

# **Are You Sufficiently Competent to Prove Your Incompetence? An Analysis of the Paradox in the Federal Courts**

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## I. INTRODUCTION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the trial of an incompetent defendant.<sup>1</sup> To reinforce this principle, Congress has enacted substantive and procedural safeguards, requiring the trial of an incompetent defendant to be delayed while medical treatment is administered.<sup>2</sup> Despite Congressional attempts to effectively implement this Fourteenth Amendment guarantee, a crucial question is currently being debated in the federal circuits:<sup>3</sup> whether the defendant bears the burden of proving incompetency, or, in the alternative, whether the government must establish competency.<sup>4</sup> In the absence of statutory allocation,<sup>5</sup> the federal circuits must be careful when determining which party bears the burden of proof since “where the burden of proof lies may be decisive of the outcome.”<sup>6</sup>

The recognition that an incompetent defendant should not be tried dates back to English common-law and was included in William Blackstone’s seventeenth century commentaries.<sup>7</sup> Blackstone wrote that if an individual, before arraignment of an offense, “becomes mad, he ought not be arraigned for it; because he is not able to plead to it with that advice and caution that he ought.”<sup>8</sup> Blackstone further argued that if the individual becomes mad after pleading, “he shall not be tried: for how can he make his defense?”<sup>9</sup> Thus, there are firm historical roots that advise against trying a defendant who is unable to comprehend and participate in the proceedings against him.<sup>10</sup>

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<sup>1</sup> U.S. CONST. AMEND. XIV, § 1 states “nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”; *Medina v. California*, 505 U.S. 437, 439 (1992) (“It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal government of a defendant who is not competent to stand trial.”).

<sup>2</sup> See 18 U.S.C. § 4241 (2006).

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See *United States v. Patel*, 524 F. Supp. 2d 107, 110 (Mass. Dist. Ct. 2007).

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

<sup>7</sup> Bruce J. Winick, *Criminal Law: Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 574 (1995). Blackstone’s Commentaries have been referred to as “the most influential legal text in colonial America.” Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key’s Freedom Suit – Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799, 832 (2008).

<sup>8</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*24.

<sup>9</sup> *Id.*

<sup>10</sup> See Paula Siuta Eichner, *Cooper v. Oklahoma and the Fundamental Right Not to Be Tried While Incompetent*, 24 N.E.J. ON CRIM. & CIV. CON. 511, 517 (1998) (“The legal doctrine against the trial of an incompetent defendant is firmly rooted in English and American legal history.”).

The leading United States Supreme Court case reinforcing this conviction is *Drope v. Missouri*,<sup>11</sup> where, writing for the majority, Chief Justice Burger made two observations about the trial of an incompetent defendant. First, Burger reasoned that the trial of an incompetent defendant is analogous to a trial *in absentia*.<sup>12</sup> Specifically, despite an individual's physical presence at the proceedings, the lack of mental capacity sufficient to defend oneself is equivalent to trying a defendant utterly absent from the hearing.<sup>13</sup> Second, Burger explicitly asserted that the prohibition against trying an incompetent defendant "is fundamental to an adversary system of justice."<sup>14</sup> Ultimately, if a term of imprisonment is imposed upon a mentally incompetent defendant, the defendant's inability to effectively understand and reflect upon such sentence clashes with the underlying objectives of punishment.<sup>15</sup> Ensuring the defendant's competence preserves not only the accuracy but also the fairness, dignity and honor of the verdict, all of which form the cornerstone of the American judicial system.<sup>16</sup>

Part II of this Comment reviews the federal statute that governs incompetency, 18 U.S.C. § 4241. Despite its efforts to outline the procedures and substantive standards for determining competency, Congress has not explicitly allocated the burden of proof to the government or defendant. Further, the legislative history of the statute does not clarify which party Congress intended to bear the burden of proof. Part III explores two Supreme Court cases, *Medina v. California*<sup>17</sup> and *Cooper v. Oklahoma*,<sup>18</sup> which address state competency standards. At the outset, these cases are not persuasive for the purpose of allocating the federal standard of proof, because their analyses are respectively centered upon the California and Oklahoma state competency standards, not 18 U.S.C. § 4241. In addition to solely addressing state competency

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<sup>11</sup> 420 U.S. 162, 170 (1975).

<sup>12</sup> *Id.* at 171.

<sup>13</sup> *Id.*; see also *Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963) ("And yet one who is mentally deranged may be as far removed from the proceedings as if physically absent.").

<sup>14</sup> *Drope*, 420 U.S. at 171-72.

<sup>15</sup> See 18 U.S.C. § 3553(a)(2) (2006) (delineating factors for the court to consider in addressing the *need* for a sentencing, including: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from future crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.").

<sup>16</sup> Grant H. Morris, *Mental Disorder and the Civil/Criminal Distinction*, 41 SAN DIEGO L. REV. 1177, 1181 n.22 (2004).

<sup>17</sup> 505 U.S. 437 (1992).

<sup>18</sup> 517 U.S. 348 (1996).

standards, both state statutes create a presumption of competence<sup>19</sup>—a characteristic absent from the federal competency statute. Moreover, the allocation of the burden of proof in those two jurisdictions is settled.<sup>20</sup> Part IV reveals each circuit court's position, if any, on which party bears the federal burden of proof. Most notably, two circuits, the Fourth and Eleventh, have without original analysis, adopted the Supreme Court's position in *Cooper v. Oklahoma*. Part V offers a survey of where the burden of proof lies in state competency hearings. Part VI asserts that the substantive standards of 18 U.S.C. § 4241 embody concerns about access to evidence, risk of error, and fundamental fairness. These three factors collectively and conclusively suggest that a potentially incompetent defendant should not be called upon to prove his own incompetence. Consequently, when the issue of competence is raised during a federal criminal proceeding, the Government must bear the burden of proof of establishing the defendant's competence to stand trial. Finally, Part VII concludes by reinforcing the consistency of the arguments advanced with Blackstone's historical observations.

## II. MENTAL COMPETENCY TO STAND TRIAL: REVIEW OF THE FEDERAL STATUTE AT ISSUE

Congress codified the federal procedures governing a defendant's mental competency to stand trial in 18 U.S.C. § 4241. If concern arises regarding the defendant's mental competency, the government, defendant's counsel, or the court, *sua sponte*, may request a hearing to determine the defendant's mental competency.<sup>21</sup> This motion can only be made after the prosecution commences but prior to sentencing.<sup>22</sup> In evaluating the motion's basis, the court considers if "there is *reasonable cause* to believe that the defendant *may* presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him *or* to assist properly in his defense."<sup>23</sup> If these requirements are met, the court must grant the motion for a competency hearing.

At the competency hearing, a similar standard must be satisfied, with two exceptions: (1) the reasonable cause to believe standard of proof is replaced with a preponderance of the evidence standard; and (2)

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<sup>19</sup> See CAL. PENAL CODE § 1369(f) (West 1982); OKLA STAT. tit. 22, § 1175.4(B) (1991).

<sup>20</sup> See OKLA STAT. tit. 22, § 1175.4(B) (1991); *Medina*, 505 U.S. at 440.

<sup>21</sup> *Id.* § 4241(a).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (emphasis added).

the defendant must be “presently suffering from a mental disease,” not the possibility of suffering.<sup>24</sup> With these changes in mind, the defendant will be deemed mentally incompetent to stand trial, if, based on a preponderance of the evidence, the defendant “is unable to understand the nature and consequences of the proceedings against him *or* to assist properly in his defense.”<sup>25</sup>

Subsequent to a finding of incompetence, the Attorney General takes custody of the defendant and determines a suitable facility to treat the defendant.<sup>26</sup> During a reasonable period of treatment, which may not initially exceed four months,<sup>27</sup> the defendant is evaluated to determine if sufficient capacity exists for the proceedings to continue.<sup>28</sup> Once the defendant demonstrates the requisite capacity to “understand the nature and consequences of the proceedings against him and to assist properly in his defense,” the defendant is discharged from treatment and the trial is rescheduled on the court’s calendar.<sup>29</sup>

#### *A. Ambiguities Surrounding 18 U.S.C. § 4241*

Although § 4241 provides detailed procedures outlining which parties can raise a motion for a mental competency hearing, the substantive standards to grant the hearing, and the substantive standards to commit the defendant at the conclusion of the hearing, § 4241 and its sister sections<sup>30</sup> are silent as to which party bears the burden of proof *during* the hearing. Instead, § 4241 merely states that “[i]f, after the hearing, *the court* finds by a preponderance of evidence that the defendant is presently suffering from a mental disease,”<sup>31</sup> then the proceedings against him will be suspended.

Consequently, because the statutory language fails to indicate which party bears the burden of proof, a question arises as to “whether the Government bears the burden of establishing competency [of the defendant] or the defendant bears the burden of establishing [his] incompetency” during the hearing.<sup>32</sup> Answering this question becomes

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<sup>24</sup> Compare 18 U.S.C. § 4241(d) with 18 U.S.C. § 4241(a).

<sup>25</sup> 18 U.S.C. § 4241(d) (2006) (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> A request for an additional reasonable period of time can be made. 18 U.S.C. § 4241(d)(2).

<sup>28</sup> *Id.* § 4241(d)(1).

<sup>29</sup> *Id.* § 4241(e).

<sup>30</sup> Specifically, 18 U.S.C. § 4241(c) states that “the hearing shall be conducted pursuant to the provisions of section 4247(d) [18 U.S.C. § 4247(d)].”

<sup>31</sup> *Id.* § 4241(d) (emphasis added).

<sup>32</sup> *Patel*, 524 F. Supp. 2d at 110.

increasingly difficult due to a dearth of legislative history,<sup>33</sup> and the absence of an on-point United States Supreme Court decision.<sup>34</sup> As a result, the circuit courts have been left to resolve the allocation of proof.

*B. The Legislative History of 18 U.S.C. § 4241*

In 1984, after fifteen years of hearings and deliberations,<sup>35</sup> Congress passed the Comprehensive Crime Control Act of 1984 [hereinafter “CCCA”].<sup>36</sup> The CCCA has been deemed “the most radical change in federal criminal law in the history of our Nation,”<sup>37</sup> resulting from Congressional effort to modernize federal criminal law.<sup>38</sup> Most significantly for the present discussion, the CCCA “completely amended chapter 313 of title 18 of the United States Code relating to the procedure to be followed by federal courts with respect to offenders who are currently suffering from a mental disease or defect.”<sup>39</sup> The specific portion of the CCCA that amended 18 U.S.C. §§ 4241–47 is individually referred to as the “Insanity Defense Reform Act of 1983” [hereinafter “IDRA”].<sup>40</sup> However, despite the CCCA’s “radical”<sup>41</sup> cumulative changes to federal criminal law, the IDRA competency revisions contain only slight departures from the pre-amended statutes.<sup>42</sup> Instead, the IDRA primarily focused on federalizing the insanity defense.<sup>43</sup>

Prior to the IDRA, the statute governing mental incompetency was 18 U.S.C. § 4244.<sup>44</sup> Beginning with the differences between pre-amended § 4244<sup>45</sup> and the current competency section, § 4241, a modification was made as to when the motion to determine competency can first be raised: § 4244 allowed a motion to be raised immediately after arrest, but § 4241 only permits a motion to be raised after the

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<sup>33</sup> *Id.* at 110, n.33.

<sup>34</sup> *Id.* at 110–11 (“The Supreme Court, however, briefly commented on this issue [which party bears the burden of proof in a section 4241 mental competency hearing] in *dicta* in *Cooper v. Oklahoma*.”) (emphasis added).

<sup>35</sup> KENNETH R. FEINBERG, COMPREHENSIVE CRIME CONTROL ACT OF 1984 250 (Practising Law Institute 1985).

<sup>36</sup> *Id.* at 249.

<sup>37</sup> *Id.*

<sup>38</sup> *United States v. White*, 887 F.2d 705, 707 (6th Cir. 1989).

<sup>39</sup> *United States v. Nichols*, 661 F. Supp. 507, 508 n.1 (W.D. Mich. 1987).

<sup>40</sup> *Id.* at 508.

<sup>41</sup> *See* FEINBERG *supra* note 38, at 249.

<sup>42</sup> *United States v. Williams*, 998 F.2d 258, 265 n.16 (5th Cir. 1993).

<sup>43</sup> *See infra* Part VI.C.

<sup>44</sup> *See generally* 18 U.S.C. § 4244 (1949).

<sup>45</sup> All subsequent references to 18 U.S.C. § 4244 refer to the pre-amended statute dealing with competency standards and procedures, not current 18 U.S.C. § 4244, or “hospitalization of a convicted person.”

commencement of the prosecution.<sup>46</sup> Next, although both sections allow a psychiatric examination before an actual competency hearing, § 4244 required the examination, while § 4241 affords judicial discretion.<sup>47</sup> Furthermore, while both sections authorize the court to subsequently hold a mental competency hearing where the judge is the trier of fact, only § 4241 codifies the standard of proof—a preponderance of the evidence standard.<sup>48</sup>

Focusing on the similarities between §§ 4244 and 4241, both sections indicate, with slightly different language, that mental incompetence is the failure of the defendant to comprehend the proceedings, or an inability of the defendant to properly assist in his defense.<sup>49</sup> Additionally, both §§ 4244 and 4241 permit a motion to determine mental competency to be raised by the government,<sup>50</sup> defendant's counsel, or the court.<sup>51</sup> Most importantly, both statutes fail to explicitly allocate the burden of proof to a specific party to demonstrate incompetency or competency during the competency hearing.<sup>52</sup>

Focusing on the burden of proof, the Senate Report considering the IDRA is similarly unhelpful. In fact, the Senate Report merely states that “Subsection (d) of *section 4241* provides that the court must make a determination with respect to the defendant's competency based upon a

<sup>46</sup> Compare 18 U.S.C. § 4244 (1949) (“Whenever after arrest . . .”) with 18 U.S.C. § 4241 (2006) (“At any time after the commencement of a prosecution . . .”).

<sup>47</sup> Compare 18 U.S.C. § 4244 (1949) (“the court shall . . .”) with 18 U.S.C. § 4241 (2006) (“the court may . . .”).

<sup>48</sup> 18 U.S.C. § 4241(d) (2006).

<sup>49</sup> Compare 18 U.S.C. § 4244 (1949) (“so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense . . .”) with 18 U.S.C. § 4241 (2006) (“rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.”).

<sup>50</sup> The 11th Circuit concluded that old § 4244 placed more of an emphasis on the Government raising an issue of defendant's mental state. *United States v. Izquierdo*, 448 F.3d 1269, 1277–78 (11th Cir. 2006). Even assuming *arguendo* that the Government had a greater obligation to raise an issue of defendant's mental state, the former § 4244 nevertheless permitted defendant's counsel and the court to raise an issue of defendant's mental state as well. See 18 U.S.C. § 4244 (1949).

<sup>51</sup> Compare 18 U.S.C. § 4244 (1949) (If “the United States attorney has reasonable cause to believe . . . he shall file a motion . . . . Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court . . .”) with 18 U.S.C. § 4241(a) (2006) (“[T]he defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion . . .”).

<sup>52</sup> Compare 18 U.S.C. § 4244 (1949) with 18 U.S.C. § 4241 (2006).

preponderance of the evidence.”<sup>53</sup> Unfortunately, the legislative history of competency to stand trial fails to shed light on which party Congress intended to bear the burden of proof.

### III. MISPLACED RELIANCE ON THE SUPREME COURT’S DECISIONS IN *MEDINA V. CALIFORNIA* AND *COOPER V. OKLAHOMA*

There is no binding Supreme Court authority on the federal burden of proof for 18 U.S.C. § 4241.<sup>54</sup> *Medina v. California*<sup>55</sup> and *Cooper v. Oklahoma*<sup>56</sup> are two leading Supreme Court decisions that address the constitutionality of California and Oklahoma state laws that require the defendant to prove his incompetency.<sup>57</sup> This section will distinguish both *Medina* and *Cooper*, arguing that neither case convincingly advocates placing the federal burden of proof in competency hearings on the defendant.

#### A. *Medina v. California*

*Medina* presented the Supreme Court with an opportunity to assess competency requirements under California state law.<sup>58</sup> There, Teofilo Medina, Jr., armed with a stolen gun, terrorized two gas stations, a food market, and dairy.<sup>59</sup> At the conclusion of his rampage, Medina had murdered three employees of the respective establishments and was charged with “three counts of first-degree murder.”<sup>60</sup> Concerned with his client’s mental state, Medina’s attorney moved for a competency hearing pursuant to California state law.<sup>61</sup>

California’s controlling statute for a determination of mental competency reads: “It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the

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<sup>53</sup> United States v. Gigante, 996 F. Supp. 194, 199 (E.D.N.Y. 1997) (quoting INSANITY DEFENSE REFORM ACT OF 1984, S. Rep. No. 98-225, at 236 (1983), reprinted in 1985 U.S.C.C.A.N. 3182, 3418).

<sup>54</sup> See *supra* note 34.

<sup>55</sup> 505 U.S. 437.

<sup>56</sup> 517 U.S. 348.

<sup>57</sup> *Medina*, 505 U.S. at 439 (“The issue in this case is whether the Due Process Clause permits a State [California] to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence.”); *Cooper*, 517 U.S. at 350 (“In Oklahoma the defendant in a criminal prosecution is presumed to be competent to stand trial unless he proves his incompetence by clear and convincing evidence.”).

<sup>58</sup> *Medina*, 505 U.S. at 439 (“The issue in this case is whether the Due Process Clause permits a State to require a defendant who alleges incompetence to stand trial to bear the burden of proving so by a preponderance of the evidence.”).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 439–40.

<sup>61</sup> *Id.*

defendant is mentally incompetent.”<sup>62</sup> California courts have interpreted this statute to force the “party claiming incompetence [to] bear[] the burden of proving that defendant is incompetent by a preponderance of the evidence.”<sup>63</sup> Consequently, due to the presumption of competence and Medina’s claim of incompetence, Medina bore the burden of proof. Despite Medina’s verbal outbursts and overturning of the counsel table, the jury determined that Medina did not meet his burden of proof to establish incompetence, and the trial proceeded.<sup>64</sup> Subsequently, Medina was convicted on all three murder charges and sentenced to the death penalty.<sup>65</sup> After an unsuccessful appeal to the California Supreme Court, the United States Supreme Court granted certiorari.<sup>66</sup> There, the Court affirmed the California Supreme Court, rejecting both Medina’s constitutional arguments against a presumption of incompetency and the requirement that the defendant must demonstrate his own incompetence.<sup>67</sup>

In analyzing Medina’s constitutional claim against a defendant proving his own incompetence, the Supreme Court borrowed the due process framework from *Patterson v. New York*.<sup>68</sup> Similar to *Medina*, *Patterson* involved a due process challenge against a New York state law where the defendant bore the burden of proving an extreme emotional disturbance affirmative defense.<sup>69</sup> In rejecting the petitioner’s claim, the *Patterson* Court held:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states. 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.”<sup>70</sup>

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<sup>62</sup> CAL. PENAL CODE § 1369(f) (West 1982).

<sup>63</sup> *Medina*, 505 U.S. at 440.

<sup>64</sup> *Id.* at 441.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 442.

<sup>67</sup> *Id.* at 441–42.

<sup>68</sup> *Medina v. California*, 505 U.S. 437, 445 (1992).

<sup>69</sup> *Id.*

<sup>70</sup> *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)).

Narrowly confining analysis to *Patterson*, the Court inquired whether *Medina*'s allocation of the burden of proof was "rooted in the traditions and conscience of our people."<sup>71</sup> First, the Court recognized Blackstone's common-law view that an incompetent defendant should not be forced to stand trial.<sup>72</sup> Next, the Court noted that all fifty states have enacted procedures to determine if a defendant is competent to stand trial.<sup>73</sup> However, analysis of the procedures used by the fifty states failed to translate into one uniform position; some states place the burden on the party raising the issue, some states place the burden on the defendant to prove incompetence, while still others have held that the burden rests with the government to demonstrate competency.<sup>74</sup> Consequently, because "there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence,"<sup>75</sup> allocating the burden of proof to the defendant to prove incompetence does *not* "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," as required by *Patterson*.<sup>76</sup> In addition to finding no constitutional violation for requiring a defendant to prove his own competence, the Court also found no constitutional violation for a codified presumption of competence.<sup>77</sup>

Immediately, *Medina* cannot be viewed as persuasive Supreme Court authority to place the burden of proof on the defendant for federal competency hearings. Detrimentially, *Medina* strictly involves California state law, and *not* the federal statute at issue, 18 U.S.C. § 4241.<sup>78</sup> Moreover, in direct contrast to § 4241, the California state law has explicitly codified a presumption of competence, with an interpretation that the party claiming incompetence bear the burden of proof.<sup>79</sup>

Therefore, *Medina* is unequivocally a demonstration of the Supreme Court adhering to federalist principles. First, *Patterson* illuminates a non-intrusive or deferential approach to state legislatures.<sup>80</sup> If a "principle of justice so rooted in the traditions and conscience of our

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<sup>71</sup> *Medina*, 505 U.S. at 446.

<sup>72</sup> *Id.* at 446.

<sup>73</sup> *Id.* at 447.

<sup>74</sup> *Id.* at 447–48.

<sup>75</sup> *Id.* at 446.

<sup>76</sup> *Medina*, 505 U.S. at 446.

<sup>77</sup> *Id.* at 453 ("[T]he challenged presumption is a restatement of the burden of proof, and it follows from what we have said that the presumption does not violate the Due Process Clause.").

<sup>78</sup> *Id.* at 439.

<sup>79</sup> *See supra* notes 63–64.

<sup>80</sup> *Medina*, 505 U.S. at 446 ("The analytical approach endorsed in *Patterson* is thus far less intrusive than that approved in *Matthews*.").

people”<sup>81</sup> existed against a defendant testifying to his own incompetence, the federal circuits would not be split, nor would the fifty states take various positions on the issue.<sup>82</sup> Thus, the analytical approach taken by the Supreme Court in *Medina* was not a heightened threshold for the California law to satisfy. Second, this deferential approach gives reason to believe that variation in the California law would similarly pass constitutional muster. For example, if the California law did not codify a presumption of competence but instead explicitly allocated the burden of proof to the government, the Supreme Court would again defer to the state legislature. This conclusion results from two circumstances: first, the *Medina* Court conceded that “there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence;”<sup>83</sup> and second, the Court acknowledged that states have “considerable expertise in matters of criminal procedure and criminal process.”<sup>84</sup> As a result, the Supreme Court in *Medina* was solely concerned with the constitutional adequacy of California state law, and the Court’s analysis cannot thereby be imputed to federal competency standards.<sup>85</sup>

#### B. *Cooper v. Oklahoma*

Approximately four years after *Medina*,<sup>86</sup> the United States Supreme Court was once more called upon to interpret state law competency standards in *Cooper v. Oklahoma*.<sup>87</sup> *Cooper* involved the defendant’s murdering of an eighty-six-year-old man during a burglary.<sup>88</sup> As in *Medina*, Cooper’s attorney raised the issue of his client’s incompetency before trial.<sup>89</sup> However, Cooper’s incompetency remained in question throughout the duration of the proceedings, as questions surrounding his competence were raised on five separate occasions.<sup>90</sup> Evidence of defendant’s incompetence included his belief that clothes

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<sup>81</sup> *Id.*

<sup>82</sup> *See infra* Parts IV, V.

<sup>83</sup> *Medina*, 505 U.S. at 446.

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 453 (“Rather, our rejection of petitioner’s challenge to § 1369(f) is based on a determination that California procedure is ‘constitutionally adequate’ to guard against such results.”).

<sup>86</sup> *Compare Medina v. California*, 505 U.S. 437 (1992) with *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

<sup>87</sup> 517 U.S. 348, 350 (1996).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 351.

<sup>90</sup> *Id.* at 350 (“On five separate occasions a judge considered whether petitioner [Cooper] has the ability to understand the charges against him and to assist defense counsel.”).

selected for him to wear during trial were burning him, an imaginary spirit was counseling him, and that his defense attorney wanted to kill him.<sup>91</sup> Despite this testimony, the Court repeatedly found that Cooper was competent to stand trial.<sup>92</sup> Expressing his reluctance, the trial judge stated: “My shirtsleeve opinion of Mr. Cooper is that he’s not normal. Now, to say he’s not competent is something else.”<sup>93</sup>

The contradiction between the trial judge’s statement and his decision to find the defendant competent to stand trial rested with Oklahoma’s competency statute. Similar to California’s mental competency statute, Oklahoma codified a presumption of competence.<sup>94</sup> However, a defendant in Oklahoma had the burden of proving his incompetence<sup>95</sup> by the heightened standard of clear and convincing evidence, not the “more likely than not” standard of the preponderance of the evidence in California.<sup>96</sup>

On appeal, the Court considered “whether a State may proceed with a criminal trial after the defendant has demonstrated that he is more likely than not incompetent.”<sup>97</sup> The Court noted that, “we are aware of no decisional law from this country suggesting that any State employed Oklahoma’s heightened standard until quite recently.”<sup>98</sup> Moreover, the Court noted that only four of the fifty states require a defendant to prove incompetence by the clear and convincing standard.<sup>99</sup> To accentuate that courts have not embraced the clear and convincing burden of proof when determining incompetence, the Court looked towards 18 U.S.C. § 4241 and stated: “The situation is no different in federal court. *Congress has directed that the accused in a federal prosecution must prove incompetence by a preponderance of the evidence.*”<sup>100</sup>

Any subsequent reliance on the Court’s statement in *Cooper* regarding the federal burden of proof is misplaced. First, the Supreme

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<sup>91</sup> *Id.* at 351–52 n.1.

<sup>92</sup> *Cooper v. Oklahoma*, 517 U.S. 348, 352 (1996).

<sup>93</sup> *Id.*

<sup>94</sup> Compare CAL. PENAL CODE ANN. § 1369(f) (“It shall be presumed that the defendant is mentally competent. . . .”) with OKLA STAT. tit. 22, § 1175.4(B) (1991) (“[The defendant] shall be presumed to be competent [to stand trial.]”)

<sup>95</sup> OKLA STAT. tit. 22, § 1175.4(B) (1991) (“[The defendant] shall be presumed to be competent for the purpose of the allocation of the burden of proof and burden of going forward with the evidence.”) (emphasis added).

<sup>96</sup> Compare CAL. PENAL CODE ANN. § 1369(f) (“unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.”) with OKLA STAT. tit. 22, § 1175.4(B) (1991) (“The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent.”).

<sup>97</sup> *Cooper*, 517 U.S. at 355.

<sup>98</sup> *Id.* at 359.

<sup>99</sup> *Id.* at 360.

<sup>100</sup> *Id.* at 361–62 (emphasis added).

Court's statement is unconvincing because it is obiter dictum, or that "said in passing."<sup>101</sup> Cooper's appeal to the Supreme Court challenged the constitutionality of the heightened clear and convincing evidence standard that Oklahoma codified as necessary to prove incompetency.<sup>102</sup> Concluding that the clear and convincing standard violated due process,<sup>103</sup> the Court conducted a survey of what standard of proof Oklahoma's sister states had enacted.<sup>104</sup> After determining that only four of the fifty states required clear and convincing evidence,<sup>105</sup> the Court further noted that the federal competency statute only required a preponderance of the evidence.<sup>106</sup> Drawing upon the federal competency statute served as a corollary to the permissible constitutional standard of proof—not a discussion of which party should bear that burden. In fact, unlike *Medina*, *Cooper* never established that requiring a defendant to prove his own incompetence, regardless of the standard of proof, violates the Due Process Clause. Hence, "this language from *Cooper* is dict[um] because the case dealt with *state burdens of proof* in competency hearings, not with the federal statutes establishing the standards and procedures for competency hearings in federal court."<sup>107</sup>

Second, although in certain instances Supreme Court dictum can be authoritative,<sup>108</sup> this is not one of those occasions. To determine the weight given to dictum, the inquiry focuses on the "character of the dictum."<sup>109</sup> Obiter dictum, which carries light weight, is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."<sup>110</sup> Conversely, if the Supreme Court's dictum is considered "of recent vintage and not enfeebled by any subsequent statement," it can bind federal circuit courts.<sup>111</sup> The Supreme Court's statement in *Cooper* must be categorized as unpersuasive and non-influential obiter dictum. The District of Arizona appropriately summarized this conclusion by recognizing that the Supreme Court in *Cooper* failed to scrutinize or

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<sup>101</sup> BLACK'S LAW DICTIONARY 1177 (9th ed. 2009).

<sup>102</sup> *Cooper*, 517 U.S. at 350.

<sup>103</sup> *Id.* at 362.

<sup>104</sup> *Id.* at 359.

<sup>105</sup> *Id.* at 360.

<sup>106</sup> *Id.* at 360–62.

<sup>107</sup> *United States v. Sanchez*, 38 F.Supp. 2d 355, 368 (D.N.J. 1999) (emphasis added).

<sup>108</sup> *Patel*, 524 F.Supp.2d at 111.

<sup>109</sup> *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (quoting CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PRACTICE § 58 (4<sup>th</sup> ed. 1983)).

<sup>110</sup> BLACK'S LAW DICTIONARY 1177 (9th ed. 2009).

<sup>111</sup> *McCoy*, 950 F.2d at 19.

evaluate the federal competency statute.<sup>112</sup> In short, the Supreme Court's assertion that "Congress has directed that the accused in a federal prosecution must prove his incompetence"<sup>113</sup> was incidental to the broad comparison of Oklahoma's standard of proof to the remaining forty-nine states.

Therefore, neither *Medina* nor *Cooper* provides an appropriate foundation for concluding that the federal burden of proof for competency hearings rests with the defendant. First, the Supreme Court did not grant certiorari in *Medina* and *Cooper* to address the constitutionality of the federal competency statute, 18 U.S.C. § 4241.<sup>114</sup> On the contrary, the only reviewed statutes were state statutes of California and Oklahoma.<sup>115</sup> Moreover, these state statutes are distinct from 18 U.S.C. § 4241, as both the California and Oklahoma statutes codified a presumption of competence<sup>116</sup> and established the allocation of the burden of proof to one party.<sup>117</sup> Second, the deferential review exhibited in *Medina*<sup>118</sup> is inappropriate for determining which party bears the federal burden of proof when there is an absence of delegation. Finally, *Cooper*'s one sentence reference to 18 U.S.C. § 4241 served one narrow purpose: to strengthen the Court's position that the clear and convincing evidence standard of proving incompetence is not customary practice in the American court system.<sup>119</sup> Accordingly, the answer to which party bears the federal burden of proof cannot be found in Supreme Court precedent.

#### IV. THE CIRCUITS' ATTEMPTS TO DETERMINE WHICH PARTY BEARS THE FEDERAL BURDEN OF PROOF

Due to the lack of statutory placement,<sup>120</sup> unsupportive legislative history,<sup>121</sup> and no binding United States Supreme Court decision,<sup>122</sup> the circuits that have addressed the issue are split as to which party bears the burden of proof.<sup>123</sup>

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<sup>112</sup> *United States v. Dodds*, 2006 U.S. Dist. LEXIS 13251 at \*2 n.1 (D.Az. Mar. 24, 2006).

<sup>113</sup> *Cooper*, 517 U.S. at 362.

<sup>114</sup> *Medina*, 505 U.S. at 439.

<sup>115</sup> *See Id.* at 445; *Cooper*, 517 U.S. at 362.

<sup>116</sup> *See supra* note 95.

<sup>117</sup> *Medina*, 505 U.S. at 440. *See supra* note 96.

<sup>118</sup> *See supra* Part III.A.

<sup>119</sup> *See supra* note 100.

<sup>120</sup> *See supra* Part II.A.

<sup>121</sup> *See supra* Part II.B.

<sup>122</sup> *See supra* Parts III.A, III.B.

<sup>123</sup> *Patel*, 24 F.Supp. 2d at 112.

The Third,<sup>124</sup> Fifth,<sup>125</sup> and Ninth<sup>126</sup> Circuits have explicitly placed the burden of proof on the government to demonstrate the defendant's competence. Referencing simple logic, the Third Circuit stated that "it would be both basically unfair as well as contradictory to say that a defendant who claims he is incompetent should be presumed to have the mental capacity to show that he in fact is incompetent."<sup>127</sup> In contrast, the Fourth<sup>128</sup> and Eleventh<sup>129</sup> Circuits place the burden of proof on the defendant to prove his incompetence. Unlike the Third Circuit, neither the Fourth nor Eleventh Circuits offer any analytical reasoning for their decisions. Instead, both Circuits merely reference<sup>130</sup> Supreme Court dictum in *Cooper v. Oklahoma* that "in [a] federal prosecution [the defendant] must prove incompetence. . . ."<sup>131</sup>

Besides the Third, Fourth, Fifth, Ninth, and Eleventh Circuits, the remaining circuits have either not officially considered the burden of proof issue,<sup>132</sup> declined to address the issue,<sup>133</sup> or struggled with an intra-circuit split.<sup>134</sup>

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<sup>124</sup> *United States v. Velasquez*, 885 F.2d 1076, 1089 (3d Cir. 1989); *United States v. Hollins*, 569 F.2d 199, 205 (3d Cir. 1977); *United States v. DiGilio*, 538 F.2d 972, 986-88 (3d Cir. 1976). Although *Hollins* and *DiGilio* are pre-1984, and thus pre-CCCA, for the purposes of this comment old § 4244 is the functional equivalent of current § 4241 as the burden of proof was not allocated in old § 4244. *See supra* Part II.B.

<sup>125</sup> *Lowenfield v. Phelps*, 817 F.2d 285, 294 (5th Cir. 1987); *United States v. Makris*, 535 F.2d 899, 906 (5th Cir. 1976). Although *Makris* is pre-1984, and thus pre-CCCA, for the purposes of this comment old § 4244 is the functional equivalent of current § 4241 as the burden of proof was not allocated in old § 4244. *See supra* Part II.B.

<sup>126</sup> *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1990).

<sup>127</sup> *Hollins*, 569 F.2d at 205.

<sup>128</sup> *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005).

<sup>129</sup> *Izquierdo*, 448 F.3d at 1278.

<sup>130</sup> *Robinson*, 404 F.3d at 856 (citing *Cooper*, 517 U.S. at 362); *Izquierdo*, 448 F.3d at 1277 (citing *Cooper*, 517 U.S. at 362).

<sup>131</sup> *Cooper*, 517 U.S. at 362.

<sup>132</sup> *See United States v. Sanchez-Gonzalez*, 109 Fed. Appx. 287, 290 (10th Cir. Sept. 9, 2004) (unpublished Tenth Circuit case relying on *Cooper* to establish that the defendant bears the burden of proving incompetence); *United States v. Siders*, 2008 U.S. Dist. LEXIS 3780, at \*2 (N.D. Iowa Jan. 17, 2008) (unpublished district court case within the Eight Circuit relying on a Seventh Circuit case to establish that the government bears the burden of proving competency); *Patel*, 524 F.Supp.2d at 110 ("[T]he First Circuit does not appear to have considered the burden of proof issue."); *United States v. Hoyt*, 200 F. Supp. 2d 790, 792 (N.D. Ohio 2002) (relying on an unpublished Sixth Circuit case, *United States v. Chapple*, 47 F.3d 1170 (6th Cir. 1995) to establish that the government bears the burden of proving competence); *United States v. Rudisill*, 43 F. Supp. 2d 1, 7 (D.D.C. 1999) (relying on *Cooper* to establish that the defendant bears the burden of proving incompetence).

<sup>133</sup> *See United States v. Nichols*, 56 F.3d 403, 410 (2d Cir. 1995) ("The federal statute providing for competency hearings does not allocate the burden of proof, and neither the Supreme Court nor this Court has decided as a matter of statutory construction whether

V. THE STATES' ATTEMPTS TO ALLOCATE THE BURDEN OF PROOF IN  
STATE COMPETENCY HEARINGS

The dispute over which party bears the burden of proof in competency hearings is not limited to the federal circuit courts but is also prevalent in state legislatures and state courts. A current survey of the states affirms the Court's recognition in *Medina*, over seventeen years ago,<sup>135</sup> that there is "no settled tradition" among the states regarding which party bears the burden of proof in state competency hearings.<sup>136</sup>

Beginning with states that allocate the burden of proof to the *criminal defendant*, Oklahoma is the only state that has codified such placement.<sup>137</sup> The remaining eleven states that force the defendant to bear the burden of proving his incompetence have done so through common-law creation.<sup>138</sup>

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the government or defendant bears the burden. We decline, however, to reach this issue today.").

<sup>134</sup> Compare *United States v. Morgano*, 39 F.3d 1358, 1373 (7th Cir. 1994) ("The starting point in all this is the notion that a criminal defendant is presumed to be competent to stand trial and bears the burden of proving otherwise.") with *United States v. Teague*, 956 F.2d 1427, 1432 n.10 (7th Cir. 1992) ("We note that once the issue of the defendant's mental competency is raised, the government bears the burden of proving that the defendant is competent to stand trial.").

<sup>135</sup> *Medina v. California*, 505 U.S. 437, 439 (1992).

<sup>136</sup> See *Id.* at 446.

<sup>137</sup> OKLA. STAT. tit. 22, § 1175.4(B) (2009).

<sup>138</sup> See *Lackey v. State*, 615 So. 2d 145, 151–52 (Ala. Crim. App. 1992) ("The defendant bears the initial burden . . ."); *Lipscomb v. State*, 609 S.W.2d 15, 17 (1980) ("There is a presumption of competence to stand trial, and the burden of proof of incompetence is on the defendant."); *Johnson v. State*, 433 S.E.2d 717, 719 (Ga. Ct. App. 1993) ("The burden was upon defendant to show incompetency by a preponderance of the evidence."); *State v. Holmes*, 5 So. 3d 42, 55 (La. 2008) ("Thus, the burden is upon the accused to establish by a preponderance of the evidence that the mental incapacity exists."); *State v. Hansen*, 174 N.W.2d 697, 699 (Minn. 1970); *Emanuel v. State*, 412 So. 2d 1187, 1888 (Miss. 1982) ("It naturally devolves upon the defendant to go forward with the evidence to show his probable incapacity to make a rational defense."); *State v. Chapman*, 721 P.2d 392, 395 (N.M. 1986) ("This Court has previously determined that there is no impropriety in requiring an accused to carry this burden [of proving his incompetence to stand trial]."); *States v. Gates*, 309 S.E.2d 498, 502 (N.C. Ct. App. 1983) ("Defendant has the burden of persuasion with respect to establishing his incapacity."); *McLaughlin v. State*, 575 S.E.2d 841, 843 (S.C. 2003) ("The defendant bears the burden of proving his incompetence by a preponderance of the evidence."); *State v. Reid*, 164 S.W.3d 286, 306–07 (Tenn. 2005) ("The burden of establishing incompetence to stand trial rests with the defendant."); *Jackson v. State*, 857 S.W.3d 678, 680 (Tex. App. 1993) ("An accused is presumed competent unless she proves her incompetence to stand trial by a preponderance of the evidence.").

Conversely, Illinois,<sup>139</sup> South Dakota,<sup>140</sup> and Wisconsin<sup>141</sup> have each codified the requirement that the *state* is required to prove defendant's competence to stand trial. Six states, through judicial decree, share the opinions of Illinois, South Dakota, and Wisconsin.<sup>142</sup> Cumulatively, twenty-one states have allocated the burden of proof through codification or common-law.

Two options remain in those states where the burden of proof has not been allocated. First, states have elected to place the burden of proof on the party raising the issue of competency. Nine states<sup>143</sup> have reached this position through statutory creation, while four states<sup>144</sup> have reached

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<sup>139</sup> 725 ILL. COMP. STAT. ANN. 5/104-11(c) (LexisNexis 2009) (“[T]he burden of proving that the defendant is fit by a preponderance of the evidence and the burden of going forward with the evidence are on the State.”).

<sup>140</sup> S.D. CODIFIED LAWS § 23A-10A-6.1 (2009) (“If the defendant, state, or court asserts that a defendant is mentally incompetent to proceed, the state has the burden of proving the mental competence of the defendant by a preponderance of the evidence.”).

<sup>141</sup> WISC. STAT. § 971.14(4)(b) (2009) (“If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent.”).

<sup>142</sup> See *Diaz v. State*, 508 A.2d 861, 863 (Del. 1986) (“The prosecution must prove the defendant’s competence by a preponderance of the evidence.”); *Commonwealth v. Crowley*, 471 N.E.2d 353, 357 (Mass. 1984) (“The prosecution bears the burden of proof of competency once the issue has been raised by the parties or by the judge on his own motion.”); *State v. Zorzy*, 622 A.2d 1217, 1219 (N.H. 1993) (“The State has the burden of proving by a preponderance of evidence that the defendant is competent to stand trial.”); *State v. Lambert*, 645 A.2d 1189, 1191 (N.J. Super. Ct. App. Div. 1994) (“Once a defendant raises a bona fide doubt as to competency, the burden rests with the State to establish competency to stand trial by a preponderance of the evidence.”); *People v. Santos*, 349 N.Y.S.2d 439, 442 (N.Y. App. Div. 1973) (“[W]hen the issue of mental competence to stand trial is properly raised the People are only required to establish that competence by a preponderance of the evidence.”); *State v. Heger*, 326 N.W.2d 855, 858 (N.D. 1982) (“[T]he prosecution has the burden to establish a defendant’s capacity to stand trial.”);

<sup>143</sup> See ALASKA STAT. § 12.47.100(c) (2009); COLO. REV. STAT. § 16-8.5-103(7) (2009); CONN. GEN. STAT. § 54-56d(b) (2008); IOWA CODE § 812.3 (2008); MO. REV. STAT. § 552.020(8) (2009); 50 PA. STAT. ANN. § 7403(a) (2009); R.I. GEN. LAWS § 40.1-5.3-3(b) (2009); UTAH CODE ANN. § 77-15-5(10) (2009); VA. CODE ANN. § 19.2-169.1(E) (2009).

<sup>144</sup> See *Medina v. California*, 506 U.S. 437, 440 (1992) (California courts have interpreted their competency statute to force the “party claiming incompetence [to] bear[] the burden of proving that defendant is incompetent by a preponderance of the evidence.”); *State v. Barnes*, 948 P.2d 627, 637 (Kan. 1997) (the Kansas statute “implicitly contains a . . . burden of proof imposed on the party raising the competency issue.”); *State v. Lott*, 779 N.E.2d 1011, 1016 (Ohio 2002) (“Thus, one who challenges the presumption of sanity or competence must bear the burden of proof to challenge that presumption.”); *Loomer v. State*, 768 P.2d 1042, 1045 (Wyo. 1989) (“[T]he burden of proof by a preponderance of evidence rests on the party seeking to establish that the accused is competent.”).

the same conclusion through their courts. Second, the residual states<sup>145</sup> have left the determination of competency as a discretionary matter to the courts.

At best, a survey of the states illustrates a lack of uniformity. Similar to the inquiry behind the legislative history of 18 U.S.C. § 4241 and Supreme Court analysis, the approaches taken by the states provides little guidance in allocating the federal burden proof in competency hearings.

#### VI. THE SUBSTANTIVE STANDARDS OF 18 U.S.C. § 4241 REQUIRE PLACEMENT OF THE BURDEN OF PROOF ON THE GOVERNMENT

Despite the lack of legislative history, non-binding Supreme Court authority, and debate in the state courts and the federal circuit courts, the proper allocation of the federal burden of proof is nonetheless determinable. Pursuant to § 4241, a motion to conduct a mental competency hearing<sup>146</sup> and the ultimate decision to commit the defendant for treatment<sup>147</sup> are predicated on two concerns: the defendant's inability to "understand the nature and consequences of the proceedings against him" or inability to "assist properly in his defense."<sup>148</sup> These two factors in § 4241 demonstrate that Congress was concerned with the defendant's ability to furnish his counsel with evidence adducing his mental state, the risk of error if the defendant was forced to bear the burden of proof, and the overall fundamental fairness to the adversary system. These three considerations—access to evidence, risk of error, and fundamental fairness—collectively demonstrate that the government must bear the burden of proving competence in federal competency hearings.

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<sup>145</sup> See ARIZ. REV. STAT. ANN. § 13-4510 (LexisNexis 2008); HAW. REV. STAT. § 704-405 (2009); IDAHO CODE ANN. § 18-212(1) (2009); ME. REV. STAT. ANN. tit. 15, § 101-B (2009); MD. CODE ANN., CRIM. PROC. § 3-104 (West 2009); MICH. COMP. LAWS § 330.2020 (2009); MONT. CODE ANN. § 46-14-221 (2009); NEV. REV. STAT. ANN. § 178.415(4) (LexisNexis 2009); OR. REV. STAT. § 161.370(1) (2007); VT. STAT. ANN. tit. 13, § 4822(a) (2009); W. VA. CODE ANN. § 27-6A-3(c) (LexisNexis 2009); *Flowers v. State*, 353 So. 2d 1259, 1260 (Fla. Dist. Ct. App. 1978) ("The matter is one simply submitted to the conscience of the trial judge."); *Wallace v. Indiana*, 486 N.E.2d 445, 454 (Ind. 1985) ("[T]he only burden which exists rests on the trial judge to satisfy himself that the accused is or is not competent to stand trial."); *Commonwealth v. Wooten*, 269 S.W.3d 857, 863 (Ky. 2008) ("The trial court makes the ultimate determination of whether a defendant is competent to stand trial."); *State v. Johnson*, 4 Neb. App. 776, 787 (Neb. Ct. App. 1996) ("Competency to stand trial is a factual determination and the means to be employed to determine competency are discretionary with the district court.").

<sup>146</sup> 18 U.S.C. § 4241(a) (2006).

<sup>147</sup> *Id.* § 4241(d)

<sup>148</sup> *Id.* §§ 4241(a); 4241(d).

*A. Access to Evidence*

A categorical statement asserting that defense counsel has the greatest access to evidence to prove his client's incompetence must be dismissed. At first glance, this may challenge logic—if the defense counsel cannot prove the incompetence of *its own client*,<sup>149</sup> how is the government in a better position to present evidence of the defendant's competence? The answer is rooted in the principle that psychiatric experts and prison personnel, not lawyers, are the most persuasive individuals in establishing or disproving competency for the trier of fact.<sup>150</sup>

A lawyer's input regarding his client's mental state is not an appropriate avenue for the court. First, ethical responsibilities or attorney-client privilege may serve as preemptive obstacles against an attorney testifying to his client's competency.<sup>151</sup> Second, even if an attorney were to testify, his testimony "is far more likely to be discounted by the fact-finder as self-interested and biased" when compared to that of a medical specialist.<sup>152</sup> Thus, a lawyer's testimony serves little probative value,<sup>153</sup> as "competency determinations have been virtually delegated to mental health professionals, whose opinions are given little scrutiny by the courts. Often, courts are given little or no additional information for judging the competency of a defendant."<sup>154</sup> In fact, it has been documented that mental health professional recommendations have a judicial acceptance rate of ninety percent.<sup>155</sup>

In a *Medina* concurrence, Justice O'Connor recognized the significant role mental health professionals play in the competency determination but cautioned that "[i]f the burden of proving competence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive

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<sup>149</sup> *Medina*, 450 U.S. at 450.

<sup>150</sup> *Id.* at 465-66 (Blackmun, J., dissenting).

<sup>151</sup> *Id.*; see also James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 556 (1998) ("It is not the lawyer's function to impose her view of what is in the client's best interest. The agency relationship requires a principal who is competent; the attorney, therefore, is not authorized to act when she has a reasonable belief that the principal is incompetent.").

<sup>152</sup> *Medina*, 505 U.S. at 466 (Blackmun, J., dissenting).

<sup>153</sup> *Id.* at 455-56 (The "lawyer's view will likely have no outlet in, or effect on, the competency determination.").

<sup>154</sup> Cohen, *supra* note 151, at 544.

<sup>155</sup> *Medina*, 505 U.S. at 465 (Blackmun, J., dissenting); see also Grant Morris et al., *Health Law in the Criminal Justice Symposium: Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 199 n.28 (2004) (noting a ninety percent concurrence rate between judges and mental health evaluators).

examination will benefit the defense, not the prosecution.”<sup>156</sup> Justice O’Connor’s concern is misplaced because prison personnel can supplement mental health professionals’ recommendations and there is no federal presumption of competency.

In dissent, Justice Blackmun stressed the importance of prison personnel testimony when a psychiatric investigation may not be sufficient.<sup>157</sup> In *Medina*, the criminal defendant was held in jail for a period exceeding one year prior to his competency hearing.<sup>158</sup> During the time immediately preceding the competency hearing, Medina was placed in a padded cell for observation.<sup>159</sup> As a result, prison personnel had the opportunity to survey Medina’s behavior in reoccurring fifteen-minute intervals.<sup>160</sup> Therefore, prison personnel had the opportunity to neutrally observe a defendant’s behavior *before* psychiatric examinations were even conducted. The importance of this surveillance cannot be minimized; if a defendant exhibits certain behavior with a psychiatrist but displays the near opposite conduct while incarcerated—whether in situations like Medina’s or in the standard incarceration setting—prison personnel can testify to any discrepancies at the competency hearing.

Moreover, concerns regarding improper motives are not sufficiently compelling when no federal presumption of competency has been codified. The suggestion that a “defendant will have less incentive to cooperate”<sup>161</sup> when the government bears the burden of establishing competency makes two assumptions: (1) the defendant is competent, as the California state law in *Medina* and Oklahoma state law in *Cooper* dictate,<sup>162</sup> and (2) the competent defendant mischievously comports his behavior to portray incompetence solely for the purpose of delaying the criminal trial. The first assumption is detrimental, as accepting this line of reasoning would require the federal courts to assume a crucial precondition not delineated in 18 U.S.C. § 4241. By not recognizing a presumption of competence, the federal statute thereby places all defendants, whether truly incompetent or not, on uniform grounds. Thus, federal concern over deceit is adequately addressed through the trier of fact’s determination of competency from expert medical and prison personnel testimony, based on a preponderance of the evidence.

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<sup>156</sup> *Medina*, 505 U.S. at 455 (O’Connor, J., concurring).

<sup>157</sup> *Id.* at 465 (Blackmun, J., dissenting).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See supra* note 95.

*B. Risk of Error*

The substantive standards of 18 U.S.C. § 4241—the defendant’s inability to “understand the nature and consequences of the proceedings against him” or to “assist properly in his defense”<sup>163</sup>—demonstrate that Congress was gravely concerned with improperly forcing the defendant to bear the risk of error. As the defendant’s interest against an erroneous conclusion outweighs any burden the state may face in postponing the trial,<sup>164</sup> the government must accordingly bear the federal burden of proving defendant’s competence.

At the conclusion of a mental competency hearing, if the judge declares a defendant mentally competent to understand the proceedings against him and assist his attorney in his defense,<sup>165</sup> then the trial proceeds as scheduled. However, if the defendant fails to meet the threshold requirements of competency, the trial is merely postponed.<sup>166</sup> The trial is not postponed indefinitely, but for a “reasonable period of time, not to exceed four months” in order for the defendant to receive treatment to regain competence.<sup>167</sup> As a result, by placing the risk of error on the government, the government’s inability to establish competency will not have prejudicial effects on the government; neither the merits nor the facts of the case change. Accordingly:

[T]here is comparatively little harm in mistakenly finding a defendant incompetent, for he will simply be sent to a state mental health hospital until found sane and then re-tried. In other words, an erroneous finding of incompetency will do little more than postpone the trial. Although somewhat burdensome to the state, *this is far less costly than convicting a defendant unable to assist in or understand his defense.*<sup>168</sup>

In *Medina*, the Court noted 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.”<sup>169</sup> Under that scenario, the court’s

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<sup>163</sup> 18 U.S.C. § 4241(a); *Id.* § 4241(d).

<sup>164</sup> *See Cooper*, 517 U.S. at 365.

<sup>165</sup> 18 U.S.C. § 4241(a).

<sup>166</sup> *Id.* § 4241(d).

<sup>167</sup> *Id.* § 4241(d). The reasonable period of time can be extended beyond four months if the defendant’s condition has not improved, or the government drops the charges against him. *Id.* § 4241(d)(2)(A)–(B).

<sup>168</sup> Alaya B. Meyes, *Supreme Court Review: Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence*, 87 J. CRIM. L. & CRIMINOLOGY 1016, 1039 (1996) (emphasis added).

<sup>169</sup> *Medina*, 505 U.S. at 449 (emphasis added).

finding is directly related to the party bearing the burden of proof. For example, in *Medina* the defendant bore the burden of proving his incompetence by a preponderance of the evidence.<sup>170</sup> At the conclusion of the competency hearing, had the evidence been in equipoise, Medina would have failed to meet his burden of proof. As a result, the trial would have proceeded, despite the possibility that the defendant *may* have been incompetent. In such a “narrow class of cases,”<sup>171</sup> the defendant should not be faulted because the evidence is in equipoise. Forcing a potentially incompetent defendant to be tried creates a greater societal harm than the added financial expense of hospitalizing a competent defendant for “a reasonable period of time.”<sup>172</sup> As a result, cases in equipoise amplify the need for the government to bear the risk of error.

### C. Risk of Error and a Comparison to the Insanity Defense

Prior to the enactment of the CCCA, the federal defense of insanity was a federal common-law creation.<sup>173</sup> Accordingly, “[u]nder federal common law, the *government* had the burden of proving *beyond a reasonable doubt* that the defendant was sane at the time of the offense.”<sup>174</sup> This practice reached its pinnacle in 1984 after John Hinckley, Jr. was acquitted for his plot to assassinate then-President Ronald Regan, as the government failed to establish Hinckley’s sanity.<sup>175</sup> The public was outraged with the acquittal as “[n]ewspapers and television commentators almost unanimously condemned both the verdict and the law that permitted it” and “[n]umerous political figures, including Attorney General Smith and President Reagan, issue[d] statements” attacking the jury’s finding.<sup>176</sup> Thus, Hinckley’s acquittal served as a catalyst for Congress to drastically reform the insanity defense through the IDRA.<sup>177</sup> The IDRA created a special verdict if the defense of insanity was raised—“not guilty only by reason of

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<sup>170</sup> *Id.* at 440 (citing CAL. PENAL CODE ANN. § 1369(f) (West 1982)).

<sup>171</sup> *Id.*

<sup>172</sup> 18 U.S.C. § 4241(d)(1).

<sup>173</sup> Rick L. Sorensen, *Shannon v. United States: Supreme Court Determines Whether Federal Courts Should Instruct Juries on the Consequences of a Not Guilty by Reason of Insanity Verdict*, 21 J. CONTEMP. L. 365, 369 (1995).

<sup>174</sup> *Id.* (emphasis added).

<sup>175</sup> Shari N. Spitz, *Psychiatric and Psychological Examination for Sentencing: An Analysis of Caselaw from the Second Circuit in Comparison with Other Federal Circuits and the Governing Federal Statutes*, 6 QUINNIPIAC HEALTH L.J. 133, 137 (2003).

<sup>176</sup> Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded In Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. REV. 943, 946–47 (1987).

<sup>177</sup> Sorensen, *supra* note 173 at 370.

insanity.”<sup>178</sup> This verdict could now only be reached if the *defendant* proved his insanity through clear and convincing evidence.<sup>179</sup>

Congressional response to the Hinckley acquittal has two influential effects on the risk of error analysis for 18 U.S.C. § 4241. First, the IDRA’s explicit allocation of the burden of proof to defendant when raising the insanity defense demonstrates that Congress, if warranted, *will* explicitly place the burden of proof on the defendant. In direct contrast, when amending former § 4244 to current § 4241, Congress could have similarly placed the burden of proof on the defendant but chose not to do so. As a result, placing the risk of error on the government to establish the defendant’s competency under 18 U.S.C. § 4241 does not offend Congressional intent. Second, allocating the risk or error to the government for federal competency hearings is plainly distinct from the pre-CCCA common law insanity defense. Forcing the government to establish sanity beyond a reasonable doubt was simply an “untenable position” for the government to maintain.<sup>180</sup> After Hinckley’s acquittal, “interviews with the jurors . . . suggested that this burden of proof was a critical factor in their decision to find Hin[c]kley not guilty. . . . This suggests that if the burden of proof had been on Hin[c]kley, the jury would have produced a different result.”<sup>181</sup> In direct comparison, allocating the risk of the loss to the government in a federal competency hearing, based on the *less* demanding preponderance of the evidence standard, will not result in an unworkable standard for the government. Moreover, forcing the government to bear the risk of error on competency will merely result in the trial’s delay,<sup>182</sup> while failure to satisfy the pre-CCCA standard will terminate the trial.<sup>183</sup> Accordingly, the lower standard of proof and ultimate consequences of failing to meet that standard act as mitigating factors to opponents of placing the burden of proof on the government for federal competency hearings.

#### *D. Fundamental Fairness*

The Third, Fifth, and Ninth Circuits have explicitly allocated the burden of proof to the government to establish defendant’s competence, while the Fourth and Eleventh Circuits have forced the defendant to bear the burden of proving his incompetence.<sup>184</sup> Analysis of these circuits’

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<sup>178</sup> 18 U.S.C. § 4242(b)(3) (2006).

<sup>179</sup> 18 U.S.C. § 17(b) (2006).

<sup>180</sup> FEINBERG, *supra* note 35, at 332.

<sup>181</sup> FEINBERG, *supra* note 35, at 332–33.

<sup>182</sup> *See* 18 U.S.C. § 4241(e) (2006).

<sup>183</sup> *See* Spitz, *supra* note 175.

<sup>184</sup> *See supra* Part IV.

decisions conclusively demonstrates that placing the burden of proof on the government to establish a defendant's incompetence most accurately upholds notions of fundamental fairness.

The Third Circuit, one of the three circuits that place the burden of proof on the Government to establish competence, proffered discussion of fundamental fairness in its reasoning. Specifically, the Third Circuit concluded that "[i]t is equally contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp."<sup>185</sup> In other words, forcing the person whose incompetence is in question to prove his incompetence is "both basically unfair as well as contradictory."<sup>186</sup> The Third Circuit's recognition that placing the burden of proof on the defendant to prove his competence is amplified by the traditional reluctance of the courts "to require a party to prove negatives."<sup>187</sup>

Unfortunately, the Fourth and Eleventh Circuits offer no descriptive analysis to rebut the Third Circuit. Instead, *both* the Fourth and Eleventh Circuits quickly dispose of *any* analysis or original contemplation by mechanically deferring to *Cooper* as their controlling authority.<sup>188</sup> The reference of a non-binding Supreme Court opinion that referred to the federal incompetency statute in obiter dictum, without more, fails to illustrate why subsequent adherence to Fourth and Eleventh Circuits must follow. Based on the Fourth and Eleventh Circuit's indifference, the Third Circuit's logical reasoning is the final consideration to demand that the government must bear the federal burden of proving a criminal defendant's incompetence.

## VII. CONCLUSION

If confronted with the 18 U.S.C. § 4241 circuit split, the Supreme Court will have the opportunity to craft a decision from a clean slate. Without prior precedent, the Supreme Court is not strictly constrained to implement a decision that is deferential<sup>189</sup> or merely "adequate."<sup>190</sup> Instead, by analyzing the substantive standards of the statute, the Court can more easily consider the role of access to evidence, risk of error, and

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<sup>185</sup> *DiGilio*, 538 F.2d at 988.

<sup>186</sup> *Hollins*, 569 F.2d at 205.

<sup>187</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 286 (1973).

<sup>188</sup> *See Robinson*, 404 F.3d at 856 (citing *Cooper*, 517 U.S. at 362); *Izquierdo*, 448 F.3d at 1277 (citing *Cooper*, 517 U.S. at 362).

<sup>189</sup> *Medina*, 505 U.S. at 446.

<sup>190</sup> *See supra* note 86.

fundamental fairness.<sup>191</sup> These considerations overwhelmingly illustrate that a criminal defendant cannot be required to demonstrate his own incompetence, warranting a departure from *Cooper's* dictum.<sup>192</sup>

This approach is consistent with legislative intent. Although one may wonder how legislative intent can be inferred without a detailed Senate Report,<sup>193</sup> the answer goes beyond the congressional debate surrounding the CCA reform. In its place, advocates of criminal defendants' rights need not look further than the initial principles announced by Blackstone, furthered by the passage of the Fourteenth Amendment, and later reinforced by Chief Justice Burger's assertion in *Drope v. Missouri*.<sup>194</sup> With these factors in mind, the question becomes: how can one argue that a defendant is required to prove his own incompetence to stand trial when "[t]he legal doctrine against the trial of an incompetent defendant is firmly rooted in English and American legal history[?]"<sup>195</sup> The answer is: one cannot.

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<sup>191</sup> See *supra* Parts VI.A–D.

<sup>192</sup> *Cooper*, 517 U.S. at 350.

<sup>193</sup> See *supra* note 53.

<sup>194</sup> See *supra* Part I.

<sup>195</sup> See *supra* note 10.