In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES ARY, JR.,

Defendant and Appellant.

Case No. S173309

First Appellate District, Division Two, Case No. A113020
Contra Costa County Superior Court, Case No. 5-980575-5
The Honorable Garrett J. Grant, Judge

OPENING BRIEF ON THE MERITS

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STATUTES

ISSUE PRESENTED

In a retrospective competency hearing, does due process require the prosecution to prove competence by a preponderance of the evidence notwithstanding Penal Code section 1369, subdivision (f), which provides: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent?"

INTRODUCTION

This Court has long held that a criminal defendant bears the burden of proving his incompetency by a preponderance of the evidence. The Legislature codified that rule in Penal Code section 1369, subdivision (f) (section 1369(f)). The United States Supreme Court has upheld our state's imposition of that burden on the defendant. (*Medina v. California* (1992) 505 U.S. 437.) Until this case, no court had declared a defendant's right to due process was violated by allocating to him the burden of proving incompetency in a retrospective competency hearing. Consistent with statutory and decisional law, respondent asks this Court to find that defendants bear the same burden of proving incompetency in retrospective competency hearings as they do at trial.

STATEMENT OF THE CASE

In 1997, appellant shot and killed Ronnie Ortega. In 1998, the Contra Costa County District Attorney charged appellant with murder (Pen. Code, § 187),[1] carjacking (§ 215), robbery (§ 211), attempted carjacking (§§ 215/664), assault with a deadly weapon (§ 245, subd. (a)(2)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The information

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[1] Unless otherwise noted, all further statutory references are to the Penal Code.

alleged murder in the commission of carjacking and robbery (§ 190.2, subd. (a)(17)), while lying in wait (§ 190.2, subd. (a)(15)), and by discharging a firearm at an occupied vehicle (§ 12022.5, subd. (b)(1)). The information also alleged a prior strike conviction (§ 1170.12, subds. (b), (c)) and a prior serious felony conviction (§ 667, subd. (a)). (2 CT 565-569 [A095433].) The prosecution sought the death penalty. (2 CT 572 [A095433].)

On December 11, 2000, the jury found appellant not guilty of attempted carjacking and assault with a deadly weapon and guilty of all other counts. It found true all related special allegations. (10 CT 3778-3786, 3897-3900 [A095433]; 47 RT 13072-13087 [A095433].)

The penalty phase began on January 8, 2001. (10 CT 3927 [A095433].) On January 24, 2001, the trial court declared a mistrial after the jury deadlocked. (11 CT 4112-4113 [A095433]; 54 RT 14766-14767 [A095433].) The prosecutor declined a retrial on penalty. (11 CT 4114 [A095433]; 50 RT 14774 [A095433].) On June 14, 2001, the court sentenced appellant to life without the possibility of parole consecutive to 16 years 4 months. (12 CT 4364-4371 [A095433]; 50 RT 14922-14934 [A095433].)

The Court of Appeal found appellant had been denied due process under *Pate v. Robinson* (1966) 383 U.S. 375 (*Pate*) and *People v. Pennington* (1967) 66 Cal.2d 508, because the trial court had not ordered a hearing under section 1368 to determine appellant's competency to stand trial. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1020-1021 (*Ary I*).) The court remanded with directions to determine, in a manner not inconsistent with its opinion, whether a retrospective competency hearing could be held and, if so, to hold the hearing. (*Id.* at p. 1030.) The court held the prosecution must show that a retrospective competency hearing was feasible. (*Id.* at p. 1029.) However, the court did not allocate (or discuss) the burden of proof on competency. (See *id.* at pp. 1029-1030.)

On remand, the prosecution presented evidence demonstrating the feasibility of holding a retrospective hearing. Appellant's counsel agreed that the hearing was feasible. (7/16/04 RT 22-23.) The trial court found the prosecution made the required showing and directed a competency hearing be held. (1 RT 16125-16126.) It found nothing in *Ary I* indicated "anything should change other than what the normal procedure should be for a 1368 hearing, and that, typically, is the burden is on the defense, and proof is preponderance of the evidence." (1 RT 16179.)[2] Over appellant's objection, the court followed the California statutory scheme, which presumes the defendant is competent and places the burden on the defendant to establish his incompetency by a preponderance of the evidence. (1 RT 16182-16183.)

At the retrospective hearing, appellant presented the testimony of his two trial counsel, John Costain and Amy Morton, as well as the testimony of Drs. Karen Franklin, Timothy Derning, Nell Riley, and John Podboy. Both counsel testified that sometime after the trial was over they decided appellant had not been competent to stand trial. (3 RT 17146-17148, 17240-17241, 17247.) Both counsel acknowledged they had challenged appellant's competency to waive his *Miranda*[3] rights in pretrial proceedings, but had, expressly, not challenged his competency to stand trial. (3 RT 17156-17159, 17221-17222, 17278-17280, 17294-17296.) Neither attorney ever asked the trial experts to assess appellant's competency to stand trial, and no expert ever suggested appellant was

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[2] At appellant's urging, the trial court initially had stated the prosecution would bear the burden of proof at the competency hearing, but reversed itself upon objection by the prosecutor that statutory and decisional law placed the burden of proof on the defendant. (2 CT 357-359; 1 RT 16136-16137, 16179-16183.)

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

incompetent. (3 RT 17143-17148, 17164-17165, 17169-17171, 17175, 17206-17207, 17226.)

Dr. Riley, who testified at appellant's trial, is not an expert on competency. She had administered an IQ test before trial, on which appellant had a verbal score of 69, a performance score of 72, and a full scale score of 67. Appellant scored in the 16th percentile of the population for verbal comprehension. (6 RT 17927, 17935-17937, 17940-17943, 17974-17975.)

Dr. Franklin found appellant competent for purposes of the retrospective competency hearing. She did not assess his competency to stand trial, either at the time of the hearing or retrospectively. She believed competency was functional, and varied depending upon the proceeding at issue and the crime charged. (3 RT 17334-17336, 17347-17349, 17414-17417.) Dr. Franklin administered the CAST-MR, the only instrument available to assess competency for mentally retarded individuals. (3 RT 17390-17392.) Appellant "performed above the mean score for both groups, competent and incompetent groups of mentally retarded defendants." (3 RT 17392.)

Dr. Derning testified in appellant's pretrial and trial proceedings. (4 RT 17432-17433, 17467-17469.) Dr. Derning thought appellant was not competent to stand trial in 2000. When he was testifying at the time, however, he understood that was not an issue. He thought he had expressed a doubt regarding appellant's competency, but he could not recall any specific instance when the issue arose. (4 RT 17518, 17528-17529, 17540-17545, 7 RT 18118-18121, 18132.)

Dr. Podboy also testified in appellant's trial. (6 RT 17984.) At the time of trial, Dr. Podboy thought appellant was "obviously not competent." (6 RT 18013.) However, he did not recall that counsel asked his opinion on the matter, nor did he recall offering his opinion. (6 RT 18015, 18031-

18033.) He did not review appellant's trial testimony before the retrospective competency hearing. (6 RT 18031.)

The prosecutor presented the testimony of Drs. Paul Good, Edward Hyman, Howard Friedman, and Paul Berg. Dr. Good found appellant competent at the time of the retrospective hearing. He had not been asked to assess appellant's competence in 2000. (4 RT 17558-17561, 17598-17600, 7 RT 18110.) However, he was not aware of any information that suggested appellant's capacity to reason had changed in any meaningful way between the time of trial and the retrospective competency proceeding. (4 RT 17591.) Dr. Good discussed appellant's trial testimony with appellant, and read it himself. He thought appellant handled himself well and that his testimony reflected on his competency in several respects. (4 RT 17569-17571, 17611, 17572-17575, 17579-17585.) Dr. Good administered the CAST-MR, on which appellant scored 43.5 out of 50. The average score for incompetent mentally retarded individuals is 26, the average score for competent mentally retarded individuals is 37, and the average score for competent individuals who were not mentally retarded is 45.4. (4 RT 17585-17588.)

Drs. Hyman, Friedman, and Berg did not examine appellant at the time of the retrospective competency hearing. (5 RT 17713-17714, 17813, 17869-17873.) Dr. Hyman reviewed a voluminous amount of material, including appellant's trial testimony, and believed he had far more information than in most competency assessments. (5 RT 17829, 17849-17851.) He opined appellant was competent to stand trial in 2000 based on his extensive review. (5 RT 17685-17686.)

Dr. Friedman, who had testified at appellant's trial, also opined appellant was competent at that time. He thought appellant's testimony at trial was particularly important in demonstrating competency. Appellant's ability to answer open-ended questions at trial, in contrast to the multiple

choice questions on the CAST-MR, showed he was able to respond at a higher level than used to determine competency. (5 RT 17713-17714, 17723-17726, 17730-17733.)

Dr. Berg had testified at the pretrial motion to suppress appellant's confession. (5 RT 17790-17791.) He opined appellant was competent to stand trial in 2000 based on his own prior testimony, appellant's trial testimony, and information regarding appellant's statements to the police in 1992, 1994, and 1997, among other things. (5 RT 17792-17801, 17806-17808.) Appellant's trial testimony, in particular, reflected on his competency in numerous respects. (5 RT 17802-17803, 6 RT 18068-18072.) Dr. Berg thought appellant's level of functioning from 1992 until the present was "[v]irtually the same" based on everything he had reviewed. (6 RT 18072-18073.)

On December 15, 2005, the trial court issued its written findings and conclusions. (8 CT 2513-2550.) The court found the evidence showed appellant was mildly mentally retarded. (8 CT 2540.) Three doctors had tested appellant's competency at the time of the hearing, and "all the clinicians who testified" agreed that "mild mental retardation is a chronic impairment which does not change appreciably over time." (8 CT 2549.)

The court summarized the witnesses' testimony (8 CT 2517-2540) and made detailed findings on the credibility of several witnesses (8 CT 2540-2549). It found the testimony of Dr. Derning, Dr. Podboy, Amy Morton, and John Costain was not credible in several respects. (8 CT 2541-2547.) Although three of the prosecution experts had not personally examined appellant, the court found their opinions supported by specific examples from the information reviewed. (8 CT 2547-2549.) Also, the CAST-MR showed appellant's score exceeded the score of a mentally retarded individual deemed competent, and came within one and one half points of the score one would expect from an individual who was not

retarded. (8 CT 2550.) The court concluded appellant had failed to prove by a preponderance of the evidence that he was incompetent at his trial in 2000. (*Ibid.*)

In his second appeal, appellant argued the prosecution should have had to prove beyond a reasonable doubt that he was competent, because he had been denied due process by the *Pate* violation before his conviction at trial. A divided panel of the Court of Appeal agreed, in part, and reversed. "Because the fundamental fairness implicit in the concept of due process creates a rebuttable presumption of incompetency upon the vindication of a *Pate* claim, the burden at a retrospective hearing lies with the prosecution to show by a preponderance of the evidence that the defendant was competent to stand trial at the time he was tried." (Maj. opn. at p. 2.)

On July 29, 2009, this Court granted respondent's petition for review.

SUMMARY OF ARGUMENT

The Legislature has established that a defendant is presumed mentally competent unless it is proved by a preponderance of the evidence that he is incompetent. (§ 1369(f).) This Court has upheld section 1369(f) against a challenge that it violates due process (*People v. Medina* (1990) 51 Cal.3d 870), as has the United States Supreme Court (*Medina v. California, supra,* 505 U.S. 437). Since *Medina v. California*, the majority of states similarly impose on a defendant the burden of proving his mental incompetence by a preponderance of the evidence. In *Moran v. Godinez* (9th Cir. 1995) 57 F.3d 690, 697, overruled on other grounds in *Lockyer v. Andrade* (2003) 538 U.S. 63, the Ninth Circuit found that requiring a defendant to prove his incompetency by a preponderance of the evidence at a retrospective competency hearing also does not violate due process. Numerous state and federal courts are in accord. The Court of Appeal's decision to impose on the prosecution the burden of proving a defendant competent at a retrospective competency hearing is contrary to the overwhelming weight

of authority. In the absence of any statutory, decisional, or reasoned basis for reversing the burden of proof on competency, the burden should remain with the defendant to prove he is incompetent to stand trial.

ARGUMENT

THE TRIAL COURT DID NOT VIOLATE DUE PROCESS BY REQUIRING APPELLANT TO PROVE HIS INCOMPETENCY BY A PREPONDERANCE OF THE EVIDENCE AT THE RETROSPECTIVE COMPETENCY HEARING

This case presents the question whether the defendant or the prosecution bears the burden of proof at a retrospective hearing on competency to stand trial. The trial court applied the existing statutory scheme in requiring appellant to bear that burden. A divided Court of Appeal found due process required the prosecution to bear the burden of proof. As we explain, the trial court correctly allocated the burden to appellant.

The Court of Appeal based its determination that due process requires the prosecution to prove a defendant competent at a retrospective competency hearing on three grounds: (1) section 1369(f) does not apply to a retrospective competency hearing; (2) *Medina v. California*, *supra*, 505 U.S. 437, which upheld section 1369(f) against a claim that it violated due process, also does not apply to a retrospective hearing; and (3) *James v. Singletary* (11th Cir. 1992) 957 F.2d 1562 held that a *Pate* violation creates a rebuttable presumption of incompetence and, thus, the prosecution must bear the burden of proving competence at a retrospective competency hearing. None of these grounds withstands scrutiny.

A. Retrospective Competency Hearings Are Well Established

As an initial matter, we demonstrate the legal basis for retrospective competency hearings, because, until the decision in *Ary I*, such hearings

have not been held in California. (Maj. opn. at p. 11; *Ary I*, 118 Cal.App.4th at pp. 1027-1028.) The procedural context which justifies such hearings informs the question presented in this case.

The conviction of an accused while he is legally incompetent violates due process. (*People v. Medina, supra,* 51 Cal.3d at p. 881, citing *Pate, supra,* 383 U.S. at p. 385.) A competency hearing is required "whenever substantial evidence of the accused's incompetence has been introduced." (*People v. Medina, supra,* at p. 882; accord, *McMurtrey v. Ryan* (9th Cir. 2008) 539 F.3d 1112, 1118 ["When 'the evidence raises a "*bona fide* doubt" about the defendant's competence to stand trial, a trial judge must *sua sponte* conduct an evidentiary hearing.'"].) A trial court's failure to employ adequate procedures to protect against trial of an incompetent defendant deprives the defendant of due process. (*Pate, supra,* at p. 386; *People v. Medina, supra,* at pp. 881-882; *McMurtrey v. Ryan, supra,* at p. 1119.)

The federal courts refer to the trial of an incompetent defendant as a substantive due process violation. A trial court's failure to employ adequate procedures to protect the right to be tried only while competent is a procedural, or "*Pate*," violation. (*Battle v. United States* (11th Cir. 2005) 419 F.3d 1292, 1298; *Moran v. Godinez, supra,* 57 F.3d at p. 695; *United States v. Williams* (5th Cir. 1987) 819 F.2d 605, 607-609; *Lokos v. Capps* (5th Cir. 1980) 625 F.2d 1258, 1261-1262.)

In *Drope v. Missouri* (1975) 420 U.S. 162, 181, the high court found there had been a *Pate* violation. It then considered whether the defendant's due process rights "would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969." (*Id.* at p. 183.) It observed that "[s]uch a procedure may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with

dispatch." (*Id.* at p. 182.) In the case before it, however, "because of petitioner's absence during a critical stage of his trial, neither the judge nor counsel was able to observe him, and the hearing on his motion for a new trial, held approximately three months after the trial, was not informed by an inquiry into either his competence to stand trial or his capacity effectively to waive his right to be present." (*Id.* at pp. 182-183.) "Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, [citation], we cannot conclude that such a procedure would be adequate here." (*Id.* at p. 183.)

After *Drope v. Missouri*, the vast majority of federal circuit courts, as well as several state courts, decided that, in appropriate circumstances, a retrospective determination of competency to stand trial is permissible.[4] (E.g., *United States v. Auen* (2d Cir. 1988) 846 F.2d 872, 878; *United States v. Renfroe* (3d Cir. 1987) 825 F.2d 763, 767-768; *United States v. Mason* (4th Cir. 1995) 52 F.3d 1286, 1293; *Wheat v. Thigpen* (5th Cir. 1986) 793 F.2d 621, 630; *Cremeans v. Chapleau* (6th Cir. 1995) 62 F.3d 167, 169-170, disapproved on other grounds in *Mackey v. Dutton* (6th Cir. 2000) 217 F.3d 399, 413; *Galowski v. Berge* (7th Cir. 1996) 78 F.3d 1176, 1181; *Reynolds v. Norris* (8th Cir. 1996) 86 F.3d 796, 802-803; *Moran v. Godinez, supra,* 57 F.3d at pp. 695-696; *Clayton v. Gibson* (10th Cir. 1999) 199 F.3d 1162, 1169; *Watts v. Singletary* (11th Cir. 1996) 87 F.3d 1282, 1286-1287, fn. 6; *United States v. West-Bey* (D. Md. 2002) 188 F.Supp.2d 576, 583-586; *Thompson v. Commonwealth* (Ky. 2001) 56 S.W.3d 406, 409; *State v. Snyder* (La. 1999) 750 So.2d 832, 854-855; *Montana v. Bostwick* (Mont. 1999) 988 P.2d 765, 772-773; *Tate v. State* (Okla. 1995) 896 P.2d 1182, 1186-1188; *Commonwealth v. Santiago* (Pa. 2004) 855

[4] Respondent is aware of no case holding that a retrospective competency hearing is impermissible under all circumstances.

A.2d 682, 693; *State v. Sanders* (W. Va. 2001) 549 S.E.2d 40, 53-55; *State v. Johnson* (Wis. 1986) 395 N.W.2d 176, 184-185; *State v. McRae* (N.C. App. 2000) 533 S.E.2d 557, 560-561.)

California courts concur. In addition to the Court of Appeal's decision in *Ary I*, two other California appellate courts have found that a retrospective competency hearing is permissible on a finding of feasibility. (*People v. Robinson* (2007) 151 Cal.App.4th 606, 617-618; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 387-389.)

A variety of factors may be considered in determining whether a retrospective competency hearing is feasible. None are necessarily determinative, and the question must be decided on a case-by-case basis. (*Thompson v. Commonwealth, supra,* 56 S.W.3d at p. 409.) The Ninth Circuit has stated, "although retrospective competency hearings are disfavored, [citations], they are permissible whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." (*Moran v. Godinez, supra,* 57 F.3d at p. 696; accord, *United States v. West-Bey, supra,* 188 F.Supp.2d at p. 585; *Commonwealth v. Santiago, supra,* 855 A.2d at p. 693; *State v. Sanders, supra,* 549 S.E.2d at p. 54.) A number of courts have set forth factors to be considered in determining the feasibility of a retrospective hearing, including (1) the passage of time; (2) the availability of contemporaneous medical evidence, including 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 the defendant before and during trial. (E.g., *People v. Robinson, supra,* 151 Cal.App.4th at p. 617; *United States v. Collins* (10th Cir. 2005) 430 F.3d 1260, 1267; *Clayton v. Gibson, supra,* 199 F.3d at p. 1169; *Reynolds v. Norris, supra,* 86 F.3d at pp. 802-803; *United States v. West-Bey, supra,* 188 F.Supp.2d at p. 585, fn. 4; *Commonwealth v. Santiago,*

supra, 855 A.2d at p. 693; *Thompson v. Commonwealth, supra,* 56 S.W.3d at pp. 409-410; *State v. Sanders, supra,* 549 S.E.2d at p. 54.)

Some courts ask the trial court to determine whether a retrospective hearing is feasible, because it is in the best position to make such a finding, and do not impose a burden on either party. (E.g., *United States v. Auen, supra,* 846 F.2d at p. 878; *United States v. Renfroe, supra,* 825 F.2d at p. 767; *Commonwealth v. Santiago, supra,* 855 A.2d at pp. 693-694; *State v. McRae, supra,* 533 S.E.2d at pp. 560-561; *Montana v. Bostwick, supra,* 988 P.2d at p. 772; *State v. Johnson, supra,* 395 N.W.2d at p. 185.) Some courts require the prosecution to first show that a retrospective hearing is feasible. (E.g., *Lokos v. Capps, supra,* 625 F.2d at p. 1268, fn. 5; *Thompson v. Commonwealth, supra,* 56 S.W.3d at pp. 409-410; *State v. Sanders, supra,* 549 S.E.2d at p. 54; *State v. Snyder, supra,* 750 So.2d at p. 855; *Tate v. State, supra,* 896 P.2d at p. 1187.) A trial court's finding of feasibility is reviewed for abuse of discretion. (*Wheat v. Thigpen, supra,* 793 F.2d at pp. 630-631; *Commonwealth v. Santiago, supra,* 855 A.2d at p. 694; see *Ary I, supra,* 118 Cal.App.4th at p. 1029 [determination of feasibility "is not primarily a factual matter" and may be made "purely on the record" before the trial court]; *Tate v. State, supra,* 896 P.2d at p. 1186.)

In *Ary I,* the Court of Appeal stated the "People must still convince the trial court that there is sufficient evidence on which a 'reasonable psychiatric judgment' of defendant's competence to stand trial can be reached." (*Ary I, supra,* 118 Cal.App.4th at p. 1029.) On remand, defense counsel concurred with the prosecution that a retrospective hearing on competency was feasible. (Maj. opn. at p. 3.)

The courts are divided on the issue of which party bears the burden of proof at the retrospective competency hearing. However, the majority of jurisdictions place the burden of proof on the defendant. As we explain,

that approach does not violate due process. Both statutory and decisional law support the trial court's allocation of the burden here.

B. Section 1369(f) Applies to a Retrospective Competency Hearing

Section 1369(f) provides in pertinent part: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." This Court has reiterated the same standard. (*People v. Marks* (2003) 31 Cal.4th 197, 215 ["The defendant has the burden of proving incompetency by a preponderance of the evidence."].)

The Court of Appeal below concluded that the allocation of the burden of proof at a retrospective competency hearing has never been addressed by our Legislature. Reviewing the statutory scheme, the court asserted, "The sole purpose of section 1369 is to define the 'order of proceedings' of the '[t]rial of issue of mental competence' required by section 1368 to take place prior to judgment in an original criminal proceeding." (Maj. opn. at p. 10.) The Court of Appeal characterized the statutes respecting competency as "intended to apply to competency hearings held prior to trial or sentencing." (Maj. opn. at p. 11.) Because the Penal Code "does not expressly authorize a retrospective hearing," and such hearings had not been contemplated at the time the statutory scheme was enacted, the court found "no basis" to infer the Legislature intended the statutes to apply "beyond their express terms." (*Ibid.*)

The Court of Appeal stated, nevertheless, "The fact that section 1369 was not designed to apply to a retrospective competency hearing does not, of course, prevent a court conducting such a hearing from adhering to such of its provisions as would not impermissibly abridge a defendant's due process rights." (Maj. opn. at p. 12.) "Nothing in this opinion suggests that subdivision (a), or any other provision of section 1369 unrelated to the

presumption of competence, may not be applied to a retrospective competency hearing." (Maj. opn. at p. 13.) Essentially, the Court of Appeal concluded that only one sentence of one subdivision of the statutory scheme governing the competency of a criminal defendant did not apply to a retrospective competency hearing.

The Court of Appeal's analysis is flawed for three reasons. First, this Court has found that the absence of an express provision that section 1369 applies in a particular context does not require the conclusion that the Legislature intended it should not apply. Second, the Legislature has not amended section 1369 despite the Court of Appeal's holding in *Ary I* that a retrospective hearing may be held, and its implicit assumption that section 1369 would govern that hearing. Third, the court's conclusion that the Legislature intended the statutory scheme to apply only to contemporaneous competency proceedings conflicts with its view that, nonetheless, the entire statutory scheme does apply to retrospective hearings, with the exception of the presumption and burden of proof allocation contained in section 1369(f).

A competency proceeding, although related to the underlying criminal case, is a special proceeding and not itself a criminal action. (*People v. Masterson* (1994) 8 Cal.4th 965, 969.) The sole purpose of the competency proceeding is to determine "whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner." (*Id.* at p. 971.) "Penal Code section 1369 sets forth the procedures for the trial in which the question of the mental competence of the defendant is to be determined." (*People v. Rells* (2000) 22 Cal.4th 860, 866 (*Rells*).) The presumption of competence in section 1369(f) "is a rule of procedure." (*People v. Masterson, supra,* at p. 974.)

> Thus, for a trial of a defendant's mental competence, Penal Code section 1369 establishes, expressly, a presumption that the

> defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise. In so doing, it operates to impose the burden of proof on the party, if any, who claims that the defendant is mentally incompetent—usually, the defendant himself (see Pen. Code, § 1369, subd. (b)(1)), but sometimes the People (see Pen. Code, § 1369, subds. (a) & (b)(2))—and fixes the weight of the burden of proof at preponderance of the evidence.

(*Rells, supra,* 22 Cal.4th at p. 867, footnotes omitted.)

The same presumption applies to a hearing on the defendant's recovery of mental competence, even though the statutory scheme does not set forth the procedures for that hearing at all. (*Rells, supra,* 22 Cal.4th at pp. 867-868.)

> [F]or a hearing on a defendant's recovery of mental competence, Penal Code section 1372, unlike Penal Code section 1369, does not establish, expressly, a presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be to otherwise. We believe, however, that it does so impliedly. The presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise is applicable at a trial of the defendant's mental competence, *in spite of the fact that it may run counter to any doubt expressed by the court and supported by the opinion of his own counsel.* This presumption is applicable as well at a retrial of the defendant's mental competence, which is mandatory when the defendant has been committed for 18 months and remains so without a certificate of restoration to mental competence filed by a specified mental health official, *in spite of the fact that it is inconsistent with his apparent* non*recovery of mental competence.* Therefore, in our view, this presumption should be understood to be applicable at a hearing on the defendant's recovery of mental competence, *where it conforms in fact with the certificate of restoration filed by the specified mental health official.* As stated, whereas Penal Code section 1369 sets forth procedures for a trial of a defendant's mental competence, Penal Code section 1372 does not do so for a hearing on the defendant's recovery of mental competence. With respect at least to the presumption in question, Penal Code section 1372 allows its gap to be filled by Penal Code section 1369.

(*Rells, supra,* 22 Cal.4th at pp. 867-868; see Evid. Code, § 606 ["The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."].)

As shown in *Rells,* express statutory authorization is not required for the presumption of competence to apply at a hearing on restoration of competency. (*Rells, supra,* 22 Cal.4th at pp. 867-868.) Likewise, the absence of an express statutory application of the presumption of competence to a retrospective competency hearing does not preclude its application in that context, particularly since the presumption of competence has not been construed, until now, to apply solely to the hearing described in section 1368, as opposed to section 1372 or some other type of competency hearing.

Further, as the dissent below points out, the Legislature twice amended section 1369, subdivision (a) after *Ary I.* (Dis. opn. at pp. 3-4, citing Stats. 2004, ch. 486, § 1 & Stats. 2007, ch. 556, § 2.) Neither of those amendments made any portion of section 1369 inapplicable to a particular proceeding. "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475.) The Legislature is presumed to have been aware of *Ary I*, yet it did not alter section 1369 to preclude its application to a retrospective competency hearing.

The Court of Appeal responded that its opinion in *Ary I* "never even cited section 1369, let alone construe[d] it as applying to a retrospective hearing." (Maj. opn. at p. 11.) Yet, as the dissent points out (Dis. opn. at pp. 1-2, 4-5), all parties assumed, both on appeal and on remand, that the retrospective competency hearing was a trial under section 1368 governed

by the procedures in section 1369. Appellant never disputed the application of any of those procedures *except* the presumption of competence and burden of proof allocation in section 1369(f). The contention that the applicability of section 1369 was never contemplated is simply not borne out by the record.

The Court of Appeal's conclusion that the statutory scheme was never intended to apply to retrospective hearings is also logically inconsistent. The court first states that the provisions of chapter 6 of title 10 of the Penal Code "were intended to apply to competency hearings held prior to trial or sentencing." (Maj. opn. at p. 11.) The court did not explain what provisions apply instead to a retrospective hearing. Its categorical conclusion that the statutory scheme does not apply at all to retrospective hearings is later, without explanation, completely jettisoned. "Nothing in this opinion suggests that subdivision (a), or any other provision of section 1369 unrelated to the presumption of competence, may not be applied at a retrospective hearing." (Maj. opn. at p. 13.) Apparently, then, only the presumption of competency in section 1369(f) "was not intended by the Legislature to apply to retrospective competency determinations." (Maj. opn. at p. 13.) The court's construction of the statutory scheme was thus unnecessary to its conclusion. The court's view that the statutory scheme is not intended to apply to a retrospective hearing, but, nevertheless, all but one sentence of the scheme does apply to such a hearing, is tortured logic.

Since the Court of Appeal concluded that the statutory scheme, with the exception of one sentence, does indeed apply to retrospective competency hearings, its construction that the scheme contemplates only contemporaneous competency hearings is unpersuasive. The question remains whether that one sentence in section 1369(f) should *not* be applied at a retrospective hearing. As the dissent pointed out, however, "the majority's decision in this case comes perilously close to judicial

legislation." (Dis. opn. at p. 1.) If, as the court below concedes, the statutory scheme is generally applicable to retrospective hearings, it is for the Legislature to decide whether some aspect of that scheme should not apply. Since, as shown below, section 1369(f) is not unconstitutional as applied to a retrospective hearing, only the Legislature is empowered to amend the statute, if it so chooses.

C. This Court and the United States Supreme Court Have Upheld Section 1369(f) Against a Due Process Challenge

The constitutionality of section 1369(f) has been upheld by this Court and by the United States Supreme Court. The Court of Appeal acknowledged this point, but nevertheless addressed the issue here as if these holdings were of no consequence. We disagree that the different procedural posture of the case requires a different allocation of the burden of proof on the issue of competence.

In *People v. Medina, supra,* 51 Cal.3d 870, this Court addressed the defendant's claim that section 1369(f) denied him due process because it presumed he was competent and required him to prove his incompetence to stand trial. The Court stated,

> According to defendant, it is irrational to preserve that presumption *after* a doubt arises regarding defendant's competence. We believe the issue is controlled by the cases and analysis previously set forth regarding the allocation of the proof burden. The primary significance of the presumption of competence is to place on the defendant (or the People, if they contest his competence) the burden of rebutting it. By its terms, the presumption of competence is one which affects the burden of proof and, accordingly, it remains in effect despite the introduction of some evidence of incompetence. (See Evid. Code, §§ 500, 550, 603-605.) We decline to hold as a matter of due process that such a presumption must be treated as a mere presumption affecting the burden of production, which disappears merely because a preliminary, often undefined and

> indefinite, "doubt" has arisen that justifies further inquiry into the matter.

(*People v. Medina, supra,* 51 Cal.3d at p. 885.) The Court found that section 1369(f) "passes constitutional muster under both the federal and state Constitutions." (*Ibid.*)

In *Medina v. California, supra,* 505 U.S. 437, the high court affirmed this Court's conclusion. "Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (*Id.* at p. 446.) In contrast to the fundamental right not to be tried while incompetent, "there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence." (*Ibid.*)

> Under California law, the allocation of the burden of proof to the defendant will affect competency determinations only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent. [Citation.] Our cases recognize that a defendant has a constitutional right "not to be tried while legally incompetent," and that a State's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." [Citation.] Once a State provides a defendant access to procedures for making a competency evaluation, however, we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.

(*Medina v. California, supra*, 505 U.S. at p. 449.)

In concluding that due process requires allocating the burden of proof to the prosecution in a retrospective competency hearing, the Court of

Appeal found *Medina v. California* inapplicable, because it addressed competency determinations before trial, rather than after the finding of a *Pate* violation. It nevertheless found *Medina*'s analysis supported its view that it would be unfair to apply the presumption of competence at a retrospective hearing. (Maj. opn. at pp. 13-21.) The court stated, "While the presumption of competency is reasonable when, at the time of trial or sentencing, no evidence of incompetency has been offered and the matter has not been adjudicated, that is no longer the case after a *Pate* violation, where a showing of incompetence was made and the matter was preliminarily adjudicated." (Maj. opn. at p. 17.) "Such violations most commonly occur where the defendant's incompetency is not manifest and the conflicting evidence as to that issue is in equipoise. For this reason, the placement of the burden of proof will be the determinative factor in most cases in which competency is determined ex post facto after a *Pate* violation, and if it is placed on the defendant he or she will rarely, if ever, be able to sustain it." (Maj. opn. at p. 17, footnote omitted.)

The Court of Appeal's belief that the finding of a *Pate* violation constitutes a preliminary adjudication on the issue of incompetence is incorrect. Similarly incorrect is its view that, because it may be more difficult for a defendant to prove his incompetence at a retrospective hearing, due process requires that he no longer bear that burden.

As noted above, in *People v. Medina, supra,* 51 Cal.3d at p. 885, this Court declined to find that the presumption of competence affects only the burden of production before a competency hearing is ordered, and that it afterward disappears merely "because a preliminary, often undefined and indefinite, 'doubt' has arisen that justifies further inquiry into the matter." That adequate evidence has been presented to warrant a hearing does not mean the defendant is no longer presumed competent, because the finding that a hearing is necessary in itself decides nothing. (See *ibid.*)

The Court of Appeal's conclusion that the presumption should nevertheless be inapplicable after a *Pate* violation fails to address the nature of the *Pate* violation itself. The only "showing of incompetence" (Maj. opn. at p. 17) made here was the showing required to hold a hearing on competence. That is the identical showing appellant contended he met before trial, and which the Court of Appeal found adequate to have warranted a *Pate* hearing. Because the Court of Appeal concluded a reasonable doubt of appellant's competence warranted a competency hearing, it found a *Pate* violation in *Ary I*. Yet, the court never suggested it was applying a heightened standard to the showing required for a hearing. Rather, it applied established law to find the trial court should have declared a doubt of appellant's competency and held a hearing. There has been no "showing of incompetence" beyond that required to warrant a hearing on competency, and there has been no "preliminary adjudication" of incompetence. The finding of a *Pate* violation means only that the trial court should have declared a doubt, but failed to do so. It does not mean the defendant is more likely than not incompetent simply because the trial court failed to declare a doubt.

As this Court stated in *Rells, supra,* 22 Cal.4th at p. 867, "The presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise is applicable at a trial of the defendant's mental competence, *in spite of the fact that it may run counter to any doubt expressed by the court and supported by the opinion of his own counsel*." Because the finding of a *Pate* violation is based on the identical criteria that warrants a competency hearing in the first instance, it does not affect the presumption of competence in section 1369(f).

Contrary to the Court of Appeal's view, nothing in *Medina v. California* suggests it is permissible to presume a defendant competent and impose on him the burden of proof at a pretrial hearing on competency

under section 1369, but impermissible to apply the same presumption and burden at an identical hearing held after trial. "Once a State provides a defendant access to procedures for making a competency evaluation, however, we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial." (*Medina v. California, supra*, 505 U.S. at p. 449.)

The Court of Appeal's conclusion that due process is implicated because, where the evidence of competence is in equipoise, a defendant might have a more difficult task proving his incompetency, is similarly unfounded. "The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused." (*Medina v. California, supra,* 505 U.S. at p. 451.) "[I]t 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 stand trial." (*Ibid.*) As this Court reiterated in *Rells, supra,* 22 Cal.4th at p. 870, "A different presumption may prove 'more favorable' to a defendant. [Citation.] But it is not required by the Fourteenth Amendment's due process clause for that reason. [Citation.]"

In finding a due process violation, the Court of Appeal relied on the high court's acknowledgement that "the allocation of the burden of proof to the defendant will affect competency determinations only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent." (*Medina v. California, supra,* 505 U.S. at p. 449.) Yet, the possibility that the burden of proof would affect competency determinations in such cases did not deter the high court from its holding

that due process, nonetheless, was not violated. (See *Rells, supra,* 22 Cal.4th at pp. 869-870.)

The Court of Appeal concluded, however, that most cases arising in the current posture would be cases in which the evidence of competency was in equipoise. The court reasoned that, since the evidence of competency was not sufficiently apparent that the trial court ordered a hearing in the first instance, the evidence of competency would be closer at a retrospective competency hearing. Reasoning further that the defendant would more often lose in such circumstances, the court concluded that imposition of the presumption of competence and placement of the burden of proof on the defendant would violate due process. (Maj. opn. at pp. 16-18.) [5]

As previously noted, due process does not require the state to adopt rules of criminal procedure that are more favorable to a criminal defendant. (*Medina v. California, supra,* 505 U.S. at p. 451; *Rells, supra,* 22 Cal.4th at p. 870.) In any event, the Court of Appeal's assumption that most cases involving *Pate* violations will have evidence in equipoise is unsupported by

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[5] The Court of Appeal also discussed at some length the propriety of placing the burden of proof on the prosecution when the state bore some responsibility for the failure to hold a hearing. (Maj. opn. at pp. 18-21.) The relevance of this discussion is unclear, at least in this case. The prosecutor was the *only* participant in the case who raised the issue of appellant's competence to stand trial during pretrial proceedings. Defense counsel had raised the issue whether appellant understood particular pretrial proceedings, but, upon inquiry by the trial court, expressly stated she was not raising a doubt regarding appellant's competence under section 1368. (2 RT 397-399 [A095433].) Thus, the Court of Appeal's implicit view that the prosecution bore some blame in this case is wholly unfounded. In any event, if the trial court fails to order a competency hearing when one is required, that does not mean the prosecution should bear the burden of proof at a retrospective competency hearing. The prosecutor could have been completely silent in pretrial proceedings, but if a competency hearing was held at that time, he would not have the burden of proof.

any evidence generally, and certainly unsupported by the evidence in this case.

A *Pate* violation simply means the trial court failed to hold a competency hearing when evidence existed that should have created a reasonable doubt in the court's mind that the defendant was competent. (See *People v. Medina, supra,* 51 Cal.3d at pp. 881-882.) It is reasonable to assume that in such a case the evidence of a defendant's incompetence might be less apparent than in a case where a trial court recognized the need to hold a competency hearing at the time of trial. That does not mean, however, that once a hearing is held, the evidence will necessarily or often be in equipoise. A defendant may well be able to present preponderant evidence that he is incompetent. For example, there could be compelling evidence known only to defense counsel and the defense team that bears on the issue of competence. (See *id.* at p. 885 ["[O]ne might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry."].) Conversely, there could be compelling evidence that a defendant was competent when the issue is addressed at a retrospective competency hearing. When the defendant testifies at trial, for example, as here, a trial court has the benefit of that testimony when retrospectively assessing the defendant's competence to stand trial. As the Ninth Circuit stated, testifying in one's own defense is "the quintessential act of participating in one's own trial," and a defendant's "lengthy, logical and cogent trial testimony reflects a sufficient ability to understand the proceedings and to assist in [his] own defense." (*Benson v. Terhune* (9th Cir. 2002) 304 F.3d 874, 885-886.) In addition to a defendant's testimony, substantial other evidence might also be available after trial on the question of competence, such as expert testimony presented at trial, thus limiting the possibility the evidence would be in "equipoise."

Even where the evidence is in equipoise, a defendant who suffers a *Pate* violation should not be placed in a more advantageous position than a defendant whose potential incompetence was sufficiently manifest that *Pate* was satisfied by a hearing before trial. No justification appears for reversing the presumption of competency when a hearing is held after trial simply because a doubt regarding the defendant's competence was less apparent. If a trial court has a doubt regarding a defendant's competence before trial, such that a hearing is required, the defendant is nevertheless presumed competent. (§ 1369(f).) If the sufficiency of the evidence to warrant a hearing on competence is not discerned until after trial, as here, it is not fundamentally unfair to presume the defendant competent in that circumstance either.

This Court and the United States Supreme Court have upheld section 1369(f) against a challenge that it violates due process. No sound reason appears for finding that it nevertheless violates due process when applied to a retrospective competency determination. Accordingly, the trial court did not err by following the statutory procedure.

D. The Majority of Courts Place the Burden on the Defendant to Prove His Incompetency

The majority of state and federal courts place the burden on the defendant to prove his incompetency at the time of trial. The Court of Appeal's citation to numerous cases decided before *Medina v. California, supra,* 505 U.S. 437, and *Cooper v. Oklahoma* (1996) 517 U.S. 348 does not alter this basic premise. Further, the majority of courts that have addressed the issue also place the burden on the defendant to prove his incompetency at a retrospective competency hearing.

The Court of Appeal cited the observation in *Medina v. California* that "'there remains no settled view of where the burden of proof should lie'" at a contemporaneous competency hearing. (Maj. opn. at p. 13, citing

Medina v. California, supra, 505 U.S. at p. 447.) The Court of Appeal added, "While California and courts in some other states place the burden of proof on the defendant to show current incompetency, the majority of state courts that have addressed the issue have held that the burden of proving present incompetency rests with the prosecution." (Maj. opn. at p. 13, footnotes omitted.) In two accompanying footnotes, the court cited cases that, without exception, were decided before *Medina v. California.* (See Maj. opn. at p. 13, fns. 11, 12.)

Since *Medina v. California* was decided, the legal landscape has shifted. As the court pointed out in *Cooper v. Oklahoma, supra,* 517 U.S. at p. 362, fn. 18, four states at that time required the prosecution to prove the defendant's competence to stand trial. Four other states required the defendant to prove his incompetence by clear and convincing evidence. (*Id.* at p. 360, fn. 16.) Twenty-eight states imposed a lesser burden on the defendant. (*Id.* at p. 361, fn. 17.) The burden imposed in the remaining 14 states was unclear. (*Ibid.*) The Court of Appeal's statement that California is in the minority in requiring a defendant to prove his current incompetence is simply wrong.

Similarly incorrect is the Court of Appeal's statement that "the overwhelming majority [of federal jurisdictions] have declared that in federal prosecutions the burden must be placed on the government to prove competency, not only at a contemporaneous competency hearing, but also at a retrospective hearing." (Maj. opn. at p. 14, footnotes omitted.) The court stated the "counterpart federal statute (18 U.S.C. § 4241) does not create a presumption of competency at a contemporaneous (or retrospective) competency hearing," and "the federal statute does not explicitly allocate the burden of proof to the government or the defendant." (Maj. opn. at p. 14.) The court's reading of 18 U.S.C. § 4241 (section 4241) is also wrong.

Section 4241 provides that either the defendant or the government may seek a hearing to determine the defendant's mental competency. (18 U.S.C. § 4241, subd. (a).) Section 4241, subdivision (d) provides, "If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent . . . the court shall commit the defendant to the custody of the Attorney General. . . ."

In *Cooper v. Oklahoma, supra,* 517 U.S. at p. 362, the court observed, "Congress has directed that the accused in a federal prosecution must prove incompetence by a preponderance of the evidence. 18 U.S.C. § 4241." The Court of Appeal discounted the high court's statement because *Cooper* involved a state prosecution and therefore the federal statute was "inapplicable." (Maj. opn. at p. 14, fn. 14.) Not so. The federal statute was relevant, as were the statutes of all 50 states, to demonstrate "[c]ontemporary practice." (*Cooper v. Oklahoma, supra,* at pp. 360-362 & fns. 16-18.) Moreover, while section 4241, subdivision (d) does not expressly include a presumption of competence, the presumption nevertheless exists because preponderant evidence must be presented to show the defendant is *incompetent.*

Federal circuit courts have cited *Cooper* on the issue of which party bears the burden of proof in a competency proceeding. (E.g., *United States v. Izquierdo* (11th Cir. 2006) 448 F.3d 1269, 1276, 1277 ["[T]he relevant competency statute arguably contemplates that the burden will lie with the party making a motion to determine competency. 18 U.S.C. § 4241"; "Moreover, the Supreme Court has stated, albeit in *dicta*, that the burden of establishing incompetence rests with the defendant."]; *United States v. Robinson* (4th Cir. 2005) 404 F.3d 850, 856 ["Under federal law the defendant has the burden, 'by a preponderance of the evidence [to show] that the defendant is presently suffering from a mental disease or

defect rendering him mentally incompetent . . . .'"]; *United States v. Rudisill* (D. D.C. 1999) 43 F.Supp.2d 1, 3 [citing *Cooper v. Oklahoma*]; *United States v. Gigante* (E.D. N.Y. 1998) 996 F.Supp. 194, 199 [same]; see also *United States v. Morgano* (7th Cir. 1994) 39 F.3d 1358, 1373 [citing prior circuit authority, court stated "a criminal defendant is presumed to be competent to stand trial and bears the burden of proving otherwise"].)[6]

The Court of Appeal cited only one case for the proposition that the "overwhelming majority" of federal jurisdictions place the burden on the government to prove competency at a retrospective hearing. (Maj. opn. at p. 14, fn. 15.) In *United States v. Mason* (W.D. N.C. 1996) 935 F.Supp. 745, 759, the court concluded a retrospective determination of the defendant's competence was possible. It stated the "burden of proof of competency is on the Government to prove competency by a preponderance of the evidence." (*Ibid.*) The *Mason* court did not cite the federal statute or

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[6] Of the cases cited by the Court of Appeal to support its claim that "the overwhelming majority" of federal jurisdictions place the burden of proof on the government to prove competency (Maj. opn. at p. 14, fn. 14), eight were decided before *Cooper v. Oklahoma* and thus did not address the high court's interpretation of federal law to state the opposite proposition. The remaining three, decided after *Cooper*, consist of one unpublished case and two federal district court cases. The two district court cases rely on federal authority predating *Cooper v. Oklahoma*. (*United States v. Thomas* (D. Me. 2007) 519 F.Supp.2d 135, 137-139 [finding the issue unresolved and relying on prior circuit authority]; *United States v. Belgarde* (D. N.D. 2003) 285 F.Supp.2d 1218, 1220-1221 [citing cases predating *Cooper v. Oklahoma*, but not acknowledging *Cooper*].) As in its survey of state cases, the Court of Appeal is mistaken with respect to its interpretation of federal law.

Cooper v. Oklahoma. Instead, it relied on two older circuit cases. (*Id.* at pp. 759-760.)[7]

The Court of Appeal also relied strongly on *James v. Singletary, supra,* 957 F.2d 1562, another case decided before *Medina v. California,* for its finding that due process requires allocation of the burden of proof to the state at a retrospective competency hearing. Relying on the analysis in *James* that a *Pate* violation establishes a rebuttable presumption of incompetency, "because the state is responsible for the error" (Maj. opn. at pp. 21-22), the Court of Appeal stated, "In short, vindication of a *Pate* claim operates to shift the burden of proof from the defendant to the state." (Maj. opn. at p. 22.)

In *James*, the state defendant raised both a procedural and a substantive claim of incompetency in his federal habeas appeal, but he had raised only a substantive claim in the federal district court. (*James v. Singletary, supra,* 957 F.2d at p. 1569.) Because of the confusion that had arisen from the defendant's inclusion of a belated *Pate* claim, the circuit court felt "compelled to distinguish *Pate* claims and substantive claims of incompetency." (*Ibid.*) Ultimately, however, the court held, "*Pate* claims can and must be raised on direct appeal. As pointed out above, petitioner did not present a *Pate* claim on direct appeal. Even if petitioner had exhausted state remedies by raising a *Pate* claim on direct appeal, we could not consider his current *Pate* claim because his federal habeas petition

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[7] One of those cases, *United States v. Makris* (5th Cir. 1976) 535 F.2d 899, involved the government's pretrial motion to determine the competency of the defendant, which had been filed under a different statute with different language than section 4241. (See *United States v. Izquierdo, supra,* 448 F.3d at pp. 1277-1278.) The other case, *United States v. DiGilio* (3d Cir. 1976) 538 F.2d 972, 986-989, suggested due process principles forbid requiring a defendant to carry the burden of proof on competency. *Medina v. California, supra,* 505 U.S. at pp. 449-453, held otherwise.

included no such claim." (*Id.* at p. 1572.) Accordingly, the *James* court's entire discussion on *Pate* claims, upon which the Court of Appeal relied (Maj. opn. at pp. 21-23), is dicta.

Fundamentally, the reasoning of *James v. Singletary,* on which the Court of Appeal below relies, is that "the *nunc pro tunc* hearing is nothing but a harmless error determination in disguise" (*James v. Singletary, supra,* 957 F.2d at p. 1571, fn. 14; Maj. opn. at p. 21) and the state should therefore bear the burden of proof. We disagree.

A retrospective competency hearing in California (and in every other jurisdiction that has considered the matter) cannot be held unless and until a court determines that it is feasible. A finding of feasibility means that sufficient evidence is available upon which a reliable competency determination can be made. If the court finds a retrospective hearing is not feasible, the conviction is reversed, because the procedural due process violation cannot be rectified. (See *United States v. Renfroe, supra,* 825 F.2d at pp. 767-768; *State v. McRae, supra,* 533 S.E.2d at p. 561; *Montana v. Bostwick, supra,* 988 P.2d at pp. 772-773; *State v. Johnson, supra,* 395 N.W.2d at p. 185.) If the court finds the hearing is feasible, the procedural due process violation in effect *has been* rectified, because the finding means the defendant can have the hearing he should have had at the time of trial.

In *Tate v. State, supra,* 896 P.2d at p. 1187, the court explained the distinction as follows:

> As previously discussed, the feasibility of making a meaningful retrospective competency determination must first be determined. As occurred in the instant case, the State bears the burden of proving that such a determination is possible. [Citation.] An appellant will only bear the burden of proving his incompetency if the State can successfully meet this burden. Otherwise, the appellant is presumed incompetent, and the case must be reversed and remanded. [Citation.] A retrospective

> competency determination is only feasible in those cases where credible and competent evidence still exists. Thus, inherent in a finding of feasibility is the conclusion that the defendant will be placed in a position comparable to the one he would have been placed in prior to the original trial. Under these circumstances, no due process violation occurs by ultimately placing the burden of proving incompetency on the defendant in a retrospective competency hearing.

(See *Moran v. Godinez, supra,* 57 F.3d at p. 696 [postconviction hearing cured *Pate* due process violation]; *Montana v. Bostwick, supra,* 988 P.2d at p. 773 [if court finds defendant competent at retrospective hearing, damage from *Pate* violation is cured].)

Here, the court in *Ary I* required the prosecution to show on remand that a retrospective hearing was feasible. The prosecution made the required showing. Once the trial court determined the retrospective hearing was feasible, the parties were in a position comparable to that which they would have been before trial. The retrospective hearing itself was a hearing on the substantive question of appellant's competency, at which the burdens and presumptions are well established.

Other than the Court of Appeal, we are aware of no court that has followed *James v. Singletary*'s dicta that the state bears the burden of proof at a retrospective competency hearing held after a *Pate* violation. However, several federal and state courts have held the defendant bears the burden of proof.

In *Moran v. Godinez, supra,* 57 F.3d 690, the Ninth Circuit explained why reliance on *James v. Singletary* was unwarranted.

> Moran challenges the findings of the post-conviction court by arguing that the court incorrectly placed the burden of proof on him to establish his incompetence. He relies on *James v. Singletary*, 957 F.2d 1562, 1570-71 (11th Cir. 1992).
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> In *James*, 957 F.2d at 1570-71, the Eleventh Circuit interpreted *Pate*, 383 U.S. at 385, 86 S.Ct. at 842, to require a defendant to

first establish that the trial court failed to conduct a competency hearing at the time a *bona fide* doubt should have arisen as to his competency. According to *James*, if a defendant establishes this *Pate* error, the burden of proof then shifts to the state to prove it is possible to hold a retrospective hearing to determine whether the defendant was competent to stand trial. *James*, 957 F.2d at 1570-71. If the state successfully demonstrates a meaningful retrospective hearing can be held, the burden of proof remains with the state at the retrospective proceeding to show the defendant was competent. *Id. But see Porter v. Estelle*, 709 F.2d 944, 949 n. 3 (5th Cir. 1983) (petitioner bears burden of proof by preponderance of the evidence), *cert. denied sub nom. Porter v. McKaskle*, 466 U.S. 984, 104 S.Ct. 2367, 80 L.Ed.2d 838 (1984).

After the decision in *James*, the Supreme Court, in *Medina v. California*, 505 U.S. 437, ___, 112 S.Ct. 2572, 2579, 120 L.Ed.2d 353 (1992), held that a state may constitutionally place the burden of proof on a defendant at a competency hearing. The Court recognized a state must provide procedures "adequate to protect a defendant's right not to be tried or convicted while incompetent." *Id.* (internal quotations omitted). However,

> [o]nce a State provides a defendant access to procedures for making a competency evaluation, . . . we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.

Id. Thus, so long as the state provides adequate procedures to assess competence, it constitutionally may assign the burden of proof to the defendant.

Although *Medina* involved a pretrial competency hearing, the Supreme Court's rationale is equally applicable to retrospective competency hearings. When it is established that a petitioner's competence can be accurately evaluated retrospectively, there is no compelling reason to require states to divert from their normal procedures for assessing competence. Moran's competence could be accurately evaluated retrospectively. Nevada was not constitutionally obligated to place the burden of proof on the prosecution to establish his competence, or to relieve him of the burden of establishing his incompetence.

(*Moran v. Godinez, supra,* 57 F.3d at p. 697; see *McMurtrey v. Ryan, supra,* 539 F.3d at pp. 1119, 1131-1132 [affirming *Moran v. Godinez*, but finding retrospective hearing not feasible].)

In *Rhode v. Olk-Long* (8th Cir. 1996) 84 F.3d 284, the Eighth Circuit similarly rejected the defendant's claim that *Medina v. California* should apply only when the competency hearing is held at the time of trial.

> "[The defendant] contends that *Medina* should apply only when the competency hearing and trial are held contemporaneously. She argues that applying a presumption of competence in a post-conviction competency hearing violates due process because it unfairly adds to the difficulties inherent in such hearings. This argument is without merit. In *Medina*, 505 U.S. at 445-46, 112 S.Ct. at 2577-78, the Supreme Court indicated that federal courts should not disturb state laws allocating the burden of proof in competency hearings. The *Medina* decision was based upon the long-standing principle that state legislatures, not federal courts, should establish state rules of criminal procedure. *Id.* Because we believe that this principle applies with equal force to post-conviction competency hearings, we decline to adopt Rhode's narrow reading of *Medina*.

(*Rhode v. Olk-Long, supra*, 84 F.3d at p. 288.)

The Fifth Circuit placed the burden of proof on the defendant at a retrospective competency hearing before *Medina v. California* was decided. In *Lokos v. Capps, supra,* 625 F.2d 1258, the court held,

> If it is decided in the collateral attack that the original trial court committed a *Pate* violation, the question then becomes whether a hearing can now be adequately held to determine retrospectively the petitioner's competency as of the time of his trial. If the state does not convince the court that the tools of rational decision are now available, the writ should be granted. If a meaningful hearing can be held nunc pro tunc, then it proceeds with petitioner bearing the burden of proving his incompetency by a preponderance of the evidence. *Martin v. Estelle*, 546 F.2d 177 (5th Cir. 1977); *Lee v. Alabama* , 386 F.2d 97 (5th Cir. 1967).

(*Lokos v. Capps, supra,* 625 F.2d at p. 1262; see *Wheat v. Thigpen, supra,* 793 F.2d at p. 630 ["If a meaningful [retrospective] hearing can be held, the district court holds a nunc pro tunc hearing as to the petitioner's competency. The petitioner bears the burden of proving his incompetency by a preponderance of the evidence."]; *Porter v. Estelle* (5th Cir. 1983) 709 F.2d 944, 949, fn. 3 [citing *Lokos v. Capps*]; *Bruce v. Estelle* (5th Cir. 1976) 536 F.2d 1051, 1059 ["Once petitioner has come forward with enough probative evidence to raise a substantial doubt as to competency, however, his task is not complete. He must then go further and prove the fact of incompetency, at least by a preponderance of the evidence."; "In sum, at the federal nunc pro tunc hearing, Bruce had the burden of proving that he was most probably incompetent at the time of his 1965 trial."].)

In *Galowski v. Berge* (7th Cir. 1996) 78 F.3d 1176, 1181, the Seventh Circuit noted the competing views on the issue of whether the defendant bears the burden of proof at a retrospective competency hearing, with prior circuit authority placing that burden on the state. Any error in placing the burden on the defendant in that case was harmless, however, since "the state would have satisfied its burden, with room to spare." (*Id.* at p. 1181.)

In *Commonwealth v. Santiago, supra,* 855 A.2d 682, the Pennsylvania Supreme Court reviewed the postconviction court's retrospective finding that the defendant was competent at the time of trial. "Our analysis begins with the principle that a defendant is presumed to be competent to stand trial. [Citation.] Thus, the burden is on Appellant to prove, by a preponderance of the evidence, that he was incompetent to stand trial." (*Id.* at p. 694.)

In *Traylor v. State* (Ga. 2006) 627 S.E.2d 594, 601, the Georgia Supreme Court similarly explained the procedure for a retrospective competency hearing as follows:

Upon remand the burden first falls upon the [S]tate

> to show there is sufficient evidence to make a meaningful determination of competency at the time of trial. If the court rules that a determination of appellant's competency at the time of his trial is not presently possible, then a new trial must be granted. If the court decides such a determination is possible, the issue of competency to stand trial must be tried and the appellant shall have the burden to show incompetency by a preponderance of the evidence.

As the foregoing cases demonstrate, every court except *James v. Singletary* that has addressed the issue has placed the burden of proof on the defendant once it has been determined a retrospective competency hearing is feasible. The Court of Appeal's decision to follow *James* ignores the weight of contrary authority and is based on a rationale that does not withstand scrutiny.

Section 1369(f), which has been upheld as constitutional by this Court and the United States Supreme Court, provides that a defendant is presumed competent. Nothing in the statutory scheme requires a finding that it should not apply to a retrospective competency hearing. Nothing in decisional law requires a finding that its application in that context violates due process. Accordingly, the trial court properly allocated to appellant the burden of proving his incompetence by a preponderance of the evidence.

CONCLUSION

For the reasons stated, respondent respectfully asks that the Court of Appeal's decision be reversed.

Dated: September 25, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,684 words.

Dated: September 25, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. James Ary, Jr.**
No.: **S173309**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 25, 2009, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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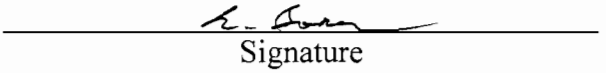
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 25, 2009, at San Francisco, California.

L. SORENSEN
Declarant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