SUPREME COURT COPY

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JAMES ARY, JR., Defendant and Appellant.	)	CASE NO. S173309

ANSWER BRIEF ON THE MERITS

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

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INTRODUCTION TO THE BRIEF

Respondent's Opening Brief on the Merits ("OBM") recites the following, as the "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?"
>
> OBM 1.[1]

Mr. Ary deems there to be another and more accurate articulation of the question to be decided in this case:

> Should the state bear the burden of persuasion at a retrospective competency hearing on the question whether defendant had been competent at the time of an earlier trial, after a state appellate court had found on direct appeal that the trial court's failure to conduct pre-trial inquiry into the defendant's trial competence -- despite substantial evidence of his lack of competence to stand trial -- had constituted a Fourteenth Amendment procedural due process violation under *Pate* v. *Robinson* (1966) 383 U.S. 375?

As will be explained, respondent's and appellant's alternative statements of the issue illuminate the core disagreement between the parties. As stated in *Drope* v. *Missouri* (1975) 420 U.S. 162: "In *Pate*

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[1]/ While this mirrors the issue set forth in respondent's Petition for Review, this court's description of the issue is more balanced: "At a retrospective competency hearing, does the prosecution or the defendant bear the burden of proving competence by a preponderance of the evidence?"

v. *Robinson*, 383 US 375, . . . (1966), we held that the 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*." *Drope* v. *Missouri*, *supra*, 420 U.S. at 172; emphasis added. The Due Process Clause requires that a hearing be held whenever the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial. *Id.*, at 172-73.

People v. *Ary* (2004) 118 Cal.App.4th 1016 ("*Ary I*") concluded that a procedural due process violation occurred when the trial court in 2000 failed to conduct a competency hearing, despite substantial evidence that Mr. Ary was not competent to proceed to trial. That oversight deprived Mr. Ary of "his due process right to a fair trial." *Drope* v. *Missouri*, *supra*. Yet respondent treats that circumstance as though there had been no such violation, or at the very least that the violation was "cured, "remedied," or "rectified," such that this court should treat the Due Process Clause violation as if it had never occurred.

Mr. Ary, on the other hand, submits that the fact of a procedural due process violation dictates the result, which is that the prosecution should have borne the burden of persuasion at the retrospective competency hearing. The fact of the federal constitutional violation identified in *Ary I* prescribes the procedural pathway which should have been pursued when the retrospective competency hearing was held, and it prescribes the analytical pathway this court should follow to resolve the issue now before it.

There is a distinction between a *substantive* due process violation which occurs when a defendant is tried while incompetent (*Dusky* v. *United States* (1960) 362 U.S. 402), and a *procedural* due process

violation which occurs when a trial court fails to investigate the issue when substantial evidence raises a doubt with regard to the defendant's trial competence. *Pate* v. *Robinson*, *supra*, 383 U.S. 375 ("*Pate*"). Each constitutional violation stands independently, and each is evaluated according to different procedural rules.

A procedural due process violation must be raised on direct appeal or it is waived, while a substantive due process violation is raised in a habeas proceeding. A substantive due process violation is prejudicial *per se*, while a "procedural" due process violation does not automatically require a new trial.

This does not mean, however, that no procedural due process has occurred in the latter context. It means only that the effect of the procedural due process violation may be examined in some cases, with that examination occurring at a retrospective competency hearing.

Respondent's contentions, in a nutshell, are that Penal Code section 1369 places the burden on a defendant asserting lack of trial competence, and that the United States Supreme Court in *Medina* v. *California* (1992) 505 U.S. 437 held that it does not violate the Due Process Clause to do so. However, section 1369 and *Medina* envision cases in the procedural posture in which no due process violation has yet occurred. They do not resolve -- implicitly or otherwise -- the law which should control where there has been such a violation.

Respondent places unwarranted reliance on section 1369 and the "presumption" of trial competence contained in subdivision (f). *Ary I* found that a Fourteenth Amendment Due Process Clause violation had occurred under *Pate*. The United States Supreme Court affirmed in *Chapman* v. *California* (1986) 386 U.S. 18, 21 that "[w]hether a convic-

tion for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is *every bit as much of a federal question* as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." Emphasis added.

Accordingly, it is the Due Process Clause which controls whether Mr. Ary, or the prosecution, must shoulder the burden of persuasion at a retrospective competency hearing, after a Fourteenth Amendment *Pate* violation has been found. Penal Code section 1369 may no more dictate the result than might Article VI, section 13 dictate resolution of the question of prejudice flowing from a federal constitutional "trial error."

Mr. Ary submits further that respondent's reliance on *Medina* v. *California* (1992) 505 U.S. 437 ("*Medina*") is misplaced, because of the critical differences between the procedural pathway on which Mr. Medina stood -- with no due process violation having occurred -- and the pathway on which Mr. Ary stands, where a procedural due process violation has been found on direct appeal. The fact of such a violation in Mr. Ary's case has a profound effect on the Due Process Clause analysis.

The issue now presented -- the constitutionally compelled burden of persuasion following a procedural due process violation under *Pate* -- may be viewed from two perspectives. The first is from the point of view of "harmless error" and potential "prejudice" flowing from the *Pate* violation. The second is from the point of view of "fundamental fairness," "allocation of risk," balancing of interests, and similar matters which were central to the United States Supreme Court's opinion in *Medina* and other due process cases.

From the first perspective, the question is which party should bear the burden of persuasion as to whether Mr. Ary suffered "prejudice" as a result of a due process violation. In that regard, the United States Supreme Court's view has consistently been that the state should bear the burden where a federal constitutional right has been violated. Respondent has not cited, nor will respondent be able to cite, a United States Supreme Court decision -- *which applies to a state case on direct review in state court* -- in which a federal constitutional error was found and the burden of persuasion was imposed on the criminal defendant to establish that he or she was actually prejudiced as a result. The traditional burden in such contexts has been placed on the prosecution.

From the second Due Process Clause perspective, the issue concerns whether a finding of a *Pate* violation alters the "fairness" and "assignment of risk" analysis done in *Medina*, and whether the fact of the due process violation removes from the calculus the United States Supreme Court's extreme reluctance to involve itself in the states' procedural rules. Mr. Ary's position is that the *Pate* violation "turned the tables" not only by creating a "presumption of incompetency," but by shifting the questions of "fundamental fairness" and "assignment of risk" in his constitutional favor.

Mr. Ary hastens to add that his reference of "fairness" in this context is not to suggest that the precise analysis in *Medina* is to be conducted anew in the context of this case, because *Medina* was asking whether section 1369's presumption violated due process in the abstract. Mr. Ary's position is that considerations of "fairness" dictate the *remedy* for a *Pate* violation, with section 1369's presumption not dictating the result of that analysis.

As a further preamble, Mr. Ary urges this court in its analysis to be cautious in its consideration of the cases cited by either side, to ensure that the cases stand on the correct analytical "pathway," *to wit*: a retrospective competency hearing held on remand to a state trial court after a *Pate* violation has been found by a state appellate court on direct appeal. A cited case might contain language which sounds applicable in the *Pate* context, while the case presents not a *Pate* claim but a substantive due process claim asserting the trial of an incompetent person. For another example, a cited case might arise in the federal habeas context, where the rules regarding "burdens" are markedly different than in a case on direct appeal in state court.

With that backdrop, Mr. Ary turns now to the case in detail.

STATEMENT OF THE CASE

A. The Original Proceedings in the Trial Court.

At a 2000 guilt trial, Mr. Ary was convicted of first degree murder and other offenses, with special circumstance and firearm use findings. 10CT(I) 3778-3786.[2] At the penalty phase, the jury deadlocked on penalty (11CT(I) 4112-4113; 54RT 14764), and the prosecution elected not to retry the issue. 11CT(I) 4114. A Notice of Appeal was timely filed (12CT(I) 4372-4374; 1CT 5[3]), and action number A095433 was assigned in the Court of Appeal.

B. The Resolution in *Ary I*.

In the opinion filed May 20, 2004, the Court of Appeal found that a procedural due process violation had occurred under *Pate*.

> Defendant contends he was denied due process under *Pate* v. *Robinson* (1966) 383 U.S. 375, 377 [ ] (*Pate*) and *People* v. *Pennington* (1967) 66 Cal.2d 508 [ ] (*Pennington*), because the trial court did not order a competency hearing despite substantial evidence that, due to his mental retardation, he was incapable of understanding the nature of the proceedings against him and of assisting in his defense. We agree.
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> *Ary I, supra*, 118 Cal.App.4th at 1020.

The disposition order specified as follows:

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[2]/ "CT-(I)" refers to the Clerk's Transcript in *People* v. *Ary*, A095433, which was incorporated by reference in the present appeal.

[3]/ Clerk's Transcript in A113020.

> We remand the case to the trial court with instructions to determine within sixty days, in a manner not inconsistent with this opinion, whether a retrospective competency hearing can be held. In the event such a hearing is held and defendant is found to have been competent to stand trial, we will consider the remaining issues raised in this appeal. In the event defendant is found to have been incompetent to stand trial, the judgment shall be reversed.
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> *Id.*, at 1030.

C. The Proceedings on Remand.

On July 29, 2004, the lower court determined by a preponderance of the evidence that sufficient evidence had been identified to permit it to conduct a retrospective competency hearing. 1RT 16125-16126.[4] On August 4, 2004, the defense filed a legal memorandum contending that the prosecution should bear a burden of persuasion at the evidentiary hearing on competence at time of trial. 1CT 251. That memorandum contended, in part:

> Given that this case is post-conviction, and that proof of a violation of a constitutional right on appeal requires that the State rebut that proof beyond a reasonable doubt, the burden of proof should be placed on the prosecution. See *Fallala v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987), relying in part on *Drope v. Missouri*, (1975) 420 U.S. 172, 172, noting that a court's failure to observe procedures adequate to protect a defendant's right not to be tried or convicted where incompetent, by definition, deprives that defendant of his due process right to a fair trial.
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> Usually, on appeal, errors of constitutional dimension are reviewed under *Chapman v. California*, (1967) 386

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[4]/ Reporter's Transcript in A113020.

> U.S. 18, 24, a standard that requires proof beyond a reasonable doubt that the errors did not affect the proceedings.
>
> 1CT 253.

On September 17, 2004, the lower court ruled that the prosecutor would bear the burden of persuasion at the retrospective competency hearing, by a preponderance of the evidence. 2CT 348; 1RT 16136. On October 4, 2004, the prosecution filed a motion for reconsideration. 2CT 357. On October 22, 2004, the trial court reversed field and ruled that the defense would bear the burden of persuasion at the retrospective competency hearing by a preponderance of the evidence. 1RT 16182.

A seven-day evidentiary hearing was held in October and November of 2005. 7CT 2501-2512. The Superior Court's written decision was filed in the Superior Court on December 15, 2005, and it included an apparently unintended conclusion that Mr. Ary had been "incompetent" at the time of trial. 7CT 2513, 2550.[5] The lower court's order was modified on January 10, 2006 to correct the finding to one of competence. 7CT 2564. [It is noteworthy that the lower court in its written decision did not include language stating or implying that the same conclusion would have been reached as to competence if the prosecution had borne the burden of persuasion.]

Mr. Ary filed a new Notice of Appeal on February 8, 2006. That gave rise to the proceeding now before this court.

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[5]/ Objections to the decision were filed by the defense on December 21, 2005. 7CT 2512.

THE EVIDENCE AT THE RETROSPECTIVE COMPETENCY HEARING HELD ON REMAND IN 2005

A. Introduction and Overview.

At OBM 3-7, respondent presents a brief summary of the evidence at the 2005 retrospective competency hearing. Mr. Ary will discuss briefly the testimony of his trial attorneys and the two alienists who examined him prior to his 2000 trial. Thereafter, he will have observations about the testimony of the alienists on which the prosecution relied, and the testimony of one alienist who had evaluated Mr. Ary's competence to proceed with the retrospective hearing in 2005. Mr. Ary's objectives are to illuminate factors which led defense counsel not to declare a doubt as to competence in 2000, as well as factors which render any retrospective hearing problematic.

B. The 2000 Trial Attorneys.

1. Lead Counsel, Amy Morton.

Ms. Morton had represented Mr. Ary at trial. 3RT 17177. She had never conducted a section 1368 trial on competence. 3RT 17179.

Ms. Morton had been brought into the case while Linsey Freeman was lead counsel. Ms. Morton was to try the guilt phase, and Ms. Morton deemed Mr. Freeman to be "on top of" his "mental health team" for the penalty phase. 3RT 17181-17182.

In August 1999, Mr. Freeman stepped down, and Ms. Morton took over the lead. Mr. Costain was brought in to take over the mental health experts. 3RT 17186-17188.

There were things in the courtroom process Mr. Ary professed not to understand, and there were instances in which he would express a lack

of recollection. 3RT 17203-17204. However, Ms. Morton did not have a concern about his competence. 3RT 17208-17207.

Ms. Morton had never had a mentally retarded client, but she assumed the work done by Mr. Freeman was "up-to-speed." Everyone on the defense team believed Mr. Ary suffered from mental retardation and had learning disabilities. 3RT 17190-17200.

Ms. Morton and Mr. Ary had "very simplistic, elementary communication" as to what the defense would be. They did not discuss outcome options such as felony-murder predicated on a plan to commit robbery, and they did not discuss alternative defenses. 3RT 17211-17212.

Mr. Ary had written: "Whenever we got to court, it's like I'm not there because I don't understand nothing. That's why when you told me to trust you, it was hard at first." 3RT 17216-17217. However, Ms. Morton believed Mr. Ary had faith in her. 3RT 17237.

During a 1999 motion to suppress, Ms. Morton had a brief conversation with Dr. Derning during a recess. She recalled asking how, if Mr. Ary were not competent to waive *Miranda*, he could be competent to stand trial. She understood from Dr. Derning's "one or two line response" that not being competent to waive and understand *Miranda* rights did not mean one was not competent to stand trial. 3RT 17221-17222.

Ms. Morton interpreted Dr. Derning statement as meaning he did not question Mr. Ary's trial competence, and she never pursued that issue further. 3RT 17222. She never asked a mental health expert for an opinion as to Mr. Ary's competence to stand trial. 3RT 17225-17226.

During the trial, Ms. Morton had the opinion Mr. Ary was not able to follow the daily proceedings in court. However, she thought he understood her. 3RT 17232-17233.

Ms. Morton recognized that Mr. Ary was "slow" and had trouble understanding and communicating. She was aware that on various psychiatric tests, he had tested at the second grade or kindergarten level. She did not attach the importance to these results she realized in 2005 she should have. 3RT 17238-17239.

Ms. Morton had not been trained in the assessment of competence to stand trial, and she had a very limited understanding of trial competence. 3RT 17239, 17263, 17265. It was her understanding that section 1368 dealt with mental disorders, mental illnesses, and persons "not in touch with reality." 3RT 17263, 17272.

At the time, Ms. Morton did not have a working knowledge of the Supreme Court's formulation of competence in *Dusky*, and she had not understood it to include developmental disability. 3RT 17289. She had never had an experience with a client who was developmentally disabled. 3RT 17290.

Since the Ary case, Ms. Morton had taken classes and read cases and statutes. 3RT 17239-17240. She had come to believe Mr. Ary had not been competent to stand trial in 2000. 3RT 17240.

2. *Keenan* Counsel, John Costain.

Mr. Costain was contacted in early 2000. 3RT 17135. All expert examinations had been done before Mr. Costain became involved. 3RT 17136. Mr. Costain was convinced Mr. Ary was mildly mentally retarded, and he did not know if Mr. Ary had understood "what was going on." 3RT 17141-17142. While driving home after the trial, Mr. Costain had the thought that perhaps they should have referred Mr. Ary for evaluation, in view of his mental retardation. 3RT 17146-17147.

C. Defense Alienists Who Had Examined Mr. Ary Prior to the 2000 Trial.

1. John Podboy, Ph.D.

Dr. Podboy had testified in 2000. 6RT 17984. Dr. Podboy had examined Mr. Ary on four occasions. 6RT 17993, 18002. He found Mr. Ary to be developmentally disabled. 6RT 18010-18011. Mr. Ary fell into the range of mild mental retardation, which is a "pretty serious" disability. 6RT 18011.

Dr. Podboy had formed an opinion in 2000 that Mr. Ary was "obviously not" competent to stand trial. Mr. Ary could not meaningfully participate in the court proceedings because of his developmental disability. He lacked language skills, and matters were not being sufficiently "edited" for him. He did not sufficiently understand the defenses or the ways in which defenses could be presented, and he had a limited ability to assist counsel. 6RT 18013-18014.

It was Dr. Podboy's "irrefutable opinion" that Mr. Ary had a very serious deficiency and was mentally retarded. Dr. Podboy had never believed Mr. Ary was competent to stand trial. 6RT 18034.

However, Dr. Podboy had not expressed to anyone his doubts about Mr. Ary's trial competence, as the defense team had an opinion about what they were going to do. If he had been brought in initially, he would have insisted they look at competence, but his role was "quite limited." 6RT 18032.

2. Timothy Derning, Ph.D.

Dr. Derning had testified at Mr. Ary's pretrial and trial proceedings. 4RT 17432-17433. It was Dr. Derning's opinion that Mr. Ary at

time of trial had the developmental disability of mental retardation. 4RT 17517-17518.

It was Dr. Derning's further opinion that Mr. Ary had not been competent to stand trial. He had significant cognitive deficits to the extent he qualified for a diagnosis of mental retardation. 4RT 17528-17529.

Dr. Derning was asked only to address whether Mr. Ary had made a knowing and voluntary waiver of his *Miranda* rights. 4RT 17506. The issue of competence to stand trial was not an issue the attorneys wanted to pursue. 4RT 17507, 17543-17544, 17548, 18134, 18140. .

Dr. Derning saw Mr. Ary four times. 4RT 17472-17473. Dr. Derning had collected data through testing and interviews. 4RT 17494-17495, 17516-17520. Dr. Derning also went with Ms. Morton to see Mr. Ary, in order to observe their interactions. 4RT 17498.

Dr. Derning was specifically considering Mr. Ary's understanding of his rights and the criminal justice process, in order to evaluate his waiver of his *Miranda* rights. 4RT 17498-17499. These issues also bore on his competence to stand trial. 4RT 17499-17501, 17506. However, Dr. Derning recalled no lawyer having asked him whether Mr. Ary was competent to stand trial. 4RT 17503-17504.

In 2000, on the basis of his examination, Dr. Derning had believed Mr. Ary was not competent to stand trial. 7RT 18118. Although Dr. Derning had not formally evaluated Mr. Ary for trial competence, he had reached that conclusion based on his data. 7RT 18119-18121.

D. Prosecution Alienists Who Opined on Competence to Stand Trial in 2000, Who Had Never Examined Mr. Ary.

1. Paul Berg, Ph.D.

Dr. Berg was in private practice as a psychologist. 5RT 17775. Dr. Berg had never previously qualified to express an opinion about someone's competence to stand trial years earlier. 5RT 17788.

Dr. Berg had formed the opinion Mr. Ary had been competent to stand trial in 2000. 5RT 17792. Dr. Berg conceded that Mr. Ary, from age six through his most recent tests, had tested from eight points below, to a few points above, an IQ of 70, and his functioning in "real life" was consistent with mild mental retardation. 5RT 17805-17806.

2. Howard Friedman, Ph.D.

Dr. Friedman was a neuropsychologist. 5RT 17699-17700. Dr. Friedman had testified during Mr. Ary's trial and had expressed a preference to examine Mr. Ary personally. 5RT 17713-17714.

Dr. Friedman would have preferred to interact with Mr. Ary directly to determine his communication skills. 5RT 17769. Dr. Friedman would potentially have re-administered tests and observed the pattern of performance rather than relying on scores. 5RT 17769.

Dr. Friedman in his 2000 trial testimony had opined that Mr. Ary was not mentally retarded because he deemed the testing and data insufficient to justify that diagnosis. 5RT 17741-17742. However, Dr. Friedman had reviewed the report by the Regional Center for the East Bay, and he now concurred with their diagnosis of mild mental retardation. 5RT 17715, 17737, 17743.

Dr. Friedman acknowledged the ethical principles that apply to an examiner being asked to express an opinion without having personally

assessed an individual. 5RT 17739. Dr. Friedman also conceded that no instrument was a definitive measure of competence to stand trial. 5RT 17766.

3. Edward Hyman, Ph.D.

Dr. Hyman was a clinical and forensic psychologist. 5RT 17618-17619. Dr. Hyman assumed Mr. Ary fell in the range of mild mental retardation. 5RT 17651. He conceded that neither he nor any other forensic psychologist in California had done a retrospective competency evaluation. 5RT 17638-17639.

"Without exception," Dr. Hyman would interview the individual when evaluating trial competence. 5RT 17633. It was an accepted standard in his field for a trial competence examiner to conduct a personal assessment, and it was his practice when assessing trial competence to contact defense counsel. 5RT 17634-17635. However, Dr. Hyman had not met Mr. Ary, and he had not interviewed trial counsel or present counsel. 5RT 17636-17637.

Dr. Hyman believed that in 2000, Mr. Ary had been competent to stand trial. 5RT 17686. On the other hand, Dr. Hyman did not "generalize" that Mr. Ary was always astute. 5RT 17693. It remained his opinion, as he had written in his report: "Mr. Ary also had some substantial deficits at the time of his trial. Principally, his inability to appraise available defense strategies, his inability to challenge prosecution witnesses, and his limited ability to pay adequate attention over a substantial period during the proceedings." 5RT 17866.

E. Karen Franklin, Ph.D., Who Evaluated Mr. Ary's Competence in 2005, to Proceed with the Retrospective Hearing.

Karen Franklin, Ph.D. had evaluated Mr. Ary's competence solely in the context of the 2005 retrospective hearing, and she had found him competent in that context. 3RT 17326-17327, 17334. Nonetheless, her report included the following: "It is my opinion that Mr. Ary has some type of diffuse brain damage which is probably multi-determined. He appears to have particular deficits in verbal comprehension and learning. He functions at the high end of the mild mental retardation ranges." 3RT 17330. Dr. Franklin was "very confident" of her opinion regarding mental retardation. 3RT 17332-17333.

Dr. Franklin was unaware of an instrument or structured interview developed for use to assess competence retrospectively. 3RT 17325-17326. She knew of nothing in the forensic psychological literature on retrospective competency. 3RT 17326, 17329. Section 9.01 of the Code of Ethics of the American Psychological Association states that an alienist generally should not offer psychiatric opinions about individuals who had not been personally evaluated, except in the limited circumstances in which it was necessary, and in those circumstances, one should clearly spell out the limitations on an opinion not derived from personal evaluation. 3RT 17374, 17400, 17402-17403.

Dr. Franklin's report included the following: (i) "He is incapable, in my opinion, of actively participating in the planning of defense strategy" (3RT 17336); (ii) "His deficits in verbal comprehension and articulation bear directly on his competency" (3RT 17336); (iii) "He has difficulty understanding what is going on, especially as things become complex." 3RT 17337.

I

BECAUSE A RETROSPECTIVE COMPETENCY HEARING AFTER A PROCEDURAL DUE PROCESS VIOLATION IS TO EVALUATE THE POTENTIAL IMPACT OF THAT FEDERAL CONSTITUTIONAL VIOLATION, THE DUE PROCESS CLAUSE REQUIRES THAT THE BURDEN OF PERSUASION BE BORNE BY THE PROSECUTION.

A. Overview of the Arguments.

Respondent organized its brief into several section: a discussion of the general permissibility of a retrospective competency hearing under the Due Process Clause (OBM 8-13); respondent's position as to the alleged significance of Penal Code section 1369, subdivision (f) (OBM 13-18); respondent's position as to the significance of the United States Supreme Court's decision in *Medina* v. *California* (1992) 505 U.S. 437 (OBM 18-25; and a discussion of cases from other jurisdictions (OBM 25-36).

The constitutional permissibility of a retrospective competency hearing is not before this court, and that subject will not be separately addressed. However, Mr. Ary will discuss each of the other subjects raised by respondent, generally in the order presented.

B. Section 1369, Subdivision (f) Does Not Dictate the Result.

At OBM 13-18, respondent argues that Penal Code section 1369, subdivision (f), controls the burden of persuasion at a retrospective competency hearing. Mr. Ary disagrees under the Fourteenth Amendment Due Process Clause. He also disagrees under the terms of section 1368 *et seq.*

1. Because of the Finding of a Fourteenth Amendment Procedural Due Process Violation in *Ary I*, the Issue of Remedy Is No Longer One of State Statutory Law.

As noted, the Court of Appeal in *Ary I* found that a procedural due process violation had occurred under *Pate*. *Ary I*, *supra*, 118 Cal.App.4th at 1020. As also noted, the United States Supreme Court spoke broadly in *Chapman* with regard to the significance of a federal due process violation in relation to the issue of remedy.

The larger quote from *Chapman* on that subject -- a portion of which appears at page 2, above -- was as follows:

> . . . [T]the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal courts would be the "guardians of those rights." Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, *we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.*
>
> *Chapman* v. *California*, *supra*, 386 U.S. at 20-21; emphasis added.

Where there has been federal constitutional error, the traditional burden is imposed on the state. *Chapman* v. *California*, *supra*, 386 U.S.

at 24 (the state must demonstrate the absence of "prejudice" beyond a reasonable doubt). While *Chapman* is usually cited in relation to "trial errors," it applies to "most constitutional errors." *See Arizona* v. *Fulminante* (1991) 499 U.S. 279, 306. For example, *Chapman* imposes the burden on the state to demonstrate that the defendant was not prejudiced by the failure to have provided an attorney at the preliminary hearing. *Coleman* v. *Alabama* (1964) 399 U.S. 1, 10-11.[6] Mr. Ary submits that the *Chapman* burden -- and arguably the *Chapman* standard -- should apply here.

Mr. Ary contends that this represents the entire answer to respondent's assertions with regard to section 1369, subdivision (f). If the Fourteenth Amendment Due Process Clause imposes the burden of persuasion on the prosecutor -- as Mr. Ary believes it does -- the Supremacy Clause of Article VI, clause 2, precludes reliance on section 1369 to reassign the burden elsewhere.

California has a state constitutional rule to govern the issue of "miscarriage of justice" in both criminal and civil cases. Yet Article VI, § 13 does not control the result when there has been a violation in a California court of a federal constitutional right.

The California legislature would similarly lack the power to enact a statute to dictate the remedy for a federal constitutional violation. Section 1369, subdivision (f) stands on no firmer ground merely because it existed prior to *Pate*. It is the Due Process Clause and not section 1369 which controls here.

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[6]/ *Chapman* is also applied in evaluating procedural due process violations. *See, e.g., In re Angela C.* (2002) 99 Cal.App.4th 389, 394; and *In re Amy M.* (1991) 232 Cal.App.3d 849, 867-868.

2. Section 1369(f) Does Not Apply by the Terms of the Statutory Scheme of Which It Is a Part.

Mr. Ary also relies on Presiding Justice Kline's analysis in *Ary II* (Maj. opn., at 9-13). The provisions of Chapter 6 of Title 10 of Part 2 of the Penal Code were intended by their terms to apply "during the pendency of an action and prior to judgment." See, section 1368. Section 1370 makes clear that the competency proceeding contemplated is to be held prior to trial, since the next procedural step after a competency finding would be resumption of criminal proceedings and a trial.

As for respondent's specific contentions at OBM 13-18, the Legislature in enacting sections 1368 *et seq.* could not have envisioned there would be retrospective competency hearings, as no such hearing had occurred in California until *Ary I.* For that reason, the Legislature could not reasonably have implied in sections 1368 *et seq.* that the statutory scheme would apply at a retrospective competency hearing.

This same circumstance distinguishes Mr. Ary's case from the situation addressed in *People* v. *Rells* (2000) 22 Cal.4th 860. The Legislature when it enacted sections 1368 *et seq.* was fully aware that "restored competence" hearings were certain to occur, and the Legislature reasonably implied that the statutes would apply to the conduct of such hearings. However, the Legislature could not reasonably have intended to imply anything with respect to retrospective competency hearings, as none were on the California horizon when section 1368 was enacted.

Furthermore, the post-*Ary I* amendments to section 1369 did not imply an intention that it would apply to a retrospective competency hearing because *Ary I* neither cited section 1369 nor suggested it would apply -- or not apply -- at a retrospective competency hearing. Finally,

Justice Kline's observations in *Ary II* that the lower court could in its discretion look to sections 1368 *et seq.* for procedural guidance at the retrospective competency hearing were consistent with the view that sections 1368 *et seq.* would not control the burden of persuasion at a retrospective competency hearing.

In short, Mr. Ary deems the constitutional barrier to section 1369's application in this context to be insurmountable. He also deems Presiding Justice Kline's conclusions as a matter of statutory interpretation to represent the better view.

C. Similarly, *Medina* Does Not Vindicate Respondent's Position.

1. The Context in Which *Medina* Was Decided.

Professors LaFave, Israel, *et al.* devote a substantial portion of their *Criminal Procedure (3d ed).* (2007) to the history of the United States Supreme Court's Due Process Clause jurisprudence. LaFave and Israel refer variously to "the independent content of due process" (1 *LaFave*, § 2.7, p. 666), and to "free-standing due process (*id.*, §2.7(a), pp. 670-671). The authors carefully differentiate this series of High Court cases from those in which the court had addressed "selective incorporation" of other federal constitutional provisions in the Bill of Rights.

It is in relation to "independent" or "free standing" due process that the *Medina* court rendered its decision. It did so in recognition of the High Court's reluctance to declare a state procedural rule in violation of the Due Process Clause.

As recently explained by the High Court in another context:

> . . . [T]he Constitution "has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer* v *Texas*, 385 US 554, 564, . . . (1967) (citing, *inter alia*, *Griffin*, [v. *Illinois* (1956) 351 U.S. 12, 20]). Accord, *Medina* v *California*, 505 US 437, 443-444, 447-448, . . . (1992).
>
> *Smith* v. *Robbins* (2000) 528 U.S. 259, 274 [quoted in *Medina*, *supra*, 505 U.S. at 44].

As explained further in *Smith*:

> . . . [I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time, as they come before us [citation], while leaving "the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance," *Cruzan* v *Director, Mo. Dept. of Health*, 497 US 261, 292 . . . (1990) (O'Connor, J., concurring) (citation and internal quotation marks omitted).
>
> *Smith* v. *Robbins*, *supra*, 528 U.S. at 275.

Although *Dowling* v. *United States* (1990) 493 U.S. 342, arose in relation to a federal appeal, it was relied upon in *Medina*. *Medina* v. *California*, *supra*, 505 U.S. at 443-444. Moreover, *Dowling* expresses the federal judicial philosophy applied in *Medina* in reference to "free standing" due process and "fundamental fairness":

> Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. As

we observed in [*United States* v. *Lovasco* (1977) 431 U.S. 783, 790]:

> "Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' Rochin v California, 342 US 165, 170 [ ] (1952). . . . [They] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' Mooney v Holohan, 294 US 103, 112 [ ] (1935), and which define 'the community's sense of fair play and decency,' Rochin v California, supra, at 173 [ ]."
>
> *Dowling* v. *United States* (1990) 493 U.S. 342, 352-353.

It is in the context of "free standing" due process that *Medina* must be considered. Viewed in that context, it is clear that *Medina* does not control the question of remedy for a *Pate* violation which had already been found.

2. The *Medina* Decision.

In *Medina*, the High Court addressed "whether the Due Process Clause permits a State to require a defendant who alleges incompetence to bear the burden of proving so by a preponderance of the evidence." *Id.*, at 439. The starting point of the analysis was as follows:

> In the field of criminal law, we "have defined the category of infractions that violate 'fundamental fairness' very narrowly" based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the

> Due Process Clause has limited operation." [Citations.] The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in Spencer v Texas, 385 US 554, . . . (1967), "it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." [Citations.]
>
> *Medina, supra,* 505 U.S. at 443-447.

Medina determined to resolve the issue under the analytical approach adopted in *Patterson* v. *New York* (1977) 432 U.S. 197:

> "Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citations.]" Patterson v New York, supra, at 201-202, . . .
>
> *Medina, supra,* 505 U.S. at 445.

The *Medina* court proceeded from its adoption of the *Patterson* analytical approach to this 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." Patterson v. New York, supra, at 202 . . . (internal quotation marks omitted).
>
> *Medina, supra*, 505 U.S. at 446.

The High Court observed that "there is no settled tradition" and "there remains no settled view" as to which party should bear the burden as to the defendant's competence in a state pretrial competency determination. *Id.*, at 446, 447. There being no such "historical basis for concluding that the allocation of the burden of proving incompetency violates due process," the High Court "turn[ed] to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation. [Citation.]" *Id.*, at 448.

Thereafter, the High Court set forth its "equipoise" analysis:

> 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." Drope v. Missouri, 420 US, at 172, 173, . . . 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.
>
> *Id.*, at 449.

The High Court next considered and rejected an alternative theory advanced by the petitioner:

> Petitioner further contends that the burden of proof should be placed on the State because we have allocated the burden to the State on a variety of other issues that implicate a criminal defendant's constitutional rights. E.g., Colorado v Connelly, 479 US 157, 168-169 . . . (1986) (waiver of Miranda rights); Nix v Williams, 467 US 431, 444-445, n 5, . . . (1984) (inevitable discovery of evidence obtained by unlawful means); United States v Matlock, 415 US 164, 177-178, n 14, . . . (1974) (voluntariness of consent to search); Lego v Twomey, 404 US 477, 489, . . . (1972) (voluntariness of confession).
>
> *Medina, supra*, 505 U.S. at 451-452.

The *Medina* court rejected this theory because each cited case "involved situations where the government sought to introduce inculpatory evidence obtained by virtue of a waiver of, or in violation of, a defendant's constitutional rights." *Id.*, at 452.

The *Medina* court ended its analysis, as follows:

> Nothing in today's decision is inconsistent with our longstanding recognition that the criminal trial of an incompetent defendant violates due process. Drope v Missouri, 420 US, at 172-173, . . .; Pate v Robinson, 383 US, at 386, . . .; [other citation omitted]. Rather, our rejection of petitioner's challenge to § 1369(f) is based on a determination that the California procedure is "constitutionally adequate" to guard against such results, Drope v Missouri, supra, at 172 . . ., and reflects our considered view that "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused

> ha[s] been left to the legislative branch," Patterson v New York, supra, at 210, ...
>
> *Medina, supra*, 505 U.S. at 453.[7]

In short, *Medina* does not control the result. While the Due Process Clause does not ordinarily allow federal courts to meddle in state criminal procedures in the absence of either a "historical basis" or "fundamental" unfairness, it is equally clear that the Due Process Clause dictates the remedy where a federal constitutional violation has been found to have occurred. *See Chapman* v. *California, supra*, 386 U.S. at 20-21. *Cf. American Trucking Assns.* v. *Smith* (1990) 496 U.S. 167, 177-178.[8]

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[7]/ The High Court in *Medina* declined to apply the tripartite "balancing" analysis it had undertaken in an administrative setting in *Mathews* v. *Elridge* (1976) 424 U.S. 319. Nonetheless, the *Medina* court did balance the interest of the parties in terms of allocation of the risk of error in the competency determination, and Justice O'Conner wrote separately in order to "reject" the "intimation that the balancing of equities is inappropriate in evaluating whether state criminal procedures amount to due process." *Medina, supra*, 505 U.S. at 453 *et seq.*, O'Conner, J., concurring. *See, also*, Justice Blackmun's dissent, in which Justice Stevens joined: " . . . I do not interpret the Court's reliance on Patterson to undermine the basic balancing of the government's interest against the individual's interest that is germane to any due process inquiry." *Id.*, at 460, Blackmun, J., dissenting.

[8]/ "The determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. [Citations.] The retroactive applicability of a constitutional decision of this Court, however, 'is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.' California, [supra,] 386 US 18, 21 . . . ."

3. The Analysis in *Ary II* in Relation to *Medina*.

Presiding Justice Kline opined in *Ary II* that "the analysis in *Medina* does not support a presumption of competence in the 'rare cases' (*Ary, supra,* 118 Cal.App.4th at p. 1028) in which a retrospective hearing may be conducted after a *Pate* violation, because such hearings *involve a paradigm significantly different in crucial particulars* from that presented and analyzed in *Medina*." *Ary II* (Maj. opn., at 16); emphasis added; original emphasis omitted. Presiding Justice Kline read *Medina* as holding only "that California was free to place the burden of proof on the defendant at a contemporaneous competency hearing because the issue of competency rarely presents a close question at such hearings, *so that it is not fundamentally unfair to impose the burden on the defendant." Ary II* (Maj. opn., at 17); emphasis added.

Presiding Justice Kline explained that the significance of a *Pate* violation in this context was to alter entirely the "fundamental fairness" analysis:

> The situation analyzed in *Medina* is, however, very different from that in which a retrospective competency hearing is necessitated by a *Pate* violation; that is, after a defendant has shown to the satisfaction of a reviewing court that the evidence at trial raised a "'*bona fide* doubt'" as to the defendant's competence to stand trial. (*Pate, supra*, 383 U.S. at p. 385.) 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.
>
> *Pate* violations are, of course, unlikely when there is strong evidence of competency (in which case it is clear to all that a competency inquiry is unnecessary) or of incom-

> petency (in which case a competency hearing is most likely sought and provided). 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. This is inconsistent with the fundamental fairness implicit in the constitutional concept of due process. If a defendant who has succeeded in demonstrating that there was serious doubt about his competency at the time he was tried and convicted can be retrospectively deemed competent, it should not be on the basis of a failure of his or her proof, but on the basis of an affirmative showing of competency by the state.
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> *Ary II* (Maj. opn., at 17-18.

Presiding Justice Kline further addressed the issue of "fundamental fairness," as follows:

> In reaching its conclusion that California courts could allocate the burden of proof to the defendant at a contemporaneous hearing, the *Medina* court emphasized the significance of the fact that the court did not deprive Medina of his due process right to a fair trial because it provided him pretrial "'procedures adequate to protect [his] right not to be tried or convicted while incompetent to stand trial.'" (*Medina, supra*, 505 U.S. at p. 449.) When that is done, the court concluded, there is "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." (*Ibid.*) However, in the present case, as in all in which the defendant's *Pate* rights were violated, the defendant was deprived of his due process right to a fair trial, because the court failed to observe procedures adequate to protect his right not to be tried while incompetent at the

> time at which a competency determination could most confidently have been made. It is the trial court's failure to conduct a competency hearing at that time that creates the need for a retrospective hearing years later, when the available evidence is almost never as reliable as that which was available at the time of trial, when the defendant's present competency could have been tested and assessed by both prosecution and defense experts.
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> *Ary II* (Maj. opn., at 18-19; footnote omitted.

Presiding Justice Kline also addressed the *Medina* court's declination to apply cases such as *Connelly* and *Lego* to the issue before it:

> The *Medina* court differentiated the situation before it from that in cases in which the government had violated a defendant's constitutional rights. (*Medina, supra*, 505 U.S. at pp. 451–452, citing *Colorado v. Connelly* (1986) 479 U.S. 157 [ ] [burden of proof on state to show waiver of *Miranda* rights]; *Nix v. Williams* (1984) 467 U.S. 431 [ ] [burden of proof on state to show inevitable discovery of evidence obtained by unlawful means]; *United States v. Matlock* (1974) 415 U.S. 164 [ ] [burden on government to show voluntariness of consent to search]; *Lego v. Twomey* (1972) 404 U.S. 477 [ ] [burden on state to show voluntariness of confession].) The burden of proof was placed on the state in those cases to deter it from abridging constitutional rights in the course of carrying out its investigatory responsibilities. There is no need for such deterrence where, as in *Medina*, the state properly carries out its responsibility to immediately inquire into the competency of a defendant when "bona fide doubt" is presented. That is not the case, however, when, despite reason for such doubt at the time of trial, an investigation is not then undertaken. Shifting the burden to the state at a retrospective hearing necessitated by the abridgment of a defendant's due process right to a contemporaneous competency determination would deter

such investigative errors and thereby diminish the likelihood of *Pate* violations.

Ary II (Maj. opn., at 19; footnote omitted.

Presiding Justice Kline noted further that *Medina* had relied upon the analytical approach set forth in *Patterson v. New York*, *supra*, 432 U.S. 197, which in turn had "engaged in the balancing prescribed in *Morrison v. California* (1934) 291 U.S. 82 [ ], the seminal opinion on allocation of the burden of proof in criminal proceedings." *Ary II* (Maj. opn., at 20. In *Morrison*, Justice Cardozo had written:

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.
>
> *Morrison v. California*, *supra*, 291 U.S. at 88-89.

Presiding Justice Kline reasoned as follows, based on *Morrison*:

> It is reasonable to conclude, as did the *Medina* court, that the foregoing principle allows allocation to the defendant of the burden of showing incompetency at a *contemporaneous* competency hearing, when a presumption of competence is not unfair. But it seems to us difficult to think the principle allows that allocation of the burden at a retrospective hearing after a *Pate* violation. Where the defen-

> dant's competency was not examined at trial despite reason to do so, the state has not "proved enough" that it would be just to require the defendant to "repel." Indeed, where there has been a *Pate* violation the state has not proved *anything at all* regarding the defendant's competency to stand trial. The only party that has in that situation made any persuasive showing on the issue of competency is the defendant, who demonstrated that there was "bona fide doubt" about his or her competency at the time of trial that should then have been investigated. . . . While imposing the burden of proving incompetency on the defendant would certainly "aid the accuser," it just as certainly would not do so "without subjecting the accused to hardship or oppression." (*Morrison v. California, supra*, 291 U.S. at pp. 88–89.)
>
> *Ary II* (Maj. opn., at 20-21; emphasis in original.

Mr. Ary urges this court to adopt and apply Presiding Justice Kline's view of *Medina*. The burden of persuasion should be borne by the prosecution at a retrospective competency evaluation, after a *Pate* violation had been found on direct appeal.

4. Respondent and Mr. Ary Have Significant Disagreement with Regard to the Ultimate Nature and Fairness of a Retrospective Competency Evaluation.

At OBM 21-25, in the course of a critique of Presiding Justice Kline's analysis in *Ary II*, respondent advances a number of assertions and presumptions with which Mr. Ary does not agree. For example, respondent argues at OBM 21 that the term "doubt" in section 1368 has a meaning identical to "substantial doubt" in the *Pate* context. While that assertion is not determinative, it is not precisely accurate.

In *People* v. *Pennington* (1967) 66 Cal.2d 508, this court reexamined section 1368 and *People* v. *Merkouris* (1959) 52 Cal.2d 672, *cert. den.* 361 U.S. 943, in light of *Pate*. *Merkouris* had held that "doubt" within section 1368 "is doubt in the mind of the trial judge, rather than doubt in the mind of counsel for the defendant or any third person. [Citation.]" *Merkouris* had held further that the determination of the issue invited exercise of "sound discretion," in view of all the relevant evidence. *Id.*, at 678-679.

This court in *Pennington* recognized that *Pate* required that those views be reassessed. *Pennington*, *supra*, 66 Cal.2d at 516-518. The court adopted a bipartite California rule:

> When the evidence casting doubt on an accused's present sanity is less than substantial, *People* v. *Merkouris*, *supra*, 52 Cal.2d 672, 678-679, correctly states the rules for application of section 1368 of the Penal Code. Whether to order a present sanity hearing is for the discretion of the trial judge, and only where a doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal. But, when defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right under *Pate* v. *Robinson*, *supra*, 383 U.S. 375. The judge then has no discretion to exercise.
>
> *Pennington*, *supra*, 66 Cal.2d at 518.

Accordingly, a "doubt" under section 1368 arises constitutionally when there is "substantial" evidence of incompetence. However, section 1368 proceedings may be commenced by the trial court on a lesser showing, under *Merkouris*.

Moreover, the partial overlap between section 1368 "doubt" and *Pate* "substantial doubt" is not dispositive, for the reason that contemporaneous compliance with *Pate*'s mandate *avoids* a procedural due process violation, while failure to do so *constitutes* a procedural due process violation. Notwithstanding respondent's best efforts, the fact of the *Pate* violation in this case has fundamental significance.[9]

Also inherent in respondent's analysis is the suggestion at OBM 21-23 that a retrospective competency hearing held years after a jury trial will accord the same degree of accuracy and trustworthiness as a hearing held contemporaneously with the trial, and the Ninth Circuit in *Moran* v. *Godinez* (9th Cir. 1995) 57 F.3d 690 seemed to have been influenced by this notion. While *Moran* recognized that retrospective competency hearings are "disfavored" (57 F.3d at 696, citing *Drope*, 420 U.S. at 183), it found such hearings "permissible whenever a court can conduct a *meaningful* hearing to evaluate retrospectively the competency of the defendant. [Citations.]" *Moran*, *supra*, 57 F.3d at 696; emphasis added. *Moran* noted further that contemporaneous medical records "generally increase the chance for an *accurate* retrospective evaluation of the defendant's competence. [Citation.]" *Ibid.*; emphasis added.

Yet neither *Moran*, nor *Ary I*, nor any other case approving retrospective competency hearings has required that the retrospective competency hearing be "as accurate" as a contemporaneous competency evaluation, for that standard could rarely if ever be satisfied. All that *Ary I* required was that the lower court "determine whether the available

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[9]/ For this reason, also, the citation of *People* v. *Rells*, *supra*, 22 Cal.4th 860 (OBM 21-22) is unavailing. In the *Rells* "restored competency" context, as in the section 1368 contemporaneous hearing context, there has been no federal constitutional violation.

evidence and witnesses are sufficient to permit it to reach a 'reasonable psychiatric judgment' of defendant's competence to stand trial. (*Odle* [v. *Woodard*] (9th Cir. 2001) 238 F.3d [1084,] at p. 1089.)" *Ary I*, *supra*, 118 Cal.App.4th at 1029.[10] *Ary I* held further that the issue was not the *quality* of the evidence in comparison to that available at time of trial but the *availability* of evidence: ". . . . [T]he issue of whether there is sufficient evidence available upon which to base a retrospective competency determination is not primarily a factual matter." *Ary I*, 118 Cal.App.4th at 1029.

Mr. Ary submits that retrospective competency hearings, in general, will not be as accurate as a hearing held contemporaneous with the trial, for the reasons that mental status is not constant over time and the community of alienists lacks the experience, protocols, tools and tests to conduct retrospective competency evaluations. If there is to be a less accurate retrospective hearing because of the state's procedural due process violation, the state should shoulder the burden of persuasion on the retrospective issue of competence.

Justice Brennan wrote in *Speiser* v. *Randall* (1958) 357 U.S. 513, 525: "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." Justice Brennan reasoned further, as follows:

> There is always in litigation a *margin of error*, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest

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[10]/ *Odle* also stated: "Although many years have passed since Odle was convicted and sentenced, the state court should be able to 'adduce sufficient evidence' to determine whether Odle was competent to stand trial. [Citation]." *Odle*, *supra*, 238 F.3d at 1090; footnote omitted.

> of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.
>
> *Id.*, at 525-526; emphasis added.

Although *Speiser* was considering the Due Process Clause in the context of burdens at a criminal trial, recognition of a "margin of error" is relevant here. As at a trial, a contemporaneous competency hearing will have a "margin of error," and a retrospective competency hearing will have an even greater "margin of error." Where the increased "margin of error" at the retrospective hearing is the result of a due process violation, the burden should not be imposed on the defendant.

Moreover, there are special problems associated with assessing the competency of mentally retarded defendants.

> . . . . [B]ecause persons with mental retardation are cognitively impaired, not mentally ill, the strongly cognitive elements of a competency evaluation need to be given special attention. In addition, defendants with mental retardation may be limited as to their functional behavior. Thus, a defendant with mental retardation might be seemingly "restored" to competency by instructing that individual about trial elements, but he or she may not be able to make intelligent legal decisions.
>
> *National Benchbook on Psychiatric and Psychological Evidence and Testimony* (1998), at 168.

Furthermore, it was explained at the 2005 hearing in this case that there are neither tests nor protocols for use by alienists to evaluate trial competence retrospectively, and none of the alienists had previously undertaken retrospectively to form an opinion on trial competence. The alienists who did not consider the matter until 2005 -- Drs. Berg, Friedman, and Hyman -- were "flying by the seat of their proverbial pants" in their analyses.

Finally, Mr. Ary has noted, at page 9 above, that the lower court in 2005 could have -- but did not -- include in its written decision as to the retrospective determination of competence any language suggesting that the same conclusion would have been reached if the prosecution had borne the burden of persuasion. That circumstances tends to support the conclusion that the assignment of the burden of persuasion was dispositive in this case.

In short, there should not be an assumption that a retrospective competence hearing will be "as accurate" as a contemporaneous hearing, or that assignment of the burden of persuasion will rarely affect the result. Requiring the defendant to bear the burden of persuasion should not be deemed "close enough for government work" when the question concerns the effect of a procedural due process violation under *Pate*.

D. When Relevant Cases Are Considered from Other Jurisdictions, Particularly in Relation to the Quality of the Analyses, Mr. Ary Submits that the Better Reasoned View Is That the State Bears the Burden of Persuasion at a Retrospective Competency Hearing After a *Pate* Violation.

1. The Analysis in *James* v. *Singletary*.

Presiding Justice Kline relied in *Ary II* upon *James* v. *Singletary* (11th Cir. 1992) 957 F.2d 1562 (*Ary II* (Maj. opn., at 21-22)), and *James* is illuminative here in three respects. First, *James* emphasizes "the urgent need for clearly distinguishing between the two incompetency claims available to a federal habeas petition." *Id.*, at 1569.

> . . . [T]here are two kinds of incompetency claims. First, a petitioner may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. This is a *Pate* claim. Second, a petitioner may allege that he or she was denied due process by being tried and convicted while incompetent. This is a substantive claim of incompetency.
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> *Id.*, at 1571.

Second, *James* explains the relationship between a *Pate* procedural due process violation and a retrospective competency hearing, with the latter being intended to resolve the questions of "prejudice" and "harmless error."

> A petitioner presenting a claim under *Pate* must first establish that the trial court should sua sponte have held a competency hearing. Once the petitioner has established this, he or she has made out a federal constitutional violation. At this point, the state has the opportunity to establish before the federal district court the petitioner's competency

> at the time of trial. *In effect, the state thereby may demonstrate that the state trial court's failure to hold a competency hearing constituted harmless error.* In this harmless error inquiry, the federal district court need not decide whether or not the error influenced the determination of guilt or punishment, because a finding of incompetency by the state trial court would have precluded a determination of guilt or innocence: the defendant could not have been tried.
>
> *Ibid.*; footnote omitted; emphasis added.

Third and finally, *James* identified the *Pate* "spin on the already well-established prohibition against trying and convicting an incompetent defendant" (*id.*, at 1570):

> *Pate*, in essence, established a *rebuttable presumption* of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioner's competency. According to *Pate*, the state could rebut this presumption by proving that the petitioner in fact had been competent at the time of trial.
>
> In short, *Pate* turned the tables on the state as soon as the habeas petitioner established the relevant trial error. Whereas the petitioner in a traditional, substantive, claim of incompetency was forced to establish his incompetency, it was now on the state to prove competency.
>
> *Ibid.*; footnote omitted; emphasis added.

The Supreme Court in *Medina* did nothing to undermine the rationale or logic of any aspect of *James*'s analysis. *James* was interpreting *Pate*, and *Medina* implied anything about the meaning of *Pate*.

2. The Import of *Moran* v. *Godinez*.

At OBM 30-33, respondent relies upon *Moran* v. *Godinez*, *supra*, 57 F.3d 690, a two-to-one decision. While the *Moran* majority recognized that *James* had been interpreting and applying *Pate*, *Moran* concluded that *Medina* had eclipsed *James*.

> After the decision in James, the Supreme Court, in Medina v. California, 505 U.S. 437 . . . (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, "once 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.
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> *Moran*, *supra*, at 697; emphasis added.

Circuit Judge Pregerson wrote a lengthy dissent (57 F.3d at 700 *et seq.*). Judge Pregerson reasoned that *Medina* "is not in conflict with [a] requirement that the state bear the burden of retrospectively proving competence where there has been a Pate violation." *Id.*, at 701 fn. 1, Pregerson, J., dissenting. Mr. Ary deems Judge Pregerson analysis in dissent better reasoned than the terse majority opinion.

Judge Pregerson's conclusion at the outset was as follows:

> It is clear that a *Pate* violation can only be cured by a post-conviction hearing in which the state bears the burden of proving that the defendant was competent to stand trial. In other words, the state must bear the burden of retrospectively proving competence if the trial court failed to provide the defendant with the constitutionally required *contemporaneous* hearing.
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> *Id.*, at 701, Pregerson, J., dissenting; footnote omitted; emphasis in original.

Judge Pregerson relied primarily on *Pate* v. *Robinson*, *supra*, 383 U.S. 375, which was divisible "analytically into two parts." Part one addressed the procedural due process violation in failing to conduct "a contemporaneous hearing where a good faith doubt arises before sentencing concerning the defendant's competence to stand trial," and part two addressed the appropriate remedy. Judge Pregerson read "the second part of *Pate*" as having "established that where the trial court failed to hold the required contemporaneous hearing the state then bears the burden of nonpersuasion in any subsequent competency determination." *Moran*, *supra*, 57 F.3d at 701, Pregerson, J., dissenting.

> This second part of *Pate* has not been analyzed as often as the first, but it is well established and frequently applied. In *Pate*, after determining that the defendant's constitutional right to a contemporaneous competency hearing had been violated, the Supreme Court turned to the question of what relief was proper on habeas review. The state argued that it could cure the violation by holding a retrospective hearing, but the Court disagreed, noting that after six years there was insufficient evidence to make the required competency determination.
>
> At this point, if the burden in a retrospective competency determination had been on the defendant, the Court would have affirmed the state court conviction. Instead, the Court reversed the conviction and remanded for a new trial; thus the Court established that the *burden* of proving a defendant's competence in a retrospective determination is *on the state.*
>
> *Id.*, at 701-702; emphasis in original.

Judge Pregerson found support for this conclusion in other United States Supreme Court and Ninth Circuit cases.

> This precedent has been consistently followed by the Supreme Court, *see, e.g., Drope v. Missouri*, 420 U.S. 162, 183, . . . (1975) (reversing for new trial after finding that remand for psychiatric evaluation to determine whether defendant was competent to stand trial six years ago was not a proper remedy), and has frequently been applied by this circuit, *see, e.g., Evans v. Raines*, 800 F.2d 884, 888 (9th Cir. 1986) (upholding the findings of a competency hearing held five years ex post facto only because the evidence was sufficient to retrospectively determine competence); *Sieling v. Eyman*, 478 F.2d 211, 215-16 (9th Cir. 1973) (remanding to trial court to determine whether there was sufficient evidence to determine competence retrospectively).

> In every case where our court or the Supreme Court has addressed the sufficiency of the evidence for making a retrospective determination, we have affirmed the view that the state bears the burden of nonpersuasion: where the evidence is insufficient to make a retrospective determination, the conviction is reversed and the case remanded for a new trial. The necessary conclusion from these cases is that the state bears the burden of proving competence in a retrospective hearing held *after* a *Pate* violation. This is precisely the conclusion of the Eleventh Circuit, *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992), which examined the issue in greater detail than any other circuit.
>
> *Moran*, *supra*, at 702, Pregerson, J., dissenting; footnotes omitted;[11] emphasis in original.

Judge Pregerson emphasized the crucial distinction between a pretrial competency hearing where no *Pate* violation had occurred, and a retrospective determination following a *Pate* violation.

> Two other cases cited by the state, *Fallala v. Dugger*, 819 F.2d 1564, 1567-68 n.1 (11th Cir. 1987), and *Nathaniel v. Estelle*, 493 F.2d 794, 798 n.6 (5th Cir. 1974), are completely inapposite. These discuss the burden of proof as to the substantive issue of competence where no *Pate* violation occurred at the trial. Here we are discussing the burden where there was such a violation.
>
> "Once the petitioner has established [that the trial court should sua sponte have held a competency hearing]

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[11]/ One omitted footnote reads, in part: "Only the 5th Circuit has stated otherwise. *Wheat v. Thigpen*, 793 F.2d 621, 630-31 (5th Cir. 1986), *cert. denied*, 480 U.S. 930, 94 L. Ed. 2d 759, 107 S. Ct. 1566 (1987); *Bruce v. Estelle*, 536 F.2d 1051, 1059 (5th Cir. 1976) (*Bruce II*), *cert. denied*, 429 U.S. 1053, 50 L. Ed. 2d 770, 97 S. Ct. 767 (1977)." *Moran*, *supra*, at 702 footnote 3.

> . . . he or she has made out a federal constitutional violation. At this point, *the state* has the opportunity to establish before the federal district court the petitioner's competency at the time of trial." *James*, 957 F.2d at 1571 (emphasis added).
>
> *Moran*, *supra*, at 702, Pregerson, J., dissenting.

Judge Pregerson exposed a flaw in the majority's reliance on *Medina*:

> The majority argues that [*Medina*] requires us to disregard the compelling logic of *James*. In *Medina*, the Supreme Court addressed the question, not addressed in *Pate*, of who must bear the burden of proof in a *contemporaneous Pate* hearing. *Medina* determined that the Constitution permits the states to place the burden on the defendant in the required contemporaneous competency hearing. This holding is completely consistent with *Pate* and *James*.
>
> The *Medina* opinion explicitly discussed and reaffirmed the first part of *Pate*, that a defendant is entitled to a contemporaneous hearing in the event doubts are raised as to competence. 112 S. Ct. at 2578-79. The Supreme Court went on to explain that the allocation of the burden of proof in such a *contemporaneous* hearing is not of constitutional dimension. *Id.* The test for whether a state procedure violates the Constitution is that of fundamental fairness, and no principle of fundamental fairness is violated by placing on a defendant the burden of proof in a contemporaneous competency hearing. *Id.* One of the reasons that fundamental fairness is not violated is that in a contemporaneous hearing only a very small proportion of the cases are affected by the state's allocation of the burden of proof: cases where the evidence as to competence is in perfect equipoise. *Id.*

> The Medina opinion did not directly or indirectly address the second part of *Pate* discussing the proper relief when no contemporaneous hearing is held despite doubt about the defendant's competence. In *Medina*, the required contemporaneous hearing *was* held. The only question was the adequacy of that contemporaneous hearing. Thus, *Medina* did not discuss the burden of proof in a *retrospective* competence determination *after* a *Pate* violation. *See* Appellee's brief at 5 (conceding this point). We therefore remain bound by Pate and its progeny on this issue.
>
> *Moran, supra*, at 702-703, Pregerson, J., dissenting; emphasis in original.

Finally, Judge Pregerson noted the significant practical implications of the majority's view.

> Allowing the burden to fall on the defendant to prove incompetence in the retrospective determination would result in affirmances in *every* case where the record has become stale. This is the exact opposite of the current practice. Yet in such cases it is the state court's error in failing to hold a contemporaneous hearing that results in the loss of evidence. It is fundamentally unfair to allow the conviction of a possibly incompetent defendant to stand *because of the state's failure* to observe constitutionally mandated procedures in the first instance.
>
> *Id.*, at 703; emphasis in original.

Mr. Ary asks this court to reject the majority view in *Moran* and to adopt the views expressed by Judge Pregerson.

3. Other Cases Cited by Respondent on the Question of the "Burden" of Persuasion at a Retrospective Competency Hearing Are Either Inapposite or Unpersuasive.

At OBM 30-35, respondent advances a series of cases which are deemed by respondent to hold that the burden should be on the criminal defendant at a retrospective competency hearing after a *Pate* violation had been found on direct appeal. In that regard, Mr. Ary recalls his caution at pages 5-6, above, that this court must be careful to ensure that a cited case applies in the *Pate* context on direct appeal.

For example, respondent at OBM 34 cites *Bruce* v. *Estelle* (5th Cir. 1976) 536 F.2d 1015. However, the issue in *Bruce* was the burden of persuasion where a state prisoner had advanced a collateral attack on a state judgment by way of federal habeas. More importantly, the remand ordered in that case, which had led to a retrospective hearing as to competence at the time of trial, had been on the defendant's substantive due process claim and not after a finding of a *Pate* violation. *See Bruce* v. *Estelle* (5th Cir. 1973), 483 F.2d 1031, 1037-1038.

Also cited (OBM 34-35) is *Traylor* v. *State* (Ga. 2006) 627 S.E.2d 594, 601. However, the court in that case found there had been no *Pate* violation (*id.*, at 599), and the discussion of the burden at a retrospective competency hearing was solely in relation to the defendant's claim of a substantive due process violation. *Id.*, at 599-601. The defendant always bears the burden as to a substantive due process claim, because a showing of lack of trial competence is an element of the claim.

Commonwealth v. *Santiago* (Pa. 2004) 855 A.2d 682 is cited at OBM 34. However, the sole issue in *Santiago* -- a Pennsylvania state habeas proceeding -- was again a substantive due process claim under

Drope. *Id.*, at 691-692. The discussion of the "burden" was again in regard to that claim of error. *Id.*, at 694.

Respondent cites *Galowski* v. *Berge* (7th Cir. 1996) 78 F.3d 1176 at OBM 34. Yet again, however, the issue in *Galowski* was a substantive due process claim and not a *Pate* claim. *Id.*, at 1180-1181.

At OBM 31, *State* v. *Bostwick* (Mont. 1999) 988 P.2d 756 is cited. While *Bostwick* cited *Moran* in relation to the potential for a retrospective competency hearing, (*id.*, at 772), *Bostwick* reached no conclusion regarding the correct burden of persuasion. *Id.*, at 772-773.

Tate v. *Oklahoma* (Okla. Cir. 1995) 896 P.2d 1182 is quoted at OBM 30-31. However, that case misread *James* v. *Singletary*, *supra*, as applying solely to the burden of demonstrating the feasibility of a retrospective competency hearing. *Id.*, at 1187-1188.

Another cited case is *McMurtry* v. *Ryan* (9th Cir. 2008) 539 F.3d 1112 (OBM 33). That case was before the Ninth Circuit on federal habeas, and it cited *Moran* but concluded that a retrospective competency hearing thirteen years after trial "was insufficient to cure this due process violation." *Id.*, at 1332. *McMurtry* did not, as respondent asserts (OBM 33), "affirm" *Moran*.

At OBM 33, respondent cites *Lokos* v. *Capps* (5th Cir. 1980) 625 F.2d 1258, and it is true that *Lokos* cited *Martin* v. *Estelle* (5th Cir. 1977) 546 F.2d 177 for the proposition that the defendant bears the burden at a retrospective competency hearing. *Lokos* v. *Capps*, *supra*, 625 F.2d at 1262. However, the *Lokos* court found the defendant had satisfied his burden (*id.*, at 1268-1267), and the only discussion of a "burden" in *Martin* appears in a concurrence, in relation to the burden of

persuasion where a *substantive* due process claim is advanced on federal habeas. *Martin*, *supra*, 546 F.2d at 181 (Gee, J., concurring).

Porter v. *Estelle* (5th Cir. 1983) 709 F.2d 944 is cited at OBM 34. However, no *Pate* violation was found in *Porter*. *Id.*, at 951-952.

That leaves three cited cases which address the issue squarely, and which reach conclusions other than in *dicta*: *Moran* v. *Godinez*, *supra*, 57 F.2d 690 (OBM 31-33); *Wheat* v. *Thigpen* (5th Cir. 1986) 793 F.2d 621 (OBM 34); and *Rhode* v. *Olk-Long* (8th Cir. 1996) 84 F.3d 284 (OBM 33). As for *Moran*, it has been discussed in detail, at pages 41-46, above. The second case, *Wheat* v. *Thigpen*, *supra*, 793 F.2d at 629-630 merely cited and relied upon *Lokos* v. *Capps*, *supra*, 625 F.2d 1258 and *Bruce* v. *Estelle*, *supra*, 536 F.2d 1051, 1059.

Finally, *Rhode* noted that criminal defendants are presumed competent under Iowa case law, and *Rhode* applied *Medina* as follows:

> 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*.
>
> 84 F.3d at 288.

However, *Rhode* overlooked that rule that the remedy for a federal due process clause violation is an issue not of state law but of federal constitutional law. The cited cases are either applicable to a state case on direct appeal in which a *Pate* violation had been found, or unpersuasive.

4. To the Extent the Matter Is Relevant, Respondent's Discussion of Federal Cases Addressing 28 U.S.C. § 4241 Greatly Understates the Disagreement Among the Circuits.

At OBM 25-29, respondent suggests that, after the United States Supreme Court decisions in *Medina* and *Cooper*,[12] there has been a landslide of federal cases holding that the defendant bears the burden of persuasion as to competence under 18 U.S.C. § 4241. Mr. Ary addresses this contention with strong reservations, for a proper interpretation of 18 U.S.C. § 4241 is collateral to the issue presented. However, respondent's representation of the matter is inaccurate, as the federal circuits remain generally split.

As explained in *United States* v. *Patel* (D. Mass. 2007) 524 F.Supp.2d 107, the United States Supreme Court had held in *Cooper* that an Oklahoma statute requiring a defendant asserting incompetence to bear a burden by *clear and convincing evidence* violated the Due Process Clause. In noting the burdens imposed among the fifty states and in federal court, the *Cooper* court had observed in passing:

> Indeed, a number of States place no burden on the defendant at all, but rather require the prosecutor to prove the defendant's competence to stand trial once a question about competency has been credibly raised. The situation is no different in federal court. *Congress has directed that the accused in a federal prosecution must prove competence by a preponderance of the evidence.* 18 U.S.C. § 4241.
>
> *Patel*, *supra*, 524 F.Supp.2d at 111, quoting *Cooper*, *supra*, 517 U.S. at 361-362; footnote omitted; emphasis in original.

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[12]/ *Cooper* v. *Oklahoma* (1996) 517 U.S. 348.

However, the *Patel* court recognized the italicized language to be *dictum*. It elected not to deem the *dictum* persuasive because it had not been a "carefully considered statement" by the Supreme Court. *Id.*, at 111-112.

> . . . . [T]he statement is merely incidental to the more comprehensive discussion of the varying standards of proof in the fifty states. . . . [T]he point of the comparison is that the federal system has a lower standard of proof, not the fact that the "accused" has the burden of proof.
>
> *Id.*, at 112.[13]

As for the positions of the federal circuits on the burden of persuasion under 18 U.S.C. § 4241, the District Court noted in *Patel* that the Second Circuit had declined to decide the issue,[14] as had several District Courts. *Patel, supra*, 524 F.2d at 112. *Patel* observed that the Fourth Circuit[15] and Eleventh Circuit[16] had treated the *Cooper* dictum as resolving the question. *Patel, supra*, 524 F.Supp.2d at 113. [In truth it was only the Fourth Circuit which had reached that conclusion, since both Eleventh Circuit cases were discussing the burden of persuasion on a

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[13]/ *See, also, United States* v. *Dodds* (D. Ariz. 2006) 2006 U.S. Dist. LEXIS 13521: "Because the Supreme Court's statement is dictum, the Court feels bound to follow the Ninth Circuit rule."

[14]/ *United States* v. *Nichols* (2d Cir. 1995) 56 F.3d 403, 410.

[15]/ *United States* v. *Robinson* (4th Cir 2005) 404 F.3d 850, 856.

[16]/ *Battle* v. *United States* (11th Circuit) 419 F.3d 1292, 1298 and *Medina* v. *Singletary* (11th Cir. 1995) 59 F.3d 1095, 1106.

post-trial claim of a substantive due process violation in having been tried while incompetent.[17]]

The *Patel* court also noted that the Third Circuit,[18] Fifth Circuit,[19] and Ninth Circuits[20] had interpreted 18 U.S.C. § 4241 as placing the burden on the government. *Patel*, *supra*, 524 F.Supp.2d at 113. Finally, the *Patel* court noted in a footnote that the Seventh Circuit had held inconsistently on the issue. *Id.*, at 113-114 fn. 52.[21]

Hence, the correct "score card" in light of *Patel*'s review is as follows: Second Circuit, unresolved; Fourth Circuit, burden on the defendant; Third, Fifth and Ninth Circuits, burden on the government; and Seventh Circuit, a split of authority.[22]

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[17]/ *Battle*, *supra*, 419 F.3d at 1298-1299; and *Medina*, *supra*, 59 F.3d at 1106-1107.

[18]/ *United States* v. *Velasquez* (3d Cir. 1989) 885 F.2d 1076, 1089, *cert. den.* 494 U.S. 1017; and *United States* v. *DiGilio* (3d Cir 1976) 538 F.2d 972, 988.

[19]/ *United States* v. *Hutson* (5th Cir 1987) 821 F.2d 1015, 1018.

[20]/ *United States* v. *Hoskie* (9th Cir. 950) F.2d 1388, 1392.

[21]/ Compare *United States* v. *Teague* (7th Cir 1992) 956 F.2d 1427, 1431 with *United States* v. *Morago* (7th Cir 1994) 39 F.3d 1358, 1373, *cert. den.* (1995) 515 U.S. 1133.

[22]/ At OBM 27-28, respondent cites several circuit cases. However, they do not change the *Patel* "scorecard."

CONCLUSION

Mr. Ary is aware his brief has grown lengthy, and he will belabor the issue no further. He asks this court to recognize the significance of the *Pate* violation to the analysis, and to conclude that the proper remedy after such a violation is to place on the state the burden of persuasion at a retrospective competency hearing.

Dated: December 2, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

IN COMPLIANCE WITH RULE 33, SUBDIVISION (B)

I hereby certify, pursuant to Rule 33, subdivision (b), California Rules of Court, that the attached brief contains 13202 words. In this certificate, I am relying on the word count produced by Wordperfect 5.1.

Dated: December 2, 2009

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JAMES ARY

PROOF OF SERVICE

I declare that:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2626 Harrison Street, Oakland, California 94612.

On December 2, 2009, I served the within ANSWER BRIEF ON THE MERITS on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 2, 2009 at Oakland, California.

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