and Texas regularly order retrospective competency hearings to remedy other constitutional violations in the competency hearing context. *See, e.g.*, State v. Davis, 130 P.3d 69, 78-79 (Kan. 2006) (acknowledging retrospective hearings are generally allowed, but not permitted in the instant case due to the lack of medical evidence in the record); State v. Bostwick, 1999 MT 237, ¶

structural error typically requiring automatic reversal, "[i]n limited situations . . . where the denial of counsel was for a discrete time or hearing only . . . the rule of automatic reversal is inappropriate."[232] Citing the United States Supreme Court in *Satterwhite v. Texas*, the court reasoned the trial court could effectively judge whether the violation affected the outcome of the trial or whether the error was harmless.[233] Because the violation was committed outside the jury's presence, the trial court could retrospectively review the case to decide if the violation was harmless beyond reasonable doubt.[234] Therefore, instead of a rule of automatic reversal, the court ordered limited reversal to "determine whether a retrospective competency hearing is feasible."[235] If such a hearing is possible, the court found it "both appropriate and permissible" to engage in retrospective analysis.[236]

By contrast, although it did not decide the issue, the Supreme Court of Washington noted that a competency hearing is a critical stage of trial.[237] Citing *United States v. Cronic*, the court stated that "[a] complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal."[238]

### *IV. Why The Third and Sixth Circuit's Rule of Automatic Reversal is the Only Acceptable Remedy for Denial of Counsel at a Mental Competency Hearing*

The Third and Sixth Circuits' rule of automatic reversal is the only remedy that adequately protects a criminal defendant's fundamental Sixth Amendment right to counsel at a competency hearing. This section will

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31, 296 Mont. 149, 161, 988 P.2d 765, 772 (remanding "to determine if a meaningful retrospective competency hearing can be held"); Tate v. State, 1995 OK CR 24, ¶ 6, 896 P.2d 1182, 1186 (stating retrospective competency hearings do not violate due process); *Ex parte* Lawton, Nos. WR-65068-01, WR-65068-02, 2006 WL 3692632, at *1 (Tex. Crim. App. Dec. 13, 2006) (remanding for a determination of whether a retrospective competency hearing is feasible).

232. *Lightsey*, 279 P.3d at 1097.

233. *Id.* (citing Satterwhite v. Texas, 486 U.S. 249, 258 (1988)).

234. *Id.* at 1098 (citing Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991)).

235. *Id.* at 1102.

236. *Id.*

237. *See* State v. Heddrick, 215 P.3d 201, 207-08 (Wash. 2009) (holding that although the court affirms "the Court of Appeals on the issue of due process during competency proceedings," the defendant "was not denied the assistance of counsel at a critical stage in the proceedings").

238. *Id.* at 207 (citing United States v. Cronic, 466 U.S. 648, 658-59 (1984)).

discuss the advantages of the Third and Sixth Circuits' remedy and examine the flaws behind the D.C. and Tenth Circuits' remedy.

*A. A Third and Sixth Circuit Analysis*

The Third and Sixth Circuits concluded the proper remedy for deprivation of counsel at a competency hearing was automatic reversal of the defendant's conviction.[239] Both circuits arrived at this remedy by applying language from *Cronic*.[240]

The Supreme Court's holding in *Cronic* that the denial of counsel at a critical stage of trial renders the trial unfair seemingly makes the remedial decision an easy one. The rationale behind the case reveals the Supreme Court's opinion regarding the fundamental nature of a defendant's Sixth Amendment right to counsel. Denial of that fundamental right at a critical stage is so likely to affect the defendant's trial that prejudice is not required to establish a violation.[241]

By adopting the *Cronic* analysis and rejecting retrospective competency hearings, the Third and Sixth Circuits effectively—and correctly—rejected harmless error review as the proper remedy.[242] Retrospective review for harmless error is inappropriate because, in order to amount to reversible error, the harmless error rule requires proof that the constitutional violation prejudiced the defendant's trial and "'might have contributed to the conviction.'"[243] To meet *Cronic*, courts acknowledge the constitutional violation was so egregious that the defendant is not required to make any showing of prejudice.[244] Because the defendant was not required to show prejudice to establish the Sixth Amendment violation, a requirement of prejudice for reversal seemingly places the value of a new trial above a defendant's Sixth Amendment rights.

Simply ensuring the trial's outcome was fair through harmless error analysis does not adequately protect a criminal defendant's fundamental Sixth Amendment right to counsel. The Supreme Court has reasoned, "It is true enough that the purpose of [the Sixth Amendment] is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the

239. United States v. Ross, 703 F.3d 856, 874 (6th Cir. 2012); Appel v. Horn, 250 F.3d 203, 218 (3d Cir. 2001).

240. *Ross*, 703 F.3d at 874; *Appel*, 250 F.3d at 212-13.

241. United States v. Cronic, 466 U.S. 648, 659-60 (1984).

242. *See, e.g.*, *Ross*, 703 F.3d at 873-74.

243. Chapman v. California, 386 U.S. 18, 23 (1967) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

244. *Cronic*, 466 U.S. at 658-59.

trial is, on the whole, fair."[245] Depriving a defendant of counsel at a competency hearing affects the entire structure of the criminal proceeding. As the United States Supreme Court has consistently held, the only acceptable remedy for these violations is reversal and retrial.[246]

### *B. Cronic Contamination: Depriving a Defendant of Counsel at His Competency Hearing Infects the Entire Trial*

As the above cases illustrate, a defendant's Sixth Amendment right to counsel can be violated in several different ways. A defendant may be completely deprived of counsel by being permitted to proceed pro se at his own competency hearing,[247] or he may be constructively denied counsel due to his attorney's failure to provide "meaningful adversarial testing" at the hearing.[248] Regardless of the circumstances underlying the constitutional violation, once the court fails to provide the defendant adequate competency procedures, the only adequate remedy is reversal and retrial.[249]

Depriving a defendant of his right to counsel at a competency hearing is not an error that remains confined to the hearing. This structural error undermines "the fairness of the trial process" and "pervade[s] the entire proceeding." [250] Defendants who are ordered into competency proceedings are in an extremely vulnerable state. Competency hearings are only ordered when a defendant's behavior has provided the court reasonable belief that he is mentally unstable to the point that he may "presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[251]

In addition to their mental vulnerability, defendants may enter into competency proceedings defensively in light of the court's inquiry into their

245. United States v. Gonzalez-Lopez, 548 U.S. 140, 145 (2006).

246. Appel v. Horn, 250 F.3d 203, 217 (3d Cir. 2001) (citing Drope v. Missouri, 420 U.S. 162, 181-82 (1975); Pate v. Robinson, 383 U.S. 375, 386-87 (1966); Dusky v. United States, 362 U.S. 402, 403 (1960)).

247. *See, e.g.*, United States v. Klat, 156 F.3d 1258, 1262-63 (D.C. Cir. 1998).

248. *See, e.g.*, *Appel*, 250 F.3d at 216-17; Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (holding *Cronic* standard met where the defendant's attorney slept through the proceeding).

249. Beaudreau, *supra* note 42, at 386.

250. Satterwhite v. Texas, 486 U.S. 249, 256 (1988).

251. 18 U.S.C. § 4241(a) (2012).

mental competency.[252] Whether the court orders the hearing sua sponte or it is requested by one of the parties,[253] this creates the potential for a tense atmosphere and can lead to a lack of cooperation during the competency proceedings. An uncooperative defendant is unlikely to provide helpful information to an examining psychologist. Without such information, and in the absence of counsel, the defendant has no way to effectively challenge the psychologist's findings or the court's decision when he is actually or constructively deprived of the assistance of counsel. And, as the Supreme Court has made "abundantly clear," the stakes involved at competency hearings render the need for counsel exceptionally high both "for the defendant [and] the integrity of our judicial proceedings."[254]

Contamination of a defendant's trial is most likely to occur upon a determination that an incompetent defendant is, in fact, competent. Once a defendant is deemed competent, the trial proceeds as normal.[255] In the case of a pro se defendant, this individual will continue to represent himself, proceeding with all aspects of pre-trial and trial representation until he hires, or is appointed, counsel.[256] Although the dangers of self-representation are not present in constructive denial of counsel cases, these situations still pose serious constitutional hazards.

The Fourteenth Amendment's Due Process Clause "prohibits the trial of an incompetent defendant."[257] Failing to provide adequate procedural and substantive protections to safeguard a defendant's right not to stand trial while incompetent is an express violation of a defendant's right to due process.[258] Whether the defense attorney utterly failed to provide actual assistance of counsel or the defendant was allowed to represent himself in the competency hearing, an incompetent defendant could easily slip through the cracks and be allowed to stand trial. The Supreme Court has explicitly prohibited this result.[259] Moreover, "[e]nsuring the defendant's competence

252. *E.g.*, People v. Lightsey, 54 Cal. 4th 668, 683, 279 P.3d 1072, 1086 (2012) ("In response to the court's order [for a psychiatric assessment and competency hearing], defendant questioned how the court could 'suspend criminal proceeding[s] without giving [him] an opportunity to speak,' and stated, 'Cancel the doctor's appointment. I don't need a doctor. I refuse.'").

253. 18 U.S.C. § 4241(a).

254. Parsons, *supra* note 16, at 243-44.

255. *See* 18 U.S.C. § 4241(d).

256. *See generally* People v. Robinson, 60 Cal. Rptr. 3d 102, 105 (Cal. Ct. App. 2007).

257. Marino, *supra* note 39, at 166.

258. Beaudreau, *supra* note 42, at 376.

259. Medina v. California, 505 U.S. 437 (1992) (citing Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966)).

preserves not only the accuracy but also the fairness, dignity and honor of the verdict, all of which form the cornerstone of the American judicial system."[260]

Equally as significant are the implications surrounding a finding of incompetence. Upon such a finding, the defendant faces the possibility of involuntary hospitalization for an indeterminate period of time and even the risk of forced medication.[261] Subjecting a defendant to involuntary commitment after depriving him of the means to effectively raise a defense in the proceedings leading to his commitment is an extreme violation of due process.

The competency doctrine is designed "to guarantee reliability in criminal prosecutions, to ensure that only those defendants who can appreciate punishment are subject to it, and to maintain moral dignity, both actual and apparent, in criminal proceedings."[262] None of these goals are met when a defendant is deprived of his Sixth Amendment right to counsel during his competency hearing. Depriving a defendant of his right to counsel risks sending him through to trial while incompetent. This contaminates the entire proceeding and warrants automatic reversal of the defendant's conviction.[263]

### *C. The D.C. and Tenth Circuits' Remedies Do Not Adequately Protect a Defendant's Fundamental Sixth Amendment Right to Counsel at a Competency Hearing*

The D.C. and Tenth Circuits both based their remedial decisions on the Supreme Court's language in *Satterwhite*.[264] Effectively adopting *Satterwhite's* rule of harmless error, both courts remanded for retrospective hearings to determine if the deprivation of counsel contaminated the entire

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"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Id.*

260. Marino, *supra* note 39, at 167.

261. 18 U.S.C. § 4241(d) (2012); WRIGHT & LEIPOLD, *supra* note 46, § 208.

262. J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461, 461 (2012).

263. *E.g.*, Appel v. Horn, 250 F.3d 203, 218 (2001).

264. United States v. Bergman, 599 F.3d 1142, 1148 (10th Cir. 2010) (citing United States v. Collins, 430 F.3d 1260, 1266-67 (10th Cir. 2005) (holding "a Sixth Amendment violation requires automatic reversal only when the constitutional violation pervades the entire criminal proceeding" (citing Satterwhite v. Texas, 486 U.S. 249, 257-58 (1998)))); United States v. Klat, 156 F.3d 1258, 1263-64 (D.C. Cir. 1998).

proceeding.[265] Each court provided a different objective for their retrospective hearing,[266] and each has its own fatal flaws.

*1. The Supreme Court Has Since Implicitly Rejected the D.C. Circuit's Remedy*

The objective of the D.C. Circuit's remedy is to retrospectively determine whether counsel could have changed the outcome of the competency hearing.[267] The D.C. Circuit instructed the trial court to base its judgment on whether counsel could have made certain arguments or decisions to change the result of the hearing.[268] This remedy may seem ideal because it squarely addresses the issue of the effect of denial of counsel on the competency hearing. However, a more recent Supreme Court case illustrates the practical difficulties of such a determination and renders the D.C. Circuit's chosen remedy inappropriate.

The 2006 Supreme Court case *United States v. Gonzalez-Lopez* suggests the Court would disapprove of the D.C. Circuit's particular type of retrospective determination.[269] Because the Sixth Amendment provides that a defendant has the right to hire counsel of his choosing, the Court held Gonzalez-Lopez's Sixth Amendment right to counsel was violated when the district court denied his choice of counsel.[270] Because "[t]he right to select counsel of one's choice" is "regarded as the root meaning of the constitutional guarantee" of the Sixth Amendment, the Court found the violation without any analysis for prejudice.[271]

To remedy this violation, the Court first explained the two relevant types of constitutional errors.[272] Most constitutional errors are trial errors, which occur while the case is being presented to the jury.[273] These can be qualitatively assessed to determine whether or not they were harmless.[274] Other errors, such as the denial of counsel, are structural in that they affect the entire framework of the trial and, therefore, "'defy analysis by 'harmless-error' standards.'"[275]

265. *Bergman*, 599 F.3d at 1148-49; *Klat*, 156 F.3d at 1263-64.
266. *Bergman*, 599 F.3d at 1148-49; *Klat*, 156 F.3d at 1263-64.
267. *Klat*, 156 F.3d at 1264.
268. *Id.*
269. *See* 548 U.S. 140 (2006).
270. *Id.* at 148.
271. *Id.* at 147-48.
272. *Id.* at 148.
273. *Id.*
274. *Id.*
275. *Id.* (quoting Arizona v. Fulminante, 499 U.S. 279, 306, 309-10 (1991)).

The Court had "little trouble concluding" that denial of Gonzalez-Lopez's right to his choice of counsel was a structural defect, which "'affec[ted] the framework within which the trial proceeds,' and [was] not 'simply an error in the trial process itself.'"[276] Denial of counsel was structural error because of the countless alternate arguments and strategies a different attorney could have employed.[277] Because "[i]t [would be] impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings," the Court would not allow "speculative inquiry into what might have occurred in an alternate universe."[278]

The D.C. Circuit's remedy for denial of counsel at a competency hearing is inappropriate because it purports "to determine whether counsel might have made certain decisions or arguments which could have changed the result of the competency hearing."[279] Although retrospective review of a competency hearing would be more limited than review of a trial, this is nevertheless the "speculative inquiry" into "an alternate universe" that the Supreme Court rejected in *Gonzalez-Lopez*.[280]

*2. The Tenth Circuit's Retrospective Competency Hearing Remedy is Disfavored by the Supreme Court*

The unpopularity of retrospective competency hearings is well documented.[281] Moreover, it has been suggested that "[a]ny attempt to retrospectively determine competency violates the [defendant's] procedural due process right[s]."[282] But although the Tenth Circuit recognized the Supreme Court's disfavor with retrospective competency hearings, it still chose to proceed with this remedy in *United States v. Bergman*.[283] In ordering the retrospective hearing, the court aimed to determine if the lack of counsel led to an erroneous conclusion that the defendant was competent to stand trial.[284] This remedy was based on the court's conclusion that "[d]eprivation of the right to counsel at a competency hearing affects the entire proceeding only if the defendant stands trial while incompetent."[285]

276. *Id.* at 148, 150 (quoting *Fulminante*, 499 U.S. at 309-10).
277. *Id.* at 150.
278. *Id.*
279. *See* United States v. Klat, 156 F.3d 1258, 1264 (D.C. Cir. 1998).
280. *Gonzalez-Lopez*, 548 U.S. at 150.
281. *E.g.*, Pate v. Robinson 383 U.S. 375, 387 (1966).
282. *See* Beaudreau, *supra* note 42, at 373.
283. 599 F.3d 1142, 1148 (10th Cir. 2010).
284. *Id.*
285. *Id.*

Therefore, on remand, the district court must determine if it was possible, based on the record, to decide whether the defendant had been competent to stand trial on the date of the original competency hearing.[286] However, "[a]lthough 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].'"[287]

Although the Supreme Court has mentioned the possibility of retrospective competency hearings, it has also emphasized the inherent difficulty in making such judgments.[288] Retrospective competency determinations are made solely from the record, which is less reliable than a contemporaneous hearing.[289] The retrospective hearing may be held several years after the original determination, when the court cannot "observe the subject of [its] inquiry, and expert witnesses would have to testify solely from information contained in the printed record."[290] In one case, the Supreme Court explained that doubts and ambiguities in the record developed more than a year prior would make a retrospective competency determination too difficult, so instead a new trial was ordered.[291] In fact, the Supreme Court has never ordered a retrospective competency hearing.[292]

The Tenth Circuit attempted to alleviate the Supreme Court's concerns by crafting a test that considered the amount of time that had passed since the competency hearing and the quality and quantity of evidence available from which a judgment could be made.[293] Recognizing the inherent difficulty in such a determination, however, the Tenth Circuit ultimately gave the district court total discretion to grant a new trial even upon finding the defendant was competent to stand trial.[294] Otherwise, if the district court found the defendant was competent to stand trial, the conviction would stand.[295] However, if the defendant was found incompetent, the district court was ordered to vacate the judgment, hold a competency hearing where

286. *Id.* at 1149.

287. Beaudreau, *supra* note 42, at 373 (quoting People v. Ary, 246 P.3d 322, 330 (Cal. 2011) (Werdegar, J., concurring)).

288. *E.g.*, Pate v. Robinson, 383 U.S. 375, 387 (1966).

289. *See* Beaudreau, *supra* note 42, at 373.

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

291. Dusky v. United States, 362 U.S. 402, 403 (1960).

292. *See* Beaudreau, *supra* note 42, at 373.

293. United States v. Bergman, 599 F.3d 1142, 1148 (10th Cir. 2010).

294. *Id.* at 1149.

295. *Id.*

the defendant would be represented by counsel, and ultimately proceed with a new trial.[296]

The Tenth Circuit's decision is somewhat confusing. It is difficult to understand why the court would go to the trouble of justifying adoption of the disfavored retrospective competency hearing remedy and then give the district court complete discretion to vacate and order a new trial, regardless of the outcome of the prescribed test. The court undoubtedly understands the difficulty in conducting meaningful retrospective hearings, and its grant of ultimate discretion almost encourages new trials.[297] Nevertheless, the Tenth Circuit still clings to its prior circuit decisions.

*3. Why Are Courts Ordering a Disfavored Remedy?*

Trials are expensive. Retrospective competency hearings may be thought to prevent the waste of taxpayer dollars and may also help alleviate the burdened judicial system by providing a limited review instead of an entirely new trial. However, in choosing this option, courts are merely trading the financial costs of a new trial for the costs of faith in the "fairness, dignity and honor of the verdict" which comprise the foundation of our criminal justice system.[298]

Certainly, a rule of "[a]utomatic reversal is strong medicine that should be reserved for constitutional errors that '*always*' or '*necessarily*[]' . . . produce such unfairness."[299] However, the denial of a defendant's fundamental Sixth Amendment right to counsel at a critical stage of a criminal proceeding warrants this remedy. "[L]awyers in criminal courts are necessities, not luxuries,"[300] and their absence from a competency hearing can negatively impact the remainder of the criminal trial. A bright-line rule of automatic reversal hovering over a trial judge's head will encourage close attention and ensure that defendants whose mental status is in question will not have to face a competency hearing alone.

## *V. Conclusion*

The United States Supreme Court has continually expressed concerns about a defendant's constitutional right to counsel and has an established history of protecting incompetent defendants. Based on its implicit rejection

296. *Id.*

297. *See id.* at 1148-49.

298. Marino, *supra* note 39, at 167.

299. United States v. Gonzalez-Lopez, 548 U.S. 140, 159 (2006) (Alito, J., dissenting) (citation omitted).

300. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

of the D.C. Circuit's remedy and its long-standing disapproval of retrospective competency hearings, it is likely the only remedy the Supreme Court would allow for denial of counsel at a competency hearing is the Third and Sixth Circuits' rule of automatic reversal. Violating a defendant's right to counsel at his competency hearing is structural error that infects the entire trial and renders it unfair. The only solution that effectively remedies this violation and adequately protects a criminal defendant's fundamental Sixth Amendment right of representation is the Third and Sixth Circuits' rule of automatic reversal of conviction.

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