COMMENT

PRO SE PATERNALISM: THE CONTRACTUAL, PRACTICAL, AND BEHAVIORAL CASES FOR AUTOMATIC REVERSAL

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INTRODUCTION

Johnnie Cochran, Robert Shapiro, and F. Lee Bailey all became famous as criminal defense attorneys. Television dramas depicting the high-stakes world of criminal trials, focusing on charismatic lawyers winning difficult cases, continue to captivate audiences around the country.[1] Outside of the bright lights of Hollywood, however, the protagonists of these courtroom dramas often play little role at trial. Instead, when faced with the complexities and uncertainty of criminal trials, an increasingly large number of defendants choose to forgo the assistance of a lawyer.[2] While defendants' reasons for representing themselves are as varied as the charges levied against them, doing so consistently creates headaches for all parties involved.[3] And where a pro se defendant's behavior at trial raises questions about his competence, these headaches can quickly become more serious.

This Comment examines the situation in which a pro se defendant's behavior raises questions about his own competence during trial. Is this defendant, otherwise proceeding pro se, required to have the assistance of counsel at his own competency hearing? Every federal court of appeals to consider this question has answered in the affirmative and has held that failing to provide such assistance is constitutional error.[4] However, the courts of appeals are split in deciding the proper remedy for this error. This Comment argues that by examining the different remedies courts have used from contractual, practical, and behavioral perspectives, granting an automatic reversal emerges as the best option available. When the lights go out and

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1 *See, e.g.*, Stephanie Francis Ward, *The 25 Greatest Legal TV Shows*, ABA JOURNAL (Aug. 1, 2009, 11:50 PM), http://www.abajournal.com/magazine/article/the_25_greatest_legal_tv_shows/, *archived at* http://perma.cc/H63E-ZZW8 ("From Perry Mason to Leland McKenzie, Jack McCoy to Patty Hewes, lawyers have been among the most durable and popular characters on the small screen.").

2 *See* Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearances for Such Attorneys*, 92 MARQ. L. REV. 103, 107 (2008) ("Courts . . . have experienced significant growth in the number of pro se litigants appearing before them in recent years.").

3 *See* Paula J. Frederick, *Learning to Live with Pro Se Opponents*, GPSOLO, Oct.–Nov. 2005, at 48, 50 ("Unfortunately, from a lawyer's perspective, opposing a pro se litigant often means additional headaches.").

4 *See infra* Part II.

the television cameras are gone, a bit of pro se paternalism may preserve the liberty and save the lives of defendants facing trial on their own.

In Part I, this Comment explains the origin of the right to counsel under the Sixth Amendment. After tracing the right's history and rationale, the concept of a "critical stage"—a stage of a criminal proceeding in which the guarantees of the Sixth Amendment are implicated—is examined more closely. In Part II, this Comment discusses whether a defendant's competency hearing should be characterized as a "critical stage." After explaining that every court of appeals to consider the question has answered it in the affirmative, the Comment turns to the issue of the appropriate remedy for the deprivation of counsel at a competency hearing. Part III examines the current circuit split over the proper remedy for a competency-stage deprivation and uses two courts of appeals cases to demonstrate the different remedy decisions courts have made. Part IV provides affirmative justifications for choosing automatic reversal to remedy competency-stage deprivations. Finally, Part V acknowledges and responds to potential criticisms of automatic reversals in the competency hearing context.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

To someone unfamiliar with the U.S. Constitution, the idea that a court would provide a defendant with representation seems strange. Indeed, in the criminal context, the government itself is the adversary in court seeking to deprive the defendant of his liberty. Therefore, a historical background of the right to counsel and related concepts is necessary before one can understand the more nuanced context of competency stage deprivations.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[5] The Supreme Court has traditionally provided two justifications for this right.[6] First, by providing counsel to criminal defendants, the imbalance between the accused and the government within our adversarial system is minimized.[7] Second, and relatedly, providing counsel preserves

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5 U.S. CONST. amend. VI. Also guaranteed within the amendment are the defendant's rights to a speedy and public trial, to an impartial jury, to be informed of the nature and cause of the accusation against him, to confront the witnesses against him, and to have compulsory process in obtaining witnesses in his favor. *Id.*

6 *See* Meredith B. Halama, Note, *Loss of A Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule*," 1998 U. ILL. L. REV. 1207, 1209 (explaining the two related goals of the Sixth Amendment's right to counsel).

7 *See* United States v. Wade, 388 U.S. 218, 227 (1967) ("The presence of counsel . . . operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." (citation omitted)); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The

the fairness and integrity of criminal trials.[8] These justifications recognize "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with [the] power to take his life or liberty."[9] Because the American criminal justice system is so complex, the Sixth Amendment is designed to protect the layperson who may be unable to navigate effectively his or her defense alone.[10] With the defendant facing such high stakes, and being systematically disadvantaged by a complicated system, the right to counsel is the Constitution's chosen means to achieve some degree of parity at trial.[11]

A. *Extension of the Right to Counsel to "Critical Stages"*

Today, the Sixth Amendment right to counsel attaches at all "critical stages" of a criminal proceeding.[12] The original understanding of the Sixth Amendment's protections, however, focused almost exclusively on the criminal trial itself. After all, pretrial proceedings at the time of the Framers "were insignificant."[13] But the changing nature of these proceedings over time made it apparent that threats to the fairness and integrity of the

right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

8 *See* Maine v. Moulton, 474 U.S. 159, 168-69 (1985) ("The right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice."); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

9 Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

10 *See Powell*, 287 U.S. at 69 ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *see also* Maness v. Meyers, 419 U.S. 449, 466 (1975) (explaining that a layman's assertion of his rights "often depends upon legal advice from someone who is trained and skilled in the subject matter"); Michael J. Howe, Note, *Tomorrow's* Massiah*: Towards A "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 134 (2004) ("The primary purpose of [the Sixth Amendment] is to help the layman when confronted with the inherent complexity of the American system of criminal law." (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *Powell*, 287 U.S. at 68-69)).

11 *See* James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980 (1986) ("Approximate parity between the[] combatants is critical to prevent unfair processes and unjust outcomes tainted by one side's superiority.").

12 *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (citations omitted); Iowa v. Tovar, 541 U.S. 77, 80-81 (2004) (citations omitted); *Moulton*, 474 U.S. at 170 (citations omitted); *Wade*, 388 U.S. at 224.

13 Tomkovicz, *supra* note 11, at 982; *see also* United States v. Ash, 413 U.S. 300, 309 (1973) ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' *at trial*, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." (emphasis added)).

criminal justice system were no longer limited to the trial itself.[14] The "changing patterns of criminal procedure" meant that pretrial events came to resemble trial more closely, and the accused was being "confronted, just as at trial, by the procedural system" much earlier than he was previously.[15] To account for this change, the Supreme Court began to expand the scope of Sixth Amendment protections to pretrial proceedings. As the *Wade* Court explained,

> When the Bill of Rights was adopted . . . . [t]he accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to . . . encompass[] counsel's assistance whenever necessary to assure a meaningful "defence."[16]

A series of cases during the 1960s and 1970s further clarified this contrast and highlighted the importance of representation at stages other than the trial.[17] The circumstances of these cases led to the development of what is now identified as the critical stage doctrine, which expanded the scope of the Sixth Amendment guarantee and the remedies for its violation. By the time the Court penned its seminal critical stage opinion in *United States v. Cronic*,[18] a completely new Sixth Amendment analysis replaced the original understandings of the guarantee.

The Supreme Court's development of the critical stage doctrine began in *Hamilton v. Alabama*.[19] There, the defendant was not represented by

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14 *See Powell*, 287 U.S. at 57 (identifying the period between a defendant's arraignment and his trial as "perhaps the most critical period of the proceedings").

15 *Ash*, 413 U.S. at 310.

16 *Wade*, 388 U.S. at 224-25.

17 *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (finding that a defendant was entitled to the aid of counsel at a nonmandatory preliminary hearing); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (holding that introducing into evidence incriminating statements obtained postindictment in the absence of defense counsel violated the defendant's Sixth Amendment rights); White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (reversing a conviction because defendant was not represented by counsel at the preliminary hearing where he pleaded guilty); Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961) (holding that the absence of counsel at defendant's arraignment mandated reversal, whether or not prejudice resulted).

18 466 U.S. 648 (1984).

19 368 U.S. 52 (1961); *see also* Van v. Jones, 475 F.3d 292, 297 (6th Cir. 2007) (explaining that the Court's nationwide critical stage doctrine began in *Hamilton*).

counsel during his arraignment and was subsequently sentenced to death.[20] The Court explained that "[w]hatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in a criminal proceeding. What happens there may affect the whole trial."[21] Because the arraignment was a "critical stage," the Court refused to "stop to determine whether prejudice resulted."[22] Rather, a defense may have been "irretrievably lost" due to the absence of counsel, so the defendant was not required to prove that he actually suffered a disadvantage.[23] The Court unanimously reversed the Alabama Supreme Court's denial of the defendant's writ of error *coram nobis*, and the term "critical stage" entered Sixth Amendment jurisprudence.[24]

It was not long before the Court identified other "critical stages." In a per curiam opinion, the Court in *White v. Maryland* applied *Hamilton* to identify a Maryland preliminary hearing as a critical stage where the right to counsel attaches.[25] One year later, in *Massiah v. United States*, the Court found it impermissible to use a defendant's "incriminating words" against him at trial, because "federal agents had deliberately elicited [the words] from him after he had been indicted and in the absence of his counsel."[26] Because counsel presumably would have objected or guided the defendant toward a more favorable result, evidence acquired without counsel should never have been admitted.[27] The expansion continued in *United States v. Wade*, where the Supreme Court held that a postindictment, pretrial lineup constituted a critical stage where counsel is necessary.[28] And in *Mempa v. Rhay*, the Court found a defendant's deferred sentencing hearing to be a critical stage.[29] Finally, in *Holloway v. Arkansas*, Justice Berger's opinion emphasized that the "mere physical presence" of counsel does not automatically amount to the representation guaranteed by the Sixth

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20 *Hamilton*, 368 U.S. at 52-53.

21 *Id.* at 54.

22 *Id.* at 55.

23 *Id.* at 54-55.

24 *Id.* at 53, 55.

25 373 U.S. 59, 59-60 (1963) (per curiam) (noting that "[o]nly the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently" (quoting *Hamilton*, 368 U.S. at 55) (internal quotation marks omitted)).

26 377 U.S. 201, 206 (1964).

27 *Id.* at 204, 206 (recognizing that "a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding").

28 388 U.S. 218, 236-37 (1967) (explaining that there is "grave potential for prejudice" in a pretrial lineup and that the "presence of counsel itself can often avert [such] prejudice").

29 389 U.S. 128, 135-37 (1967) (raising concerns that certain legal rights, such as the right to appeal, could be lost if not properly exercised at this stage).

Amendment.[30] Because the trial court compelled the defense attorney in the case to jointly represent at trial three different defendants with conflicting interests, it had effectively "sealed his lips on crucial matters."[31] The Court concluded that the defense attorney's physical presence, burdened by "conflicting obligations," was analogous to a complete absence of counsel in violation of the Sixth Amendment.[32] After *Holloway*, critical stages encompassed a full range of confrontations from pretrial to sentencing, whether counsel was physically present or not.

One entire category of nontrial proceedings—a category particularly relevant to this Comment—was notably absent from the Supreme Court's two-decade expansion of the critical stage doctrine: mental health determinations. But, in *Estelle v. Smith*,[33] the Court offered its first definitive guidance on the subject. There, a doctor who examined the defendant before trial was not included on the State's expected witness list.[34] At the penalty phase, however, the doctor was called as a witness—over defense counsel's objection—to testify regarding the defendant's mental health.[35] In his testimony, which "was based on information derived from his 90-minute 'mental status examination,'" the doctor claimed that the defendant presented a continuing danger to the community.[36] After this testimony—which was the only testimony presented by the State—the jury sentenced the defendant to death.[37]

The *Estelle* Court found that the defendant's "Sixth Amendment right to counsel clearly had attached when [the doctor] examined him at the Dallas County Jail, and their interview proved to be a 'critical stage' of the aggregate proceedings against respondent."[38] Because the "defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel,'" the Court found that the "psychiatric examination . . . proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel."[39] Importantly, *Estelle* dealt only with a defendant's *consent* to a mental health interview, not the actual interview itself. But the lesson

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30 435 U.S. 475, 489-90 (1978).
31 *Id.* at 490.
32 *Id.* at 489-90.
33 451 U.S. 454 (1981).
34 *Id.* at 459.
35 *Id.*
36 *Id.* at 459-60.
37 *Id.* at 460.
38 *Id.* at 470 (citations omitted).
39 *Id.* at 471 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

remained that where an event proved to be critical to the aggregate proceeding, a conviction secured without counsel would not stand.

B. Cronic*: When "Being There" Is Not Enough*

While the Supreme Court's two-decade development of critical stage doctrine greatly expanded the realm of possible Sixth Amendment violations, deprivations during these stages lacked their own, distinct method of analysis. Certain critical stage violations were held to be prejudicial per se, while others were analyzed under the "harmless error" standard.[40] In 1984, however, the Supreme Court addressed this lack of uniformity in *United States v. Cronic*.[41] The decision provided an exception to the prejudice requirement of ineffective assistance claims where circumstances exist "that are so likely to prejudice the accused" that even litigating over their effect would be "unjustified."[42]

In *Cronic*, the defendant was indicted for mail fraud following a nearly five-year federal investigation.[43] After his retained counsel withdrew, the court appointed an inexperienced attorney with a real estate practice to represent him only twenty-five days before trial.[44] The defendant was convicted and sentenced to twenty-five years in prison.[45] But the Court of Appeals for the Tenth Circuit reversed the conviction after finding that the defendant "did not have the Assistance of Counsel for his defence that is guaranteed by the Sixth Amendment to the Constitution."[46] According to the Supreme Court,

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40 *Compare* United States v. Smith, 411 F.2d 733, 737 (6th Cir. 1969) ("It is not necessary that this Court determine whether defendant was prejudiced in fact, but only that he was 'exposed to a reasonable possibility of prejudice in fact.'" (citation omitted)), *with In re* Di Bella, 518 F.2d 955, 959 (2d Cir. 1975) ("Despite the broad language of such cases as *Hamilton v. Alabama*, the absence of counsel at a 'critical stage' of a proceeding does not always require a finding of prejudice *per se*. In some instances, the harmless-error rule of *Chapman v. California* is applicable." (citations omitted)). For an articulation of the harmless error rule, see *Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

41 466 U.S. 648 (1984).

42 *Id.* at 658; *see also* Wright v. Van Patten, 552 U.S. 120, 124 (2008) (per curiam) ("*Cronic* 'recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense.'" (quoting Florida v. Nixon, 543 U.S. 175, 190 (2004))).

43 466 U.S. at 649.

44 *Id.*

45 *Id.* at 649-50.

46 *Id.* at 650 (internal quotation marks omitted).

> [t]his conclusion was not supported by a determination that respondent's trial counsel had made any specified errors, that his actual performance had prejudiced the defense, or that he failed to exercise "the skill, judgment, and diligence of a reasonably competent defense attorney"; instead the conclusion rested on the premise that no such showing is necessary "when circumstances hamper a given lawyer's preparation of a defendant's case."[47]

The Tenth Circuit found that ineffectiveness could be inferred from, among other factors, the lawyer's lack of experience and preparation time when compared to the complexity of the case.[48] However, a unanimous Supreme Court reversed.[49] In considering an ineffective assistance of counsel claim, the Court explained, a lawyer's *actual* conduct and "specific errors" must be considered.[50]

However, *Cronic* is better known for articulating the exceptions to this rule. The Court stated that demonstrating specific errors ("specificity") would not be necessary where "surrounding circumstances justify a presumption of ineffectiveness."[51] Under these circumstances, a "Sixth Amendment claim [would] be sufficient without inquiry into counsel's *actual* performance."[52] Far from providing a broad exception, the only types of circumstances that could justify this exception were limited to those "so likely to prejudice the accused that the cost of litigating their effect in a particular case [would be] unjustified."[53] Writing for the Court, Justice Stevens provided three circumstances that would satisfy this exception.[54] First, the complete denial of counsel would per se violate the Sixth Amendment's guarantee.[55] Second, counsel's total failure "to subject the prosecution's case to meaningful adversarial testing" would be "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[56] Finally, a Sixth Amendment violation would be found where, although counsel "assist[s] the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance

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47 *Id.* (citation omitted).

48 *Id.* at 652.

49 *Id.* at 666-67.

50 *Id.* at 666.

51 *Id.* at 662.

52 *Id.* (emphasis added).

53 *Id.* at 658.

54 *Id.* at 659-60.

55 *Id.* at 659.

56 *Id.* at 659. As an example, the Court noted that where a defendant is "denied the right of effective cross-examination," it "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)) (internal quotation marks omitted).

is so small that a presumption of prejudice is appropriate."[57] *Cronic* therefore applies only "where a criminal defendant was actually or constructively denied counsel," not where he solely alleges that his representation was inadequate.[58] In other words, if any of the three circumstances outlined in *Cronic* were found to exist, a defendant's conviction and sentence would not stand.

Cronic's exception to *Strickland* prejudice analysis, which requires a showing that "counsel's representation fell below an objective standard of reasonableness" and that the error prejudiced the judgment,[59] was expanded before the ink dried on the opinion. In *Kimmelman v. Morrison*, the Court distinguished between cases like *Cronic* and those alleging "actual ineffectiveness," explaining that "the defendant must prove both incompetence and prejudice" only where "the defendant alleges 'actual' ineffective assistance rather than the few contexts where ineffective assistance is 'presumed,' such as where counsel is either totally absent or prevented from assisting the accused during a *critical stage*."[60] After *Morrison*, it was clear that allegations of *actual* ineffective assistance were distinct from allegations under circumstances where prejudice would be *presumed* under *Cronic*. That is, Sixth Amendment claims under *Cronic* were no longer subject to the substantive review for prejudice mandated by *Strickland*.[61]

A more recent case, *Bell v. Cone*, reaffirmed this distinction.[62] There, the Court again considered allegations of "actual" ineffective assistance of counsel. In its opinion below, the Sixth Circuit conflated the *Cronic* and *Strickland* standards, performing the analysis required by the latter while using the reasoning and legal standard of the former.[63] The Supreme Court

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[57] *Id.* at 659-60 (identifying *Powell v. Alabama*, 287 U.S. 45 (1932), as an example of this type of case).

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

[59] *See* Strickland v. Washington, 466 U.S. 668, 687-88, 691-92 (1984) (holding that "deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution" but noting that prejudice may be presumed in certain contexts).

[60] 477 U.S. 365, 381 & n.6 (1986) (emphasis added).

[61] *See, e.g.*, Penson v. Ohio, 488 U.S. 75, 88-89 (1988) (citing *Cronic* and explaining that it would be "inappropriate to apply . . . the prejudice requirement of *Strickland*" where new counsel was not appointed after initial counsel withdrew, leaving "petitioner completely without representation during the appellate court's actual decisional process").

[62] 535 U.S. 685, 695-98 (2002) (discussing whether the principles of *Cronic* or *Strickland* should govern respondent's ineffective assistance of counsel claim).

[63] Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001) (noting that "Cone need not show actual prejudice" under *Cronic*, yet applying the *Strickland* analysis to conclude that his attorney's failure to present mitigating evidence or make a final argument "fell below an objective standard of reasonableness and prejudiced him").

quoted *Cronic*'s three exceptional circumstances in which prejudice can be presumed[64] and explained that all other deprivation claims would be analyzed under *Strickland*.[65]

II. COMPETENCY HEARINGS AS A CRITICAL STAGE

By this point, the reader should have a basic understanding of the Sixth Amendment right to counsel, as well as the development of the critical stage concept that mandates its application in certain contexts. However, the question remains: where do competency hearings fit within this framework? The answer is that competency hearings have never been declared "critical stages" by the Supreme Court, and therefore, whether the Sixth Amendment guarantee applies during this stage remains an open question. Nevertheless, competence has been addressed extensively by other areas of the law (and by circuit courts), and an understanding of these historical origins helps to inform the current discussion.

Competence is a topic that "lie[s] at the intersection of psychiatry, constitutional law, and criminal procedure."[66] From the common law[67] to the Constitution,[68] and through rules of criminal procedure[69] to federal legislation,[70] incompetent defendants have long been protected from the perils of facing trial. Perhaps the most important source of protection is the Constitution itself. A defendant's right to proffer a defense in his case is guaranteed by the Fifth, Sixth, and Fourteenth Amendments.[71] The protections of

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64 *Bell*, 535 U.S. at 695-96.

65 *Id.* at 696-98 (finding that counsel's conduct did not fall within a *Cronic* exception and was "plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components").

66 Brett F. Kinney, Comment, *An Incompetent Jurisprudence: The Burden of Proof in Competency Hearings*, 43 U.C. DAVIS L. REV. 683, 688 (2009). *See generally* MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION (2008) (exploring the intersection of law and mental health).

67 *See, e.g.*, Medina v. California, 505 U.S. 437, 445-46 (1992) (explaining that common law principles provided the foundation for the prohibition on incompetent defendants facing trial in modern criminal procedure); Youtsey v. United States, 97 F. 937, 940-46 (6th Cir. 1899) (cataloging the prohibition's history).

68 *See* U.S. CONST. amend. XIV, § 1 (providing due process rights).

69 *See, e.g.*, Godinez v. Moran, 509 U.S. 389, 396 (1993) (explaining that the competency of a criminal defendant must be established before trial (citing Pate v. Robinson, 383 U.S. 375, 378 (1966))); Drope v. Missouri, 420 U.S. 162, 171-72 (1975) ("For our purposes, it suffices to note that the prohibition [against subjecting an incompetent person to trial] is fundamental to an adversary system of justice.").

70 *See* 18 U.S.C. § 4241 (2012) (establishing a system of competency hearings and civil confinement for defendants whose competency to stand trial is questioned).

71 *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall

the Due Process Clause, found in the Fifth and Fourteenth Amendments, have also been interpreted to prohibit incompetent defendants from standing trial.[72]

Many trace these constitutional limits back to the traditional ban on trials in absentia, which prohibited trying an incompetent defendant who, although physically present in the court room, was not sufficiently mentally present to defend himself against the charges he faced.[73] Although competency as a standard does not lend itself to a one-size-fits-all definition, the Supreme Court's treatment of competency has been consistent with these traditional roots. In *Dusky v. United States*, the Court articulated a concrete test for competence, agreeing with the Solicitor General's suggestion that "the test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[74] If questions are raised regarding a defendant's ability to satisfy this test, the trial court must hold a competency hearing.[75] Specifically, a defendant is subject to a competency hearing "where evidence from any source, including the trial judge's own doubts about the defendant's competence, raises a 'bona fide doubt' as to the defendant's competency."[76] A trial judge has the discretion to determine whether a bona fide doubt exists and is able to draw inferences from the defendant's own conduct as

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enjoy the right to . . . have the Assistance of Counsel for his defence."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); Washington v. Texas, 388 U.S. 14, 19 (1967) (finding the right to present a defense to be "a fundamental element of due process of law").

72 *See* Buchanan v. Kentucky, 483 U.S. 402, 434 n.6 (1987) (Marshall, J., dissenting) ("The right to be tried and convicted only if legally competent inheres in the Fourteenth Amendment, and thus implicates constitutional principles in addition to the Fifth and Sixth Amendment requirements . . . ." (citing *Pate*, 383 U.S. at 378)).

73 *See, e.g.*, Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) ("The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials *in absentia* . . . ."); *see also* Kinney, *supra* note 66, at 689 ("The prohibition [on incompetent defendants standing trial] may have stemmed from the ban on trials in absentia."). *See generally* FED. R. CRIM. P. 43(a) ("[T]he defendant must be present at . . . every trial stage, including jury impanelment and the return of the verdict . . . .").

74 362 U.S. 402, 402 (1960) (per curiam) (internal quotation marks omitted).

75 *See* 18 U.S.C. § 4241(a) (2012) (requiring a competency hearing if the court at any time has "reasonable cause" to believe that the defendant may be mentally incompetent).

76 40 AM. JUR. 2D *Proof of Facts* § 171 (1984); *see also Pate*, 383 U.S. at 385 ("Where the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing . . . ."); People v. Leiker, 450 N.E.2d 37, 40 (Ill. App. Ct. 1983) (citing *Pate* for the proposition that "[t]he failure to follow procedures adequate to protect a defendant's right not to be tried while incompetent violates the defendant's due process rights").

well as outside information.[77] Importantly, if a defendant is found to be incompetent, he will not face charges until his competency is restored, if at all.[78] Therefore, the outcome of a competency hearing is clearly of great consequence to a defendant's fate. But the following question remains: is a defendant's competency hearing a critical stage at which the Sixth Amendment right to counsel attaches?

The Supreme Court has yet to provide an answer to this question; "[h]owever, every federal court of appeals to take up the question has answered it affirmatively."[79] After all, "[t]he Supreme Court has defined critical stages as those proceedings between an individual and agents of the State . . . that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary, and hold significant consequences for the accused."[80] The trial-type proceedings and serious consequences characteristic of competency hearings leave little doubt that such hearings are covered by the critical stage doctrine. Therefore, as with any other "critical stage," the Sixth Amendment right to the assistance of counsel attaches at a competency hearing. However, although the right to counsel is not absolute, and defendants are normally free to decline such assistance,[81] competency hearings are different. There, the Sixth Amendment guarantee becomes a mandate.

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77 *See, e.g.*, Watts v. Singletary, 87 F.3d 1282, 1287 (11th Cir. 1996) (finding that a criminal defendant failed to establish a bona fide doubt as to his competency even though he was conspicuously asleep during approximately seventy percent of his murder trial); Hance v. Zant, 696 F.2d 940, 948 (11th Cir. 1983) (explaining that the trial judge did not abuse his discretion by not holding a competency hearing where "there was scant evidence before the trial court that [defendant] had a history of irrational behavior"), *overruled on other grounds by* Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); Daniel v. Thigpen, 742 F. Supp. 1535, 1548 (M.D. Ala. 1990) (holding that defendant's trial conduct "was not so unusual . . . that it should have raised a *bona fide* doubt on the part of the trial court that would have required it to conduct a *Pate* hearing").

78 *See generally* 18 U.S.C. § 4241(d)-(e) (2012) (providing for a system of evaluation, treatment, and discharge of mentally incompetent defendants).

79 Parsons, *supra* note 58, at 242 & n.31 (citing Raymond v. Weber, 552 F.3d 680, 684 (8th Cir. 2009); United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005); Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001); United States v. Klat, 156 F.3d 1258, 1262 (D.C. Cir. 1998); United States v. Barfield, 969 F.2d 1554, 1556 (4th Cir. 1992); Sturgis v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1986)); *see also* United States v. Ross, 703 F.3d 856, 874 (6th Cir. 2012) (citing Parsons's article and explicitly joining the other circuits in finding a competency hearing to be a critical stage).

80 Parsons, *supra* note 58, at 241 (citation and internal quotation marks omitted).

81 *See* Iowa v. Tovar, 541 U.S. 77, 87-88 (2004) ("A person accused of crime, however, may choose to forgo representation . . . . [T]he Constitution 'does not force a lawyer upon a defendant.'" (citation omitted)); Faretta v. California, 422 U.S. 806, 820 (1975) ("The language and spirit of the Sixth Amendment contemplate that counsel . . . shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.").

Before permitting a defendant to waive his right to counsel, a court must ensure that the accused is "knowingly and intelligently [choosing to] forgo those relinquished benefits."[82] A defendant's waiver must, in general, be "knowing, voluntary, and intelligent."[83] In addition to this requirement, the trial court must find that the defendant "actually does understand the significance and consequences of a particular decision" and that his waiver is "uncoerced."[84] But the circumstances that lead a trial court to question a defendant's competence—and thus to hold a competency hearing—directly undermine his ability to validly waive his right to counsel. Unlike other "critical stages" in a criminal proceeding, a competency hearing is meant to examine the defendant's mental state and establish (or find lacking) the very abilities necessary for him to enter a valid waiver. Only if a defendant "has a rational as well as factual understanding of the proceedings against him" can he decide to waive his right to counsel.[85] As a result, unless a defendant's competence is confirmed at a hearing, he cannot be said to "knowingly, voluntarily, and intelligently" consent to waiver. The mirror version of that statement is easier to understand: how can a defendant, found by a court to be incompetent, also be permitted to represent himself in that same court?[86] He cannot.

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82 Karl Evan Strauss, *Between the Defendant's Scylla and Charybdis:* Brooks v. McCaughtry *and the Right to a Fair Trial and the Right to Self-Representation*, 37 U. TOL. L. REV. 235, 245 (2005) (quoting *Faretta*, 422 U.S. at 835) (internal quotation marks omitted).

83 53 AM. JUR. 2D *Mentally Impaired Persons* § 36 (2006); *see* Kenneth S. Sogabe, Note, *Exercising the Right to Self-Representation in* United States v. Farhad*: Issues in Waiving a Criminal Defendant's Sixth Amendment Right to Counsel*, 30 GOLDEN GATE U. L. REV. 129, 136 & n.52 (2000) (citing *Faretta* for the "right to waive" counsel and the "right to self-representation"); *see also* David C. Donehue, Note, Peters v. Gunn*: Should the Illiterate Defendant Have a Right to Self-Representation?*, 57 U. PITT. L. REV. 211, 214 (1995) (citing *Faretta* for the proposition that before a defendant can waive his right to counsel, the record must establish that "he knows what he is doing and his choice is made with eyes open" (internal quotation marks omitted)).

84 Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993); *see* Indiana v. Edwards, 554 U.S. 164, 177-78 (2008) (permitting separate standards for competency to stand trial and competency to proceed pro se); *see also* Alan R. Felthous, *The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After* Godinez, 18 MENTAL & PHYSICAL DISABILITY L. REP. 105, 108-09 (1994) (citing *Godinez* and distinguishing competency generally from the competency necessary to enter a guilty plea or waive the right to counsel).

85 Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (internal quotation marks omitted).

86 *See* United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998) ("[I]t [is] contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not proceed *pro se* until the question of her competency to stand trial has been resolved."); *see also* United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) ("Logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same

Recognizing this internal inconsistency, every circuit to consider the issue has held that a competency hearing is a critical stage at which the defendant must be represented by counsel.[87] At any point in the trial, even if the defendant previously proceeded pro se, "[w]hen a defendant's mental ability to waive the right to counsel and exercise the right of self-representation has been brought into reasonable question, the trial court must therefore hold a competency hearing to determine the proper course."[88] In such a case, the "defendant may not proceed pro se until the question of her competency to stand trial has been resolved."[89] But the Sixth Amendment guarantee is not satisfied simply by the physical presence of a lawyer at a defendant's competency hearing.[90] As Ronald Parsons explains in his article on constructive denial of counsel, "courts have recognized in such circumstances that a lawyer simply 'being there' is not enough."[91] Regardless of whether a physically present lawyer fails to provide the requisite degree of representation, or whether a defendant is simply not represented during his competency hearing, recognizing that a deprivation has occurred does not end the court's analysis. A remedy must follow.

III. THE CIRCUIT SPLIT OVER THE APPROPRIATE REMEDY FOR A COMPETENCY STAGE DEPRIVATION

As we have seen, circuit courts uniformly apply the *Cronic* standard—not the *Strickland* prejudice standard—when analyzing allegations of competency stage deprivations. This uniformity, however, does not extend to the courts' choices of an appropriate remedy.[92] This Part examines the circuit split over

time be convinced that the defendant has knowingly and intelligently waived his right to counsel.").

87 *See supra* note 79 and accompanying text; *see also Edwards*, 554 U.S. at 178 ("[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.").

88 Parsons, *supra* note 58, at 239.

89 *Id.* at 242.

90 *See* United States v. Cronic, 466 U.S. 648, 659 (1984) (explaining that counsel's total failure "to subject the prosecution's case to meaningful adversarial testing" would be "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable"); Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978) (explaining that being physically present is not enough when an attorney is representing multiple defendants with conflicting interests).

91 Parsons, *supra* note 58, at 239.

92 *Compare* United States v. Bergman, 599 F.3d 1142, 1148-49 (10th Cir. 2010) (remanding for an evidentiary hearing to determine whether the district court can make a retrospective competency determination), *and* United States v. Klat, 156 F.3d 1258, 1264 (D.C. Cir. 1998) (remanding for an evidentiary hearing to determine whether the presence of counsel would have altered the result of the competency hearing), *with* United States v. Ross, 703 F.3d 856, 874 (6th Cir. 2012) (concluding

the proper remedy for competency stage deprivations. Using two courts of appeals decisions as examples, I explain the two distinct remedies courts choose. While this Comment ultimately advocates for the use of one over the other, an understanding of both remedies and their justifications is critical in order to make a meaningful distinction between them.

A. *The* United States v. Klat *Approach: Evidentiary Hearings*

United States v. Klat[93] came to the D.C. Circuit with a rich factual history. In 1996, the defendant, Susan Viola Klat, was indicted on two counts of threatening to assault Chief Justice Rehnquist and William Suter, the Clerk of the Supreme Court, in violation of 18 U.S.C. §§ 115 and 1114.[94] Her threatening voice messages, letters, and statements about both men were intended as retaliation for their performance in their official capacities.[95]

Klat repeatedly asserted her desire to represent herself at trial. Her request was eventually granted when appointed counsel filed a motion to withdraw, partly as a response to Klat filing a separate civil suit against him.[96] During a district court hearing, however, the judge found Klat's behavior sufficiently "bizarre" to provide the "reasonable cause" necessary to evaluate her competence under 18 U.S.C. § 4241(b).[97] Despite granting appointed counsel's motion to withdraw, the district court failed to appoint new counsel.[98] At the formal competency hearing, Klat was found competent and able to continue representing herself at trial.[99] During this same hearing, she agreed to have standby counsel appointed for the remainder of the proceeding.[100]

At trial, Klat delivered an opening statement and cross-examined two witnesses before refusing to continue pro se because she felt "too emotional."[101] Thereafter, standby counsel represented her during the remainder of the trial and sentencing.[102] The jury found Klat guilty on both counts, and

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that the proper remedy for a finding of ineffective assistance of counsel at a competency hearing is an automatic reversal), *and* Appel v. Horn, 250 F.3d 203, 217-18 (3d Cir. 2001) (same).

93 156 F.3d 1258 (D.C. Cir. 1998).

94 *Id.* at 1260-61.

95 *Id.* at 1260.

96 *Id.* at 1261.

97 *Id.* (internal quotation marks omitted).

98 *Id.*

99 *Id.* at 1262.

100 *Id.*

101 *Id.*

102 *Id.*

she was subsequently sentenced to fifty-seven months' imprisonment, to run concurrently, for each count.[103]

On appeal to the D.C. Circuit, Klat alleged that the district court erred by "allowing her to appear *pro se* at a hearing to determine her competency to stand trial."[104] The D.C. Circuit explained that Klat, like every criminal defendant, had the "right to counsel at every critical stage of [her] criminal prosecution."[105] Relying on precedent,[106] the court stated that a competency hearing constitutes a critical stage at which the Sixth Amendment right to counsel attaches.[107] But competency hearings were different. Although Klat was permitted to waive her right to counsel during other "critical stages," the court reasoned that "where a defendant's competence to stand trial is reasonably in question, a court may not allow that defendant to waive her right to counsel and proceed *pro se* until the issue of competency has been resolved."[108] Because competence is a prerequisite to waiving counsel, the court found it is "contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel."[109] Rejecting the remainder of Klat's claims, the D.C. Circuit found that the district court erred when it allowed her to proceed pro se during her competency hearing.[110]

The panel next acknowledged that remedies were an unsettled issue.[111] While "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error,"[112] the court explained, not "all non-trial denials of counsel require automatic reversal of a defendant's conviction."[113] Instead, the court stated that under certain conditions, the proper remedy is to remand for an evidentiary hearing under the *Chapman* standard.[114] The court explained that an automatic reversal was only appropriate where "the deprivation of the right to counsel affected—and

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103 *Id.*

104 *Id.* at 1260.

105 *Id.* at 1262.

106 *See* United States v. Byers, 740 F.2d 1104, 1119 (D.C. Cir. 1984) (en banc).

107 *Klat*, 156 F.3d at 1262.

108 *Id.* at 1262-63 (footnote omitted).

109 *Id.* at 1263.

110 *Id.* at 1260, 1263.

111 *Id.* at 1263-64.

112 *Id.* at 1263 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)) (internal quotation marks omitted).

113 *Id.* (referencing *Coleman v. Alabama*, 399 U.S. 1, 11 (1970), where the Supreme Court "remanded the case to the state court to determine whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California*" (internal quotation marks omitted)).

114 *Id.* at 1263-64.

contaminated—the entire criminal proceeding."[115] In order to determine whether Klat's case met that condition, the court remanded "for an evidentiary hearing to determine whether the competency hearing could have come out differently if appellant had been represented by counsel."[116] Explaining that the purpose of the retrospective hearing was only to determine whether a lawyer could have changed the outcome of the competency hearing—not to determine if Klat was in fact competent—the court reasoned that the effects of the deprivation of counsel could potentially be limited to that stage of the proceeding.[117] This approach will hereinafter be identified as the "*Klat* approach," referring to the use of evidentiary hearings to determine prejudice. Not all circuits are willing to endorse its use.

B. *The* United States v. Ross *Approach: Automatic Reversals*

A sophisticated securities conspiracy gave rise to *United States v. Ross*.[118] The five defendants in the case concocted a scheme to buy motor vehicles from private sellers in exchange for counterfeit "official checks" and then resell those vehicles before the sellers realized that the checks were worthless.[119] The prosecution described Bryan Ross as the defendant who "conceived the scheme" and was "primarily responsible for orchestrating" it.[120]

Prior to the start of trial, three court-appointed attorneys withdrew because of Ross's "bizarre and paranoid behavior."[121] After several demands, Ross's request to proceed pro se was granted.[122] Standby counsel was also appointed.[123] The Government promptly filed—and the court granted—a motion for a competency examination and hearing.[124] At the competency hearing, the court found Ross to be competent based on its own observations and a clinical report prepared by a court-appointed psychologist.[125] However, Ross was not provided with full-time counsel during the competency hearing.[126] In fact, standby counsel withdrew, and the court appointed

115 *Id.* at 1264 (quoting Satterwhite v. Texas, 486 U.S. 249, 257 (1988)) (internal quotation marks omitted).
116 *Id.*
117 *Id.*
118 703 F.3d 856, 865 (6th Cir. 2012).
119 *Id.*
120 *Id.* (internal quotation marks omitted).
121 *Id.*
122 *Id.* at 865-66.
123 *Id.* at 866.
124 *Id.*
125 *Id.*
126 *Id.*

yet another attorney to serve as standby counsel.[127] Ross continued to represent himself for the remainder of the proceedings, including trial.[128] When the jury returned its verdict, Ross was sentenced to imprisonment on various counts.[129] He received one sixty month sentence for the conspiracy conviction and five seventy-eight month sentences for each substantive count, all to be served concurrently.[130] Ross appealed both his conviction and sentence to the Sixth Circuit.[131]

The Sixth Circuit found that the district court erred when it did not reappoint counsel to represent Ross while his competency was in dispute.[132] Following other circuits, the court held that a competency hearing was a critical stage.[133] Indeed, "a psychological impairment would go to the question of whether the waiver of counsel was knowing and intelligent."[134] Therefore, the district court's failure to appoint full-time counsel to represent Ross at the hearing and inform him of his rights to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses "den[ied] the court the ability to ensure Ross knowingly waived those rights."[135] Without a knowing or voluntary waiver, the district court erred when it did not reappoint full-time counsel at Ross's competency hearing.[136]

The remedy discussion was complicated, however, by the possibility that Ross's standby representation was satisfactory under the circumstances articulated in *Cronic*. As the court explained, "[a]lthough Ross's standby counsel did not present argument during the competency hearing, it is conceivable that he did satisfy the minimum standard by adequately investigating, undertaking appropriate preparation for the hearing and then making an independent, strategic decision not to contest competency."[137] Putting this issue aside, the *Ross* court's decision on the appropriate remedy differed dramatically from the decision in *Klat*.

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127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 873-74.

134 *Id.* at 867 (quoting United States v. Kidwell, 217 F. App'x 441, 446 (6th Cir. 2007)) (internal quotation marks omitted).

135 *Id.* at 869.

136 *Id.* ("[A] defendant cannot represent himself at his own competency hearing, the purpose of which is to determine whether a defendant understands and can participate in the proceedings in the first place.").

137 *Id.* at 873.

First, the panel reiterated that "a complete absence of counsel at a critical stage of a criminal proceeding is a *per se* Sixth Amendment violation warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error."[138] Second, the court saw "no reason to create an exception to our established rule that complete deprivation of counsel during a critical stage warrants automatic reversal without consideration of prejudice."[139] Stopping far short of requiring a separate hearing to determine whether the absence of full-time counsel *actually* resulted in prejudice, the court mandated automatic reversal if the *Cronic* standard was not satisfied.[140] If on remand the district court found that Ross had been deprived of counsel under *Cronic*, "the conviction and sentence [would be] vacated."[141] Analysis for prejudice was inappropriate.

The *Ross* court's decision to order an automatic reversal when a criminal defendant is deprived of counsel at his competency hearing was grounded in statutory and constitutional interpretation. Indeed, reliance on such authorities is expected in a federal court of appeals. When federal courts settle on the proper remedy in these cases, however, alternative reasoning may also be at play. Through contractual, practical, and behavioral analysis, the *Ross* automatic reversal approach appears to be superior to the *Klat* evidentiary hearings approach. The next Part examines the remedy question through these alternative lenses, explaining the benefits and limitations of each.

IV. THREE ARGUMENTS FOR CHOOSING AUTOMATIC REVERSALS

A. *The Bargaining Theory and Its Pro Se Contract*

When a criminal defendant is deprived of counsel at his competency hearing, the remedy should be an automatic reversal. The civil treatment of incompetence under contract law provides a useful lens through which one may arrive at this conclusion. The majority contract rule of incompetence is that "an incompetent person's transactions are voidable."[142] The rule is

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138 *Id.* at 873-74 (quoting Van v. Jones, 475 F.3d 292, 311-12 (6th Cir. 2007)) (internal quotation marks omitted).

139 *Id.* at 874.

140 *Id.*

141 *Id.*

142 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 10:3 (4th ed. 2009); *see also* Ortelere v. Teachers' Ret. Bd. of N.Y., 250 N.E.2d 460, 464 (N.Y. 1969) ("The well-established rule is that contracts of a mentally incompetent person . . . are voidable. Even where the contract has been partly or fully performed it will still be avoided upon restoration of the *status quo*.").

rooted in the requirement that for contracts to be bargained-for, "parties to them [must] have the psychological and intellectual capacity to understand and evaluate the consequences of their agreements."[143] As Professor Eisenberg explains,

> [a] party (the "promisee") who induces another (the "promisor") to make a bargain on unfair terms by exploiting the latter's incapacity has acted in a manner that violates conventional moral standards. . . . Efficiency considerations also fail to support application of the bargain principle in such cases. The maxim that a promisor is the best judge of his own utility can have little application: by hypothesis, the promisor is not able to make a well-informed judgment concerning the transaction.[144]

Importantly, a contracting party's capacity at the time of the execution of the contract determines his ability or inability to make the agreement.[145] The majority rule recognizes that contracting with an incompetent party is neither fair nor efficient and shifts the costs of noncompliance to the definitively competent party.

Proceeding pro se should be viewed as a continuing contractual relationship between the defendant and the court. Just like a traditional contract for goods or services, a defendant's waiver of his right to counsel must be "knowing, voluntary, and intelligent."[146] Indeed, similar to the requirements for contractual capacity, a trial court must find that a pro se defendant "actually *does* understand the significance and consequences of a particular decision."[147] Therefore, where a defendant is the subject of a competency hearing and the trial court errs by allowing him to proceed

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143 Michael Wayne Brooks, Case Note, *Kids Waiving Goodbye to Their Rights: An Argument Against Juveniles' Ability to Waive Their Right to Remain Silent During Police Interrogations*, 13 GEO. MASON L. REV. 219, 229 (2004) (quoting ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 481 (3d ed. 2002)) (internal quotation marks omitted).

144 Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 765-66 (1982).

145 *See* 17A C.J.S. *Contracts* § 141 (1999) ("The mental incapacity, or unsoundness of mind, that affects the validity of a contract must be of the time at which the transaction occurs, regardless of previous or subsequent insanity." (footnotes omitted)).

146 53 AM. JUR. 2D *Mentally Impaired Persons* § 36 (2006); *see also* Donehue, *supra* note 83, at 214 (explaining that before a defendant can waive his right to counsel, the court must establish that "he knows what he is doing and his choice is made with eyes open" (quoting Faretta v. California, 422 U.S. 806, 835 (1975)) (internal quotation marks omitted)); Sogabe, *supra* note 83, at 139-40 (noting that Supreme Court precedent requires any waiver of counsel be made knowingly and intelligently).

147 Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993); *see also* Indiana v. Edwards, 554 U.S. 164, 177-78 (2008) (permitting separate standards for competency to stand trial and competency to proceed pro se); Felthous, *supra* note 84, at 108 (distinguishing competency generally from the competency necessary to enter a guilty plea or waive the right to counsel).

unrepresented, the issue of his competence has not been properly resolved. Any agreement flowing from this failure to adjudicate competence should be evaluated in the same way as it would be under the contractual framework. This would mean that a defendant's continuing waiver of counsel would have to satisfy the elements of a valid contract for the pro se contract to be enforceable. But a pro se contract cannot be valid if, at any time during the criminal proceeding, the defendant's competence is called into question. If a criminal defendant is deprived of counsel at this "critical stage," the "pro se contract" should be voidable at the discretion of the defendant. But why void the trial?

Professor Eisenberg's reasoning, explaining why contracts with incompetent parties are inappropriate, applies with even more force to the pro se contract. First, a court allowing a defendant whose competence is in doubt to waive counsel "violates conventional moral standards" deeply rooted in our society.[148] Unlike a contract without mutual assent, a defendant's competency stage deprivation runs afoul of the Constitution.[149] Second, allowing a determination of one's competence to be made without counsel is inefficient. Like voidable contracts, "[t]he maxim that a promisor is the best judge of his own utility can have little application."[150] Indeed, the purpose of the competency hearing itself is to determine whether that maxim applies. Recognizing a waiver before the requisite competence is established, therefore, puts the cart before the horse.

The inefficiency flowing from defendants proceeding unrepresented at competency hearings comes in several forms. One form is theoretical: illegitimate waivers remove defense counsel from trials where they rightfully belong. The Sixth Amendment right-to-counsel was established to minimize the imbalance of power between the accused and the government within our adversarial system.[151] The right recognizes that the American criminal justice system is complex and is meant to protect the layman who may be unable to effectively navigate his defense alone.[152] Therefore, each time a

148 Eisenberg, *supra* note 144, at 765.

149 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

150 Eisenberg, *supra* note 144, at 765.

151 *See* United States v. Wade, 388 U.S. 218, 227 (1967) ("The presence of counsel . . . operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

152 *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law." (quoting *Powell*, 287 U.S. at 69)); *see also* Maness v. Meyers, 419 U.S. 449, 466 (1975) ("[A layman] often depends upon legal advice

defendant is unrepresented during his competency hearing, the trial that follows is theoretically less efficient.

A second form of inefficiency is any post-trial appeals that flow from violations of the pro se contract. The very subject of this Comment—the proper remedy after a competency stage deprivation—is relevant only when a post-trial appeal is being decided. Regardless of the remedy that a court ultimately chooses, the draining of judicial resources and credibility is a necessary consequence of this trial-level error. Instead of the theoretical, market-based inefficiency of voidable contracts, however, the violation of the pro se contract introduces immediate and tangible inefficiency into the federal system. Therefore, a trial judge's violation of the pro se contract taints the agreement at least as much as—and arguably even more than—the making of a contract for goods or services with an incompetent party. Because the two violations mirror each other in important ways, the established remedy for contractual incapacity should inform the analysis of competency stage deprivations.

The majority contract rule is that "an incompetent person's transactions are voidable."[153] If one accepts the analogy between traditional contracts and the pro se contract, the next question is: how does this rule translate into an appellate remedy following a deprivation of counsel? This question helps clarify the distinctions between automatic reversals (*Ross*) and evidentiary hearings (*Klat*), and it leads to the conclusion that the former is the more appropriate remedy for pro se contract violations.

Automatic reversal closely resembles the voiding of a traditional contract. If a contract with an incompetent party is voidable at the incompetent party's discretion, automatic reversals would provide aggrieved defendants with a functionally equivalent remedy. A judicial error that does not negatively affect the trial (in the defendant's view),[154] like a mutually beneficial contract, could stand. If the defendant was not satisfied with the outcome of his trial, however, an appeal would function as a request to void the result. An appellate court would simply evaluate whether any required element of a valid waiver, like a required element of an enforceable contract, was absent during trial. If the reviewing court finds a missing element, then the waiver and conviction would not stand.

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from someone who is trained and skilled in the subject matter . . . ."); Howe, *supra* note 10, at 134 ("The primary purpose of th[e] guarantee [of counsel] is to help the layman when confronted with the inherent complexity of the American system of criminal law.").

153 WILLISTON & LORD, *supra* note 142, § 10:3.

154 The judicial error in this case would be allowing a defendant to proceed unrepresented at his competency hearing.

Automatic reversals are also consistent with the contract incapacity timing rule, which states that a contracting party's capacity at the *time of the execution* of the contract determines his ability to make the agreement in question.[155] Therefore, where a trial court determines a defendant's competence to proceed pro se during a hearing where the defendant is unrepresented, the window of time during which competence must be confirmed is irretrievably lost. Automatic reversals recognize the importance of this lost opportunity. Instead of attempting to recreate that moment in time, the automatic-reversal remedy acknowledges the "fluid state of mental illness"[156] and the "inherent unreliability and inadequacy of all retrospective hearings."[157] This recognition would lead a court following the *Ross* approach to ask the right question: was there a valid agreement to proceed pro se or was a required element of the agreement absent? Without a constitutionally-valid waiver, a defendant would not be able to represent himself under this approach.

By contrast, an evidentiary hearing to determine whether or not a competency stage deprivation was harmless has a completely different focus—one that is arguably misguided. Evidentiary hearings do not ask whether a waiver of counsel was valid. Instead, they ask whether any potential invalidity in the waiver procedure made a difference at trial. This question essentially works like a contract rule stating that a contract with an incompetent party is voidable by that party only if (1) the court finds that the contract was a bad deal, and (2) absent the party's incompetence, the result of the deal would be different. Put another way, finding that a competency stage deprivation of counsel was "harmless error" after an evidentiary hearing shows that the court nonetheless substantially performed its constitutional duties.

However, it makes little sense to speak in terms of "substantial performance" of Sixth Amendment protections. Unlike a construction contract

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155 17A C.J.S. *Contracts* § 141 (1999) ("The mental incapacity, or unsoundness of mind, that affects the validity of a contract must be of the time at which the transaction occurs, regardless of previous or subsequent insanity.").

156 Hannah Robertson Miller, Note, *"A Meaningless Ritual": How the Lack of a Postconviction Competency Standard Deprives the Mentally Ill of Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 296 (2008); *see also* Michael L. Radelet & Kent S. Miller, *The Aftermath of* Ford v. Wainwright, 10 BEHAV. SCI. & L. 339, 349-50 (1992) (describing the issues that surround cases in which death row inmates vacillate between competency and incompetency).

157 David W. Beaudreau, Comment, *Due Process or "Some Process"? Restoring* Pate v. Robinson*'s Guarantee of Adequate Competency Procedures*, 47 CAL. W. L. REV. 369, 404 (2011); *see also* United States v. Day, 949 F.2d 973, 982 n.9 (8th Cir. 1991) ("To require a sentencing court to decide whether a defendant was competent during proceedings that took place years earlier would be an exercise in futility.").

that may be "substantially performed" despite a less-than-perfect execution,[158] a criminal trial where a defendant invalidly proceeds pro se cannot produce a "nearly constitutional" trial. A "nearly constitutional" trial is unconstitutional, and a competency stage deprivation poisons the entirety of the proceedings.[159] Yet, the focus of evidentiary hearings in this context, however improper, is to differentiate between levels of unconstitutionality.

Attempting to retrospectively assess a defendant's competence is also inconsistent with the contract incapacity timing rule for a more practical reason. Because a defendant's competence at "the time of the execution"[160] of the pro se contract is never validly determined in these circumstances, retrospective hearings attempt to recreate "the defendant's condition at the time of the original state proceedings."[161] However, when a defendant "is denied his statutory right to counsel during a hearing, it is nearly impossible for an appellate court to determine whether this error was harmless."[162] Competency stage deprivations are especially difficult to analyze. Harmlessness must be decided "on the basis of a record developed at an evidentiary hearing conducted in the absence of that counsel," while "only speculat[ion] on what the record might have been had counsel been provided" is possible.[163] The continued use of evidentiary hearings instead of automatic reversals, therefore, puts Sixth Amendment jurisprudence on an unstable foundation. The right to counsel cannot be partially performed, and every evidentiary hearing that finds "harmless error" undermines the credibility of the judiciary.

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158 *See* 15 WILLISTON & LORD, *supra* note 142, § 44:52 (4th ed. 2000) ("Pursuant to the doctrine of 'substantial performance,' a technical breach of the terms of a contract is excused . . . because actual performance is so similar to the required performance that any breach that may have been committed is immaterial.").

159 As the Supreme Court explained in *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), automatic reversal is appropriate where the court makes a structural error. Structural errors "defy analysis by 'harmless error' standards . . . [because they affect] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* The Court already recognizes that a complete denial of counsel during a criminal trial is structural error. *See* United States v. Lewis, 21 F. App'x 843, 846 (10th Cir. 2001) ("Among the rights deemed 'structural' by the Supreme Court is the complete denial of counsel during a criminal trial." (citing Gideon v. Wainwright, 372 U.S. 335 (1963))).

160 17A C.J.S. *Contracts* § 141 (1999).

161 *See* Reynolds v. Norris, 86 F.3d 796, 802 (8th Cir. 1996).

162 *Lewis*, 21 F. App'x at 846.

163 United States v. Vasquez, 7 F.3d 81, 85 (5th Cir. 1993); *see also* Green v. United States, 262 F.3d 715, 718 (8th Cir. 2001) (explaining that the government cannot retrospectively demonstrate harmless error "by relying upon testimony from the very hearing at which [a defendant] was unrepresented").

B. *Pragmatism: The Practical Futility of Evidentiary Hearings*

The second reason to automatically reverse after a competency stage deprivation is simple—it will work well in practice. A theory's value is often a function of its ease of application. A rule or standard that judges fail to correctly understand or interpret provides little utility. As Girvan and Deason explain,

> [t]he ability to operationalize the social theory embodied in the law is highly relevant to the development of sound, predictable, and reliable legal standards. . . . To the extent that [a] hypothesis is poorly operationalized such that it is not easily or obviously testable against the sort of evidence that is likely to be available . . . [case] outcomes . . . will be unnecessarily error prone at best and unpredictably random at worst.[164]

The *Ross* automatic-reversal rule is more practical than the *Klat* evidentiary hearing standard. This conclusion is based primarily on an application of the well-known rules versus standards debate to the specific contours of competency stage deprivations.[165]

Rules and standards are two "different forms that a directive can take."[166] For example, a rule might state that "no driver shall travel above sixty-five miles-per-hour in a vehicle" or, more relevant here, "a defendant deprived of counsel during a hearing to determine his competence shall have his conviction and sentence reversed." These directives, instead framed as standards, might state that "any driver traveling at an excessive speed will be subject to an appropriate fine" or "a defendant who is deprived of counsel during a hearing to determine his competence may have his conviction reversed only if the absence of counsel affected the result." Of course, rules and standards each have benefits and limitations. In his pioneering work on the rules versus standards debate, Duncan Kennedy attempted to catalog these considerations by creating the following table:

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164 Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the "Discriminatory Motive" Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1066-67 (2013).

165 *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (applying economic analysis to compare rulemaking versus standard setting at the agency and individual levels); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (examining the rules versus standards debate within the context of altruism versus individual-focused selfishness models); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (viewing the rules versus standards debate through a behavioral science lens); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995) (comparing an approach to legal judgment based on abstract principles to one based on case-by-case decisionmaking).

166 Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 225 (2009).

Table 1: Rules vs. Standards[167]

Benefits of Rules	**Criticisms of Rules**	**Benefits of Standards**	**Criticisms of Standards**
Provide for easy application	Provide only a crude application	Allow for a complex, textured analysis	Lead to unpredictable results
Seemingly comprehensive	New developments fall outside	Can be applied to new developments	Not fully articulated or concrete
Less judicial activism possible	Box judges in	Vest trust in judges	Open to judicial abuses
Immediate answers	Answers that fail to do justice	"Right answer" possible	Hard to operationalize

Admittedly, a cursory examination of the above table can make the topic of this Comment seem like an exercise in futility. If both the rule-based, automatic reversal approach and the standard-based, evidentiary hearing approach have competing benefits and limitations, the choice of one over the other might seem like a matter of preference. Application of these two approaches within the context of competency stage deprivations, however, reveals that they do not capture the benefits of their competing forms equally. *Ross*'s automatic reversal approach is able to capitalize on the advantages of rules while minimizing the impact of many of their inherent limitations. By contrast, the ability of *Klat* evidentiary hearings to produce the general benefits of standards is doubtful, and the limitations of the form are quite concerning within this context.

A competency stage deprivation of counsel prevents a proper, ex ante determination of a defendant's competence. *Ross* automatic reversals do not try to make such a determination ex post, opting instead to provide a bright-line rule once a competency stage deprivation is found. This remedy captures some of the most important benefits of rules: reversals are easy to

167 This table builds on and slightly modifies the original version provided in Kennedy, *supra* note 165, at 1710, which was cited and slightly modified in Schlag, *supra* note 166, at 226.

apply, provide uniform and predictable results, and rein in the power of the judge whose error prompted appellate review in the first instance. With regard to the potential disadvantages of rules, *Ross* automatic reversals cannot be said to be authoritarian or draconian. The remedy instead provides defendants relief from the coercive power of the State in cases where their constitutional rights were violated. Automatic reversal in the competency context is also unambiguous. Unlike the earlier example rule stating that "no driver shall travel more than 65 miles-per-hour in a vehicle," which leaves a court to decide whether motorcycles or skateboards qualify as vehicles,[168] competency stage deprivations are much clearer. *Cronic* and its progeny[169] established the boundaries and continue to provide useful guideposts for courts to use in assessing constructive denial of counsel claims. Unlike the hypothetical speed-limit rule above, a rule focused on competency stage deprivations does not suffer from threshold definitional issues like the meaning of "vehicle." This is not to say that *none* of the limitations of rules apply to post-deprivation automatic reversals, but those limitations that do apply are outweighed by competing benefits.

By contrast, the circumstances giving rise to a competency stage deprivation make *Klat*'s standards-based approach less attractive when applied. Two of the most important benefits of standards are: (1) their empowerment of judges to make individualized decisions; and (2) their ability to arrive at (or at least attempt to arrive at) an objectively correct answer in every case. However, the flexibility which is usually a significant advantage of a standards-based approach seems problematic within the context of retrospective competency hearings. First, the same judge who erred by permitting the defendant to represent himself at his original competency hearing would likely preside over the retrospective hearing. If the same judge is tasked again with making a determination of a defendant's rights, there is little justification for granting the judge broad discretion the second time around. Next, as discussed within the context of the "pro se contract," coming to an objectively correct answer, even after a retrospective hearing, may be "nearly impossible."[170] This is because the harmlessness of a prior deprivation of counsel must be decided on the "basis of a record developed . . . in

168 *See, e.g.*, H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (noting the uncertainty surrounding the meaning of words such as "vehicle" at the margins).

169 *See supra* Section I.B.

170 *See* United States v. Lewis, 21 F. App'x 843, 846 (10th Cir. 2001) (discussing the difficulties of retrospective hearings); *see also supra* Section IV.A.

the absence of that counsel."[171] At a minimum, any retrospective hearing would suffer from "the inherent unreliability and inadequacy of all retrospective hearings."[172] At worst, arriving at the "correct" result through holding a retrospective hearing may be "impossible."[173]

Additionally, the deficiencies of *Klat* retrospective hearings magnify the limitations characteristic of all standards-based approaches. Examining individual competency stage deprivations according to a vague standard yields results that are unpredictable, variable, and influenced by outside factors. Most importantly, however, remedying a Sixth Amendment violation with a procedurally inadequate retrospective hearing "completely vitiates the rights guaranteed . . . because such a remedy affirms the conviction without ever holding a procedurally adequate competency hearing."[174] By its very text, the Sixth Amendment applies to "all criminal prosecutions."[175] But when courts make procedural exceptions to uphold the results of certain trials which did not meet the requirements of the Sixth Amendment, they lower the nation's collective standards of justice. To avoid the further development of this incompetent jurisprudence, competency stage deprivations should be remedied through an automatic reversal rule.

C. *Deterring Volitional Behavior: Maximizing Compliance Through Prospect Theory*

A final justification for automatically reversing after a competency stage deprivation is based on deterrence. Automatic reversals have the potential to deter judicial malfeasance and misfeasance more effectively than evidentiary hearings.[176] That is, a future defendant's constitutional right to counsel is less likely to be violated if automatic reversal is the remedy available for violations. Behavioral psychology, rooted in the insights of prospect theory,[177] explains why this is the case. Depriving a defendant of counsel at his competency hearing is constitutional error in every circuit that has decided

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171 *See* United States v. Vasquez, 7 F.3d 81, 85 (5th Cir. 1993); *see also* Green v. United States, 262 F.3d 715, 718 (8th Cir. 2001) (explaining that the government cannot retrospectively demonstrate harmless error "by relying upon testimony from the very hearing at which [a defendant] was unrepresented").

172 Beaudreau, *supra* note 157, at 404.

173 *See* Evans v. Raines, 800 F.2d 884, 888 (9th Cir. 1986) ("When the state court fails [to hold a required competency hearing], it often may be impossible to repair the damage retrospectively.").

174 Beaudreau, *supra* note 157, at 406.

175 *See* U.S. CONST. amend. VI.

176 *See infra* subsection IV.C.1.

177 *See infra* notes 187-96.

the issue.[178] While the circuits are split over whether a *Klat* evidentiary hearing or a *Ross* automatic reversal is proper, a competency stage deprivation is error under either approach. Appellate courts reviewing a case in which a defendant waived counsel before his competency hearing, therefore, all levy a punishment of sorts against trial courts—and trial court judges—in the form of a remand. This punishment is the focus of deterrence theory.

The purpose of punishment, generally, is to "announc[e] certain standards of behavior and attach[] penalties for deviation."[179] Just as lawmakers try to design criminal punishment systems that will deter undesirable behavior, appellate courts seek to optimize their control over district court abuses by "devising a penalty-setting system that assigns . . . punishments of a magnitude sufficient to deter a thinking [court] from committing" the same error.[180] Put in economic terms, an appellate court shapes remedies so that the expected utility of future compliance for district court judges exceeds the expected benefits of noncompliance.[181] With these incentives in mind, appellate courts can shape remedies to influence district court analyses and promote more accurate judicial decisionmaking.

At its most basic level, a rational actor–deterrence model recognizes that individuals "respond to the incentives that they face, particularly the penalties which are imposed by the legal system."[182] Forced to preside over the "minefield"[183] that pro se litigation creates, a trial court judge is incentivized to avoid a penalty in the form of a remand of his judgment or sentencing decision. The full set of considerations faced by judges can be quantified by multiplying the likelihood of remand by the severity of the

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178 *See supra* Part II.

179 Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 982 (1966) (quoting H. L. A. HART, PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT 21-22 (1960)).

180 Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 950 (2003).

181 *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 55 (2005) (providing a "law and economics" analysis in the context of deterrence of prosecutorial misconduct).

182 *Id.*

183 *See* Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 166, 211 (2012) (arguing the rules imposed in court proceedings are a "minefield" for the pro se litigant); *see also* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005) (claiming that pro se litigation results in inefficiency).

specific remedy mandated by the appellate court.[184] More precisely, the simplified judicial incentive formula can be written as: *LR x SP = EP*, where *LR* is the likelihood of remand, *SP* is the severity of penalty, and *EP* is the total expected punishment.[185] Assigning numeric values to the *Ross* and *Klat* remedies helps to demonstrate this point more concretely and illustrate their different deterrent potentials.

First, for both approaches, the likelihood of remand remains constant. This is because appellate decisions to remand are not a function of the specific remedy attached. *LR = 1* in both equations, therefore, because the remedy comes after an initial decision to remand. Second, automatic reversal is a more severe penalty than an evidentiary hearing carrying only the possibility of reversal. This difference is reflected in the equation by making *SP = (-10)* for automatic reversal, while *SP = (-10) (0.5) + (0)(0.5) = (-5)* for an evidentiary hearing with possible reversal. For purposes of simplicity, the chances of reversal after the model evidentiary hearing are set at 50 percent.[186] Plugging both remedies into the formula yields the following:

Ross automatic reversal: 1 x (-10) = -10

Klat evidentiary hearing: 1 x [(-10)(0.5) + (0)(0.5)] = -5

The equations reveal that a judge can expect a penalty of -10 where automatic reversal is the remedy for a competency stage deprivation. By contrast, a judge sitting in a circuit where an evidentiary hearing is the remedy used faces a penalty with a total expected payoff of -5.

A *harsher* penalty, however, does not necessarily equate to a more *effective* penalty, and abstract quantification of different punishments says nothing about real-world effects. After all, for a difference in remedy to have any measurable deterrent impact, an implicit assumption is that a difference in remedy will influence judicial decisionmaking. While this may seem like an

184 *See* John W. Heiderscheit III, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 OR. L. REV. 57, 66-67 (1989) (explaining how Rule 37 sanctions deter bad behavior at trial depending on how the litigants perceive the likelihood and severity of potential punishments). The phrase "full set of considerations" here does not, nor should it, account for the political, personal, or other outside considerations of judges. If these considerations do consciously play a role in a particular judge's decisionmaking, such a variable would be difficult to model and even more difficult to justify.

185 *Id.* at 67 n.52 (describing the considerations for a litigant facing possible sanctions as *LP x SP = EP*, where *LP* is the likelihood of punishment).

186 In practice, this figure will vary depending on a host of factors including the particular appellate court, the reviewing judge, and case-specific facts. Regardless of the actual likelihood of a reversal in each case, the point remains that evidentiary hearings introduce uncertainty that makes appellate review less effective at serving deterrent goals.

unrealistic assumption to some, Kahneman and Tverksy's prospect theory would predict systematic deviation in judicial decisionmaking as a function of the remedies available for error.[187] Some may argue that judges are different and their cognitive psychology should not be analyzed using the same behavioral models derived from lay intuitions. If judges are individuals like the rest of us, however, then prospect theory has explanatory power.

Prospect theory describes human decisionmaking under risk. The fundamental insight of the theory is that "individuals tend to value losses more heavily than gains of the same magnitude."[188] For example:

> [I]f a person is given a choice between a 70% shot at $100 or a certain award of $70 [a gain], he will normally choose the certain $70. On the other hand, if forced to choose between paying a $70 fee or taking a 70% chance of having to pay a $100 fee [a loss], he will normally choose to gamble and face the 70% chance of paying the $100 fee.[189]

The above study, and countless others like it, conclude that individuals are risk-seeking for losses but risk-averse for gains.[190] Naturally, a host of implications flow from this insight, one of which is particularly helpful to the current discussion of a remedy's deterrent power: the certainty effect. Through an analysis of the certainty effect, *Ross* automatic reversals are shown to be more effective at deterring judges from presiding over competency stage deprivations. From a behavioral perspective, therefore, automatic reversals are preferable to evidentiary hearings if a greater number of future defendants are to receive their constitutionally guaranteed right to counsel.

1. The Certainty Effect

Automatic reversals would deter judges more effectively because their punitive effect is unambiguous. Evidentiary hearings, by contrast, introduce uncertainty and threaten only a probabilistic punishment. Prospect theory's certainty effect can help explain this difference. The certainty effect is derivable directly from prospect theory's fundamental premise. Because

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187 *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) (articulating prospect theory and its implications for the first time).

188 Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1119 (2003); *see also* Kahneman & Tversky, *supra* note 187, at 279 ("The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount.").

189 Note, *Risk-Preference Asymmetries in Class Action Litigation*, 119 HARV. L. REV. 587, 589 n.11 (2005).

190 *Id.* at 589.

losses loom larger than gains, "responses to uncertain situations appear to have an all or none characteristic that is sensitive to the possibility rather than the probability of strong positive or negative consequences, causing very small probabilities to carry great weight."[191] Put differently, when individuals are forced to make decisions under the risk of deciding incorrectly, they systematically "overweigh[] outcomes that are considered certain, relative to outcomes which are merely probable."[192] The certainty effect is most powerful when an individual's decision is accompanied by "anticipatory emotions" such as fear, anxiety, and dread.[193]

Applying prospect theory and its certainty effect reveals why the *Ross* approach deters constitutional violations better than the *Klat* approach. The difference is rooted in the uncertainty created by evidentiary hearings carrying only a chance of reversal, which contrasts starkly with the certainty provided by automatic reversal. Although an automatic reversal and an evidentiary hearing can yield the same penalty (reversal), the latter introduces variability into the deterrence calculus. A trial court judge, presiding over a competency hearing for a criminal defendant otherwise proceeding pro se, is more likely to ensure that the defendant's competence is subject to meaningful adversarial testing when the threat of an automatic reversal is available to the reviewing judge.

The certainty effect may cause a judge who is "pretty sure" of precedent governing self-representation at competency hearings to invest more time and effort into knowing the law if automatic reversal is available.[194] For example, in a cognitive study, lawyers were more willing to pay for discovery information that would increase their chances of winning from 95% to 100% than they were for information increasing their chances of winning from 25% to 30%.[195] Normatively, individuals should be willing to pay the same amount for the discovery information in both cases because the difference made by the information is 5% in each case. Descriptively, however,

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191 Paul Slovic et al., *Risk as Analysis and Risk as Feelings: Some Thoughts About Affect, Reason, Risk, and Rationality*, 24 RISK ANALYSIS 311, 318 (2004) (emphasis removed).

192 Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 283 (2006).

193 *See* George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 267-68 (2001).

194 *See* Richard Birke, Commentary, *Settlement Psychology: When Decision-Making Processes Fail*, 18 ALTERNATIVES TO HIGH COST LITIG. 203, 215 (2000) (applying the certainty effect to the behavior of lawyers in the discovery process).

195 *Id*.

individuals are systematically willing to pay a premium to avoid uncertainty.[196] But how does this reasoning apply to the current question of remedy?

The argument goes as follows: if an automatic reversal (a certain penalty) awaits a trial judge unless he ensures that a defendant is represented at his competency hearing, the certainty effect predicts that he will be much more likely to take steps to avoid error. By contrast, if an evidentiary hearing were the sole remedy available for error, the certainty effect predicts that a judge may be less likely to invest the time and research necessary to understand the nuances of the law and ensure that even stand-by counsel provides a meaningful adversarial testing. Just like individuals in cognitive studies, busy trial judges are presumably risk-seeking when faced with the prospect of a loss in the form of a remand. The threat of a loss, therefore, should incentivize judges to take the steps necessary to reduce their exposure to remand. The uncertainty introduced by evidentiary hearings makes the remedy less of a cognizable loss, however, and therefore the remedy is less effective at deterring judicial missteps. This result should remain observable even where a judge faces either automatic reversal (100% chance of loss) or an evidentiary hearing with a resulting 99% chance of reversal.[197] Indeed, the power of the certainty effect is that even this seemingly miniscule difference in probability can lead to systematic behavioral deviation. As a result, the risk premium paid by judges—time and effort, for purposes of this analysis—is more likely to be invested where a certain penalty hangs in the balance. Automatic reversal provides this certainty, and deterrence of judicial error is more likely to follow from the *Ross* approach.

2. Criticisms of Deterrence-Based Reasoning in this Context

Certain questions can be raised regarding the efficacy of deterrence-based strategies where judges are the intended audience. First, if an appellate remand is to deter subsequent violations by trial court judges, three prerequisites must be satisfied: the judge must know the new standard, he must perceive the cost of violation to be greater than the perceived benefit of misfeasance or malfeasance, "and he must be able and willing to bring

196 *See, e.g.*, Kahneman & Tversky, *supra* note 187, at 265 (noting that "people overweight outcomes that are considered certain"); *see also* Clifford W. Smith, Jr., *Market Volatility: Causes and Consequences*, 74 CORNELL L. REV. 953, 956 (1989) (explaining that investors require increasing "risk premiums" to invest in volatile opportunities); Note, *supra* note 189, at 592 ("A risk-seeking plaintiff['s] . . . greater willingness to go to trial means that the defendant must pay him a risk premium above the expected value . . . to induce him to settle.").

197 The probability of reversal of the hearing could be this high, hypothetically, for a variety of case-specific reasons.

such knowledge to bear on his conduct decision at the time of the offense."[198] The absence of even one of these preconditions undermines deterrent goals within the criminal law context.[199] Application of these preconditions to the context of appellate review, however, reveals that judges, perhaps even more than lawyers or other sophisticated parties, are good targets for deterrence-based strategies. Expecting a judge to understand new precedent, to rationally calculate, and to conform his decisions accordingly does not seem unrealistic. In this regard, automatic reversal, as opposed to an evidentiary hearing, is the penalty more likely to deter a rationally calculating judge from allowing a defendant to proceed unrepresented during his competency hearing. Although automatically reversing a defendant's conviction and sentence based on this judicial error is more severe, the result is also more likely to motivate other judges to become aware of the standard and adjust their behavior accordingly—a general deterrent effect.

Second, when taken in isolation, the above deterrence analysis is far too simplistic. One could argue that solely comparing the deterrent potential of various remedies simply leads to choosing the penalty that is the harshest in every case. In a system concerned only with deterrence, therefore, serious punishment could be appropriate for a judge allowing a defendant to proceed unrepresented during his competency hearing. This result should seem ridiculous to most readers, however, and for good reason. Analyzing a remedy through a one-dimensional deterrence analysis ignores considerations of morality and proportionality that are important to most individuals.[200] While choosing a harsh penalty like jail time might better prevent judicial error in more cases, effective deterrence might come at the cost of the justice system's credibility and legitimacy.[201]

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198 *Cf.* Robinson & Darley, *supra* note 180, at 953 (discussing the prerequisites that must be satisfied for criminal law to effectively deter potential violators).

199 *Id.* at 953-56 (discussing how deterrence is undermined by violator's lack of knowledge of the law, inaccurate perception of the cost of violating rules, and inability to make rational decisions).

200 *See, e.g.*, Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 149 (2008) (explaining that social science experiments reveal that concepts of blameworthiness and justice strongly influence community intuitions about desert); Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1434-39, 1444-46, 1450-54 (2001) (exploring issues of proportionality and justice in a criminal law system that increasingly emphasizes preventive detention).

201 PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 98 (3d ed. 2012) ("Thus, the criminal law's moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as 'doing justice' . . . .").

Again, however, this general critique of deterrence seems to be less applicable to the current analysis of remedies. First, as the *Ross* court stated, the "established rule [is] that complete deprivation of counsel during a critical stage warrants automatic reversal without consideration of prejudice."[202] With the Supreme Court developing critical stage doctrine and reaffirming its requirements over decades of jurisprudence, the argument that automatic reversal is unnecessarily draconian or unprecedented is not credible. First, granting an automatic reversal in such cases falls well within the established lines of proportionality and legitimacy established by this nation's highest court. Second, both the *Ross* and *Klat* approaches feature reversal as at least one of the remedies available when a defendant is unrepresented at his competency hearing. Both approaches, therefore, implicitly acknowledge that reversal is an appropriate remedy under at least some circumstances. The argument in favor of one or the other simply revolves around whether reversal should be automatic or come after an evidentiary hearing—a debate that belongs more within the rules versus standards paradigm, not a desert paradigm.[203] Automatic reversal is the established remedy for a deprivation of counsel at a "critical stage," so characterizing reversal as unnecessarily harsh to accomplish judicial deterrence in the competency hearing context is indefensible. Absent a global critique calling for the complete end to reversals, both *Klat* and *Ross* seem legitimate from a proportionality perspective.

Finally, the most damning critique of deterrence-based justifications for automatic reversal questions whether individual judges, operating within a larger federal court system, can even be deterred at all. This critique, rooted in what I will refer to as "organizational theory," attacks the fundamental premise that individuals can be effectively deterred under the right conditions. Organizational theory

> criticizes rational choice theory for ignoring the impact organizations play in influencing individual actions. According to this account, the structure and culture of an institution frame . . . the situation for its agents, such that they are no longer acting as isolated rational individuals, engaging in a rational actor calculus. Instead, they function as part of a larger structure, absorbed in a larger cause, with the result that the organization's rationality—its goals and means—dominates in a way that may escape the attention of any one individual. This process can then create a recipe for organizational

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202 United States v. Ross, 703 F.3d 856, 874 (6th Cir. 2012).

203 For more on the competing benefits and limitations of rules and standards, see generally Korobkin, *supra* note 165, and Kaplow, *supra* note 165.

> wrongdoing that will never trouble the conscience of anyone within the organization.[204]

If organizational norms and standards truly shape the decisions of individual judges in the same way that they allegedly limit the discretion of police officers,[205] for example, then a deterrence-based theory focused on individual judges is misguided. Instead, under organizational theory, cultural and "structural change" of the court system as a whole is required before any individual judge can be deterred.[206]

Organizational theory, however, is not nearly as accepted as the competing theory of "methodological individualism."[207] Methodological individualism holds that "[i]nstitutions composed of individuals will only behave rationally, that is, will only adopt optimal means of achieving their goals, if such behavior results from the separate, self-interested behaviors of the people who comprise them."[208] This view of organizations as being reducible to the level of the individual is "even more foundational to law and economics than the rationality assumption, serving as a kind of framing constraint, rather than simply an assumption."[209] While neither theory can be definitively proven, methodological individualism's appeal stems from a number of epistemological advantages over organizational theory. First, methodological individualism is more consistent with one's everyday experience, allowing for a more intuitive explanation and avoiding metaphorical statements.[210] Second, unlike organizational theory, methodological individualism "generates testable hypotheses" regarding individual behavior and preferences.[211] For example, identifying a particular judge as "conservative" is testable, while classifying an entire court as "conservative" is a more complex task

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204 Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 832-34 (2013) (citations and internal quotation marks omitted).

205 *See id.*; *see also* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 512-13 (2004) (claiming that informal police force norms create organizational control over the range of discretion of individual officers).

206 *See* Kinports, *supra* note 204, at 834 (arguing that, in the context of police behavior, the exclusionary rule could only serve as a deterrent if it spoke to police culture and created structural change); *see also* Armacost, *supra* note 205, at 509-10, 528 (opining that "systemic" remedies are needed to deter police misconduct, rather than "individual-specific" solutions).

207 *See* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 539 (1998) (defining methodological individualism as "the assumption that individuals are the only agents of human action"); Jason Scott Johnston, *Law, Economics, and Post-Realist Explanation*, 24 LAW & SOC'Y REV. 1217, 1244 (1990) ("Even the most superficially functional economic analysts of law ultimately adopt a methodological individualist research program . . . .").

208 Edward Rubin, Commentary, *Rational States?*, 83 VA. L. REV. 1433, 1436 (1997).

209 Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43, 45 (2011).

210 *See* Rubin, *supra* note 208, at 1436.

211 *Id.*

which requires an analysis of the preferences of individual judges anyway—just less directly. Finally, methodological individualism focuses its analysis on the point where the "human experience occurs," instead of requiring an abstraction to a higher order.[212] Therefore, while one might question the ability of appellate review to deter judges from violating the constitutional rights of future defendants, that criticism should not lead to a recommendation that entire courts should be deterred instead. Individual judges make decisions, and therefore individual judges have the power to ensure that a defendant is not deprived of counsel at his competency hearing. Automatically reversing a conviction and sentence—entered after a defendant's Sixth Amendment rights were violated—is the most effective and efficient means to prevent future constitutional violations ex ante. If one remedy, consistent with Supreme Court jurisprudence, has the ability to reduce constitutional violations, there is little reason to select a competing theory. In order to do justice efficiently, automatic reversal should be the uniform remedy in this context.

V. CRITIQUING REVERSALS: EMPIRICAL DESERT AND CHILLING EFFECTS

The preceding Part provided three separate, but related, justifications for automatic reversal after a competency stage deprivation. Whether contractual, practical, or behavioral reasoning is ultimately persuasive, automatic reversals are a superior remedy to evidentiary hearings. As the above discussion made clear, however, each justification is vulnerable to its own set of criticisms and concerns. This Part briefly sets forth more global criticisms of the use of automatic reversals, all of which apply to the remedy regardless of the justifications for its use. While the mere presence of a circuit split indicates that these competing concerns provide sufficient support for some courts to utilize evidentiary hearings, the following discussion aims to explain why that choice is misguided.

A. *Minimizing Long-Term Costs*

The first criticism of the use of automatic reversals is based in economics. Reversing a conviction, the argument goes, produces waste in the form

212 *See* Ahdieh, *supra* note 209, at 82 n.235; *see also* Edward L. Rubin, *Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 VAND. L. REV. 1705, 1717 (1998) ("[M]ethodological individualism is . . . the theoretically argued position that the human consciousness is the irreducible arena of experience.").

of a squandered trial and its side effects.[213] According to this line of reasoning, evidentiary hearings avoid unnecessary waste by distinguishing trials where an error was "harmless" from those in which a more serious error occurred. Of course, after the jury is empaneled, lawyers present their cases and the judge decides, denying that automatic reversals impose costs is an untenable position. While reversals do impose short-term costs, relying on evidentiary hearings instead of reversals may increase long-term aggregate costs. As the earlier discussion of deterrence explained, one of the advantages of automatic reversals is that the remedy may make the perceived cost of future volitional behavior "exceed the advantage of the offence,"[214] and "consequently bring about strong general preventive effects."[215] Instead of focusing on the immediate, measureable waste caused by automatic reversals in each case, "deterrence focuses forward on the prevention of future misconduct."[216] Therefore, while there is no objective measure of deterrence, it is quite possible—I argue probable—that choosing to automatically reverse after competency stage deprivations will decrease the long-term drain on judicial resources and burden on society. Although reversing in individual cases may be hard to swallow, particularly where the defendant is extremely dislikable or the crime especially heinous, the deterrent potential of reversal may lead to an overall reduction in the number of *Ross*/*Klat*-type cases.

B. *Empirical Desert and Systematic Credibility*

A second criticism of automatic reversals focuses on the moral credibility of the criminal justice system. As proponents of the "empirical desert" theory of punishment urge, in order to be effective, punishment must be

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213 *See, e.g.*, United States v. Pryce, 938 F.2d 1343, 1347 (D.C. Cir. 1991) ("[A]utomatic reversal inflicts on the public the costs of a needless retrial and on other litigants the resulting delays."); People v. Hall, 460 N.W.2d 520, 527 (Mich. 1990) ("To require automatic reversal of an otherwise valid conviction for an error which is harmless constitutes an inexcusable waste of judicial resources."); Petition for a Writ of Certiorari at 11, Gupta v. United States, 599 U.S. 905 (2010) (No. 09-711), 2009 WL 4882622, at *11 ("Such an automatic-reversal rule results in a waste of scarce judicial resources.").

214 *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 325 (C. K. Ogden, ed., Richard Hildreth, trans., 1931).

215 *See* Andenaes, *supra* note 179, at 983; *see also* Herring v. United States, 555 U.S. 135, 141 (2009) ("[T]he benefits of deterrence must outweigh the costs."); United States v. Leon, 468 U.S. 897, 910 (1984) (explaining that, in the context of the exclusionary rule, the increased deterrence that may come from a broader application of the rule may not outweigh the costs imposed).

216 Kinports, *supra* note 204, at 854.

"consistent with the community's views about what constitutes justice."[217] Community views are important because, if consistent with these views, "the law gains access to the power and efficiency of stigmatisation[,] . . . gains compliance by prompting people to defer to it as a moral authority in new or grey areas[,] . . . and it earns the ability to help shape of [sic] powerful influence of societal norms."[218] Like deterrence, choosing punishments that calibrate with empirical desert can help "to minimize future crime."[219] Unlike purely deterrence-based punishments, though, morally credible punishments can add to the overall credibility of the criminal justice system and discourage discontent.[220] So where does automatic reversal fall?

The moral criticism of automatic reversals is that all defendants deprived of counsel are treated the same under the remedy. No distinction is made between the remorseful defendant with a history of mental illness and the sadistic serial killer—if deprived of counsel at their competency hearings, both will have their convictions reversed. Yet, in a society where mental illness is widely misunderstood[221] and the perception is that "the insanity plea defeats justice, discredits psychiatry, and enrages the public,"[222] reversing a verdict for any reason related to a defendant's competence risks undermining the public credibility of the criminal justice system. While competency stage deprivations focus on a defendant's Sixth Amendment right to counsel, meaning that any comparison with the insanity defense is misguided, public perception that the two are interchangeable may be important to the criminal justice system, even if inaccurate.

By protecting the constitutional rights of even the most distasteful defendants, however, automatic reversals can powerfully demonstrate the

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217 *See* Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, *supra* note 200, at 167.

218 *Id.* at 149-50.

219 *Id.* at 166.

220 *Id.* at 153-54.

221 *See* Karin A. Guiduli, *Challenges for the Mentally Ill: The "Threat to Safety" Defense Standard and the Use of Psychotropic Medication Under Title I of the Americans with Disabilities Act of 1990*, 144 U. PA. L. REV. 1149, 1159 (1996) ("[T]he hidden and misunderstood nature of mental illness contributes to suspicion and disbelief that does not exist for physical disabilities. Lurking behind a diagnosis is the 'myth of mental illness.'" (quoting THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS (1974))).

222 WILLIAM J. WINSDALE & JUDITH WILSON ROSS, THE INSANITY PLEA 20 (1983); *see also* CAL. COMM'N FOR THE REFORM OF CRIMINAL PROCEDURE, REPORT OF THE COMMISSION FOR THE REFORM OF CRIMINAL PROCEDURE, TO THE LEGISLATURE 16-17 (1927) ("An even more serious fault of the present system is that a defendant . . . [can] bring into the case the whole matter of his sanity . . . . This enables him to submit to the jury great masses of evidence having no bearing upon the question . . . .").

system's legitimacy.[223] Instead of placing "the protection of our most precious . . . constitutional rights . . . in the tumultuous tides of public misperception,"[224] reversals do not make constitutional protections dependent on popular opinion. Some guilty defendants might benefit from their competency stage deprivations, but it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[225] The Constitution is not discretionary, and its protections apply to all.

Even if allowing community intuitions to determine appellate remedies is not a sufficiently alarming idea, the justifications for doing so have little force here. No doubt empirical desert is at its most powerful within the context of traditional criminal law, where punishment rules like the grading of attempts can be made to neatly map onto community intuitions of justice.[226] But the dangers of vigilantism and noncompliance—two justifications often offered for prioritizing empirical desert—are much less of a threat when the "community" receiving punishment is the federal judiciary. In this setting, even if automatic reversals are viewed as disproportionate or arbitrary, this perception is likely only to increase the remedy's deterrent effect. Without moral or theoretical support to stand on, the empirical desert critique of automatic reversals falls flat.

C. *Chilling Effect on Competency Hearings*

The last global critique of automatic reversals is practical. Its implications are concerning. If reversal follows every competency stage deprivation, the remedy could lead to a chilling effect on competency hearings themselves. As the *Ross* dissent argued, if raising any sort of questions

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223 *See* Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 723 (2000) ("The legitimacy of authorities is an especially promising basis for the rule of law . . . . [A]uthorities . . . are required to make unpopular decisions, which may deliver unfavorable outcomes."). However, many scholars maintain that if legitimacy and moral credibility conflict, the latter should be chosen. *See, e.g.*, Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 283 (2012) ("Sometimes, legitimacy is to be prioritized. More often, we think moral credibility is the superior value.").

224 Weinschenk v. State, 203 S.W.3d 201, 219 (Mo. 2006) (en banc).

225 *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

226 *See, e.g.*, Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1522 (1964) ("Section 110.05 . . . drops the penalty [for attempt] 'only one notch below that of the crime attempted.'" (citation omitted)). *But cf.* MODEL PENAL CODE § 5.05(1) (1985) ("Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted . . . .").

regarding a defendant's competence can create a minefield, "a trial judge may well be understandably reluctant—especially in marginal cases—to have any type of proceeding focusing on a defendant's competence."[227] According to this critique, a trial judge will rationally avoid holding any additional hearings, even where a defendant's competence is questionable, because appellate courts are much "more reluctant to reverse a sub silentio holding that no further inquiry was necessary."[228] Therefore, automatic reversals have the potential to harm defendants that are truly incompetent while undermining the overall accuracy of trials.[229]

Even the *Ross* majority acknowledged the legitimate concerns raised by this critique. As that court stated:

> [W]e note that the prosecutor was expressly (and commendably) attempting to protect the record against this very result through the two motions for competency hearings. We do not wish to discourage motions for or grants of competency hearings when the matter is in any doubt but instead seek to provide guidance on the constitutional and statutory requirements to be followed so that hearings at this critical stage are not empty formalities but are meaningful adversarial determinations that generate a record sufficient for appropriate review on appeal.[230]

This response connects with one of the affirmative arguments of this Comment. The purpose of punishment, generally, is to "announc[e] certain standards of behavior and attach[] penalties for deviation."[231] By attaching automatic reversals to competency stage deprivations, judges are able to make decisions with a clear and easy-to-understand penalty in the background. Unlike evidentiary hearings, automatic reversals announce exactly what punishment will follow each violation, which should encourage rational calculation. This clarity assuages the effects of uncertainty and disincentivizes the strategic behavior that uncertainty motivates.

In addition, there would be little threat of a chilling effect because the new standard imposed on courts is not vague, difficult to understand, or different from previous requirements. The rule is simple: "a defendant

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227 United States v. Ross, 703 F.3d 856, 887 (6th Cir. 2012) (Boggs, J., concurring in part and dissenting in part).

228 *Id.*

229 *See, e.g.*, Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007) ("[C]lose to 80% of pro se felony defendants were not ordered to undergo competency evaluations . . . .").

230 *Ross*, 703 F.3d at 874.

231 Andenaes, *supra* note 179, at 981-83 (quoting H. L. A. HART, PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT 21-22 (1960)).

[must] be represented by counsel at his own competency hearing, even if he has previously made a knowing and voluntary waiver of counsel."[232] Courts will have two clear options to weigh: (1) ensure that the defendant is represented by counsel at his competency hearing or (2) have any subsequent verdict and sentence reversed automatically. These requirements are not draconian and compliance should not present a significant new hurdle for trial judges. After all, the right to counsel is not a new concept and is relevant at many points during a criminal trial. Regardless, the focus of this critique is not the choice between reversals or hearings; rather, the Sixth Amendment requirement itself is at the center of the discussion. Unless the argument is that only automatic reversals, not the threat of evidentiary hearings with possible reversal, will lead to a chilling effect, then neither of the remedies currently used completely avoids the threat of strategic behavior by judges. While automatic reversal may foster more anxiety in the judiciary, these effects must be weighed against its benefits. The benefits of automatic reversals win the day.

CONCLUSION

A criminal defendant may proceed pro se "unless his relinquishment of the right to counsel cannot be said to be knowing and intelligent."[233] This requirement asks if the defendant "knows what he is doing and [if] his choice is made with eyes open."[234] Competency hearings are the tool used to test his understanding. This is why every circuit to decide the issue has found it "contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel."[235] The consensus regarding this finding, however, disappears at the remedy stage. The two remedies used by this nation's circuit courts, automatic reversals and evidentiary hearings for prejudice, lead to different results and provide different incentives. This Comment provides three different justifications for the use of automatic reversals—one contractual, one practical, and the last behavioral. From each of these perspectives, automatic reversal is more consistent with the Sixth Amendment's history and purpose. When a criminal defendant chooses to

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232 *Ross*, 703 F.3d at 871.

233 Brief for Petitioner at 16-17, Faretta v. California, 422 U.S. 806 (1975) (No. 73-5772), 1974 WL 186113, at *16-17.

234 Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942) (citing Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938)).

235 United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998).

proceed pro se, the trial judge must "assume a protective role."[236] If the judge fails to do so at the competency stage, some alternative source of protection must exist as a backstop. To provide this form of pro se paternalism, automatic reversals should be used. The lives and liberties of future defendants depend on it.

236 *See* Joshua L. Howard, *Hybrid Representation and Standby Counsel: Let's Clear the Air for the Attorneys of South Carolina*, 52 S.C. L. REV. 851, 856 (2001).