

---

---

## COMMENT

# An Incompetent Jurisprudence: The Burden of Proof in Competency Hearings

Brett F. Kinney\*

### TABLE OF CONTENTS

|   |     |
|---|-----|
| INTRODUCTION .....  | 685 |
| I. BACKGROUND .....   | 688 |
| A. <i>Due Process Right of the Incompetent Not to Stand Trial</i> ...   | 689 |
| B. <i>18 U.S.C. § 4241</i> .....  | 692 |
| C. <i>Cooper v. Oklahoma</i> .....  | 694 |
| D. <i>Psychiatric Evidence and Burden Shifting</i> .....  | 696 |
| II. THE CIRCUIT SPLIT: <i>UNITED STATES V. ROBINSON AND UNITED STATES V. HOSKIE</i> .....   | 698 |
| A. <i>United States v. Robinson</i> .....   | 698 |
| B. <i>United States v. Hoskie</i> .....   | 699 |
| III. ANALYSIS .....   | 700 |
| A. <i>Allocating the Burden to the Party Raising the Competency Issue Comports with Supreme Court Precedent</i> .....                 | 701 |
| B. <i>Allocating the Burden of Competency to a Defendant Correctly Construes the U.S. Constitution and Medina v. California</i> ..... | 705 |

---

\* Senior Notes & Comments Editor, *UC Davis Law Review*. J.D. Candidate, UC Davis School of Law, 2010; B.A., Political Science, Legal Studies, UC Berkeley, 2007. Many thanks to Leif Kogel, Jennifer Espanol, Shahtaj Siddiqui, and Lowell Chow for their editorial assistance. Thanks to my friends and family for their love and support. Most of all, thanks to my parents for their pride in my accomplishments, and to my siblings for finding humor in my foibles.

C. *Allocating the Burden of Competency to the Government  
Is Consistent with Placing Other Burdens on the  
Government*..... 708

CONCLUSION..... 711

## INTRODUCTION

Thamin Shawar fraudulently redeemed over 200,000 newspaper and magazine coupons.<sup>1</sup> Three court-appointed psychiatrists determined that Shawar had borderline mental retardation.<sup>2</sup> Had the Government proved Shawar's mental competence, he would have faced a twenty-year sentence.<sup>3</sup> However, the trial court found Shawar incompetent to stand trial under the Insanity Defense Reform Act of 1984, codified at 18 U.S.C. § 4241.<sup>4</sup> The Court of Appeals for the Seventh Circuit ordered Shawar committed indefinitely to a mental hospital.<sup>5</sup>

In Shawar's case, the Government failed to affirmatively establish that Shawar was competent to stand trial.<sup>6</sup> As a result, Shawar faced the prospect of life in a psychiatric ward.<sup>7</sup> The Third, Fifth, and Ninth Circuits would have resolved the case in the same manner as the Seventh Circuit.<sup>8</sup> Those circuits place on the Government the burden of proof in competency hearings brought under 18 U.S.C. § 4241(a).<sup>9</sup> In the Fourth and Eleventh Circuits, however, Shawar would have borne the burden of proving his incompetency to stand trial.<sup>10</sup> Failure

---

<sup>1</sup> See *United States v. Shawar*, 865 F.2d 856, 858 (7th Cir. 1989).

<sup>2</sup> *Id.*

<sup>3</sup> *But see id.* at 857 (observing that issue on appeal was lower court's failure to commit defendant to Attorney General for hospitalization, not question of defendant's competence).

<sup>4</sup> 18 U.S.C. § 4241 (2006); *Shawar*, 865 F.2d at 864.

<sup>5</sup> *Shawar*, 865 F.2d at 864; see 18 U.S.C. § 4241(d).

<sup>6</sup> *Shawar*, 865 F.2d at 858.

<sup>7</sup> See *id.*

<sup>8</sup> Cf. *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (holding that Government has burden of proving competency by preponderance of evidence); *United States v. Velasquez*, 885 F.2d 1076, 1089 (3d Cir. 1989) (stating that Government must establish competency); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (holding that state bears burden of proving competency to stand trial).

<sup>9</sup> See *Hoskie*, 950 F.2d at 1392 (finding that lower court erred in ruling that Government met its preponderance-of-evidence burden); *Velasquez*, 885 F.2d at 1089 (explaining that factual finding of competency is reviewable under clear-error standard); *Hutson*, 821 F.2d at 1018 (requiring state to provide enough quantity and quality of evidence to have meaningful hearing).

<sup>10</sup> See *Battle v. United States*, 419 F.3d 1292, 1298 (11th Cir. 2005) (finding no presumption of incompetence but rather that defendant must demonstrate incompetency); *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005) (emphasizing that defendant has burden of proving incompetency).

to prove incompetency would have resulted in his case proceeding to trial and the potential imposition of a twenty-year sentence at most.<sup>11</sup>

The principle that incompetent persons should not stand trial has deep roots in the common law.<sup>12</sup> The Supreme Court has recognized that the Constitution protects this principle as a fundamental right.<sup>13</sup> The circuit courts, however, have split over which party bears the burden of proof in competency hearings under 18 U.S.C. § 4241, with some circuits placing the burden on the Government and others placing it on the individual.<sup>14</sup> When a party challenges a defendant's mental competency, statutes provide for psychiatric examinations of the defendant and authorize civil confinement based on those mental health findings.<sup>15</sup> Scholarly works in this area primarily discuss the meaning of competence and the interaction of psychotherapy and the

---

<sup>11</sup> See *Robinson*, 404 F.3d at 862 n.5; see also 18 U.S.C. § 4241(d) (2006) (establishing procedures to determine and dispose of competency hearings). Compare 18 U.S.C. § 4241 (providing for civil commitment in hospital), with 18 U.S.C. § 1341 (2006) (criminalizing and punishing mail fraud).

<sup>12</sup> See *Medina v. California*, 505 U.S. 437, 446 (1992) (noting deep roots of common law prohibition on incompetents standing trial); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (discussing William Blackstone's view that courts should not arraign one who becomes "mad" after commission of offense); see also Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) (observing that ban on trials in absentia prohibits trial of incompetent defendants because defendant is unable to assist in his defense).

<sup>13</sup> See *Medina*, 505 U.S. at 453 (reaffirming long-standing recognition that criminal trial of incompetent defendant violates due process); *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (finding that conviction of incompetent defendant violated his constitutional right to fair trial); see also *Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring) (explaining that Due Process Clause prohibits involuntary administration of antipsychotic drugs to restore defendant's competence because due process gives incompetent defendant right to avoid trial).

<sup>14</sup> See *United States v. Patel*, 524 F. Supp. 2d 107, 112-14 (D. Mass. 2007) (discussing circuit split). Compare *Battle*, 419 F.3d at 1298 (finding no presumption of incompetence but rather that defendant must demonstrate incompetency), and *Robinson*, 404 F.3d at 856 (explaining that defendant has burden of proving incompetency), with *Hoskie*, 950 F.2d at 1392 (stating that Government bears burden of proving competence by preponderance of evidence), *United States v. Velasquez*, 885 F.2d 1076, 1089 (3d Cir. 1989) (stating that Government bears responsibility to establish competency), and *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (holding that state bears burden of proving competency to stand trial).

<sup>15</sup> See 18 U.S.C. § 4241 (2006) (providing for mental competency hearings and forced hospitalization); see also CAL. PENAL CODE § 1368 (West 2008) (authorizing hearings to determine defendant's mental competence); N.H. REV. STAT. ANN. § 135:17 (2008) (providing for competency hearing and psychiatric examinations on motion of either party).

law.<sup>16</sup> However, a dearth of analysis examining the procedural aspect of competency hearings leaves courts with little guidance.<sup>17</sup>

This Comment argues that the party initiating proceedings to determine competency should bear the burden of proof at such a hearing.<sup>18</sup> Part I reviews the constitutional basis for competency hearings, explores the statutory provisions of 18 U.S.C. § 4241 that create procedures and standards for competency hearings, and examines the Supreme Court's interpretation of those provisions.<sup>19</sup> Part I also highlights the confusion that the Court's dictum in *Cooper v. Oklahoma* created in the lower courts.<sup>20</sup> In *Cooper*, the Court rejected a clear-and-convincing standard for proving incompetency and noted that the federal government places that burden on the defendant.<sup>21</sup> Part II details the split between the Fourth Circuit's decision in *United States v. Robinson*, which placed the burden of proving competency on the defendant, and the Ninth Circuit's holding in *United States v. Hoskie*, which placed the burden of proving competency on the government.<sup>22</sup>

Part III argues that a burden-shifting procedure is consistent with the Supreme Court precedents of *Parke v. Raley* and *Buchanan v. Kentucky*, which address burden-shifting procedures and the admission of

---

<sup>16</sup> See generally MICHAEL L. PERLIN ET AL., *COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION* (2008) (exploring intersections of mental health and law); Naomi Bondat Mann, *Competency to Stand Trial*, 88 GEO. L.J. 1260 (2000) (discussing evolution of Supreme Court's approach to psychiatric evidence); Missouri Institute of Mental Health Policy Brief, <http://mimh200.mimh.edu/mimhweb/pie/reports/MIMH%20policybrief06-03.pdf> (last visited Nov. 22, 2008) (providing overview of legal definitions of mental competence and discussing treatment approaches for incompetency).

<sup>17</sup> But see *Cooper v. Oklahoma*, 517 U.S. 348, 360-62 (1996) (discussing burden of proof in federal competency hearing in context of reviewing state's requirement of clear and convincing evidence); *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (finding defendant needs same competence to stand trial, plead guilty, and waive right to counsel); *Patel*, 524 F. Supp. 2d at 112-14 (describing circuit split and articulating reasons for placing burden on Government).

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part I.A-B.

<sup>20</sup> See *infra* Part I.C.

<sup>21</sup> See *Cooper*, 517 U.S. at 362; *infra* Part I.C.; see also *Patel*, 524 F. Supp. 2d at 111 (recognizing that courts have found Supreme Court dicta not binding upon lower federal courts).

<sup>22</sup> See *infra* Part II. Compare *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005) (requiring defendant to prove incompetency), with *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (placing burden of proving defendant's competence on government).

psychological evidence at trial.<sup>23</sup> It then argues that *Robinson's* holding allocating the burden of proof to a criminal defendant comports with the U.S. Constitution and the Supreme Court's holding in *Medina v. California* that criminal defendants in state court may bear the burden of proof.<sup>24</sup> Part III also argues that *Hoskie* correctly found that the Government may bear the burden of proof, but erred in allocating it to the Government in that case.<sup>25</sup> Part III further explains that a system of allocation premised on the identity of the moving party ensures adversarial proceedings in which each party argues a position consistent with its interests.<sup>26</sup> If the Supreme Court were to resolve this split, it should adopt a burden-allocating procedure that places the burden of proof on the party bringing the motion to determine competency rather than implementing a per se rule.<sup>27</sup>

### I. BACKGROUND

The debate over motions to determine competency implicates important personal interests.<sup>28</sup> These interests lie at the intersection of psychiatry, constitutional law, and criminal procedure.<sup>29</sup> A long-established principle of criminal procedure protects incompetent defendants from facing trial.<sup>30</sup> The Constitution establishes this due process protection and 18 U.S.C. § 4241 codifies it.<sup>31</sup>

---

<sup>23</sup> See *infra* Part III.A. See generally *Parke v. Raley*, 506 U.S. 20 (1992) (discussing burden-shifting framework for suppression hearing); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (finding psychological evidence admissible at trial when defendant initiates examination).

<sup>24</sup> See *infra* Part III.B.

<sup>25</sup> See *Hoskie*, 950 F.2d at 1392.

<sup>26</sup> See *infra* Part III.A.

<sup>27</sup> See *infra* Part III.

<sup>28</sup> See generally PERLIN ET AL., *supra* note 16 (exploring interplay of mental health field and legal determinations); Mann, *supra* note 16 (discussing right against self-incrimination in context of Supreme Court's approach to psychiatric evidence); Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1381 (2006) (arguing that prosecuting incompetent defendant harms defendant, undermines outcome, and demeans dignity of process).

<sup>29</sup> See generally THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (2d ed. 2002) (discussing conceptual model for understanding nature of legal competencies); PERLIN ET AL., *supra* note 16 (discussing ways in which psychiatry and law interact); John W. Parry, *Highlights*, 32 MENTAL & PHYSICAL DISABILITY L. REP. 488, 489 (2008) (discussing Supreme Court opinion about right to counsel at competency hearings and ambiguous higher standard for incompetency).

<sup>30</sup> See *Medina v. California*, 505 U.S. 437, 446 (1992) (noting origin of common law prohibition on incompetents standing trial); *Drope v. Missouri*, 420 U.S. 162, 171

A. *Due Process Right of the Incompetent Not to Stand Trial*

The Supreme Court has recognized that the Constitution's prohibition on incompetent defendants standing trial is part of the common law heritage.<sup>32</sup> The prohibition may have stemmed from the ban on trials in absentia.<sup>33</sup> According to this theory, an incompetent defendant, although physically available, was not mentally present in the courtroom to proffer a defense.<sup>34</sup> In effect, an incompetent defendant was equally as absent as a defendant who did not appear at all, as neither a physically absent or mentally incompetent defendant could present a defense.<sup>35</sup> The right to present a defense is a

---

(1975) (discussing Blackstone's view that defendant who develops mental health problems after committing crime is immune from arraignment); *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (explaining that insane person cannot enter plea, go to trial, or receive judgment).

<sup>31</sup> See 18 U.S.C. § 4241 (2006) (providing for competency hearings and civil confinement if defendant is incompetent to stand trial); *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (citing *Pate v. Robinson*, 383 U.S. 375, 378 (1966)) (recognizing that criminal defendant must be competent when tried); *Medina*, 505 U.S. at 439 (explaining that Due Process Clause of Fourteenth Amendment forbids prosecution of persons incompetent to stand trial).

<sup>32</sup> See *Medina*, 505 U.S. at 445-46 (observing that criminal procedure reflects centuries of common-law practice, and acknowledging well-settled tradition regarding trial of incompetent defendants); *Drope*, 420 U.S. at 171-72 (explaining that prohibiting incompetent defendants from standing trial is essential part of adversary process). See generally *Youtsey*, 97 F. at 940-46 (detailing history of rule against trying incompetent defendants).

<sup>33</sup> See *Drope*, 420 U.S. at 171 (citing Foote, *supra* note 12, at 834); *Eddmonds v. Peters*, 93 F.3d 1307, 1314 (7th Cir. 1996) (noting that scholars suggest origin of prohibition against incompetents standing trial is common-law ban on trials in absentia); *Maroney*, *supra* note 28, at 1381 (noting theory of in-absentia bans on incompetent defendants being tried).

<sup>34</sup> Cf. *Drope*, 420 U.S. at 172 (explaining that defendant's right to be present at trial requires that he be able to aid in his defense and understand proceedings against him); Recent Decision, *Foreign Trials in Absentia: Due Process Objections to Unconditional Extradition*, 13 STAN. L. REV. 370, 377 (1961) (discussing law of extradition and arguing that conviction in absentia cannot determine defendant's guilt because it is too unreliable). See generally FED. R. CRIM. P. 43(a) (requiring presence of defendant at every stage of criminal justice process); *Crosby v. United States*, 506 U.S. 255, 256 (1993) (holding that Federal Rule of Criminal Procedure 43 does not permit trial in absentia of defendant who escaped before trial and misses its commencement).

<sup>35</sup> Cf. John L. Calcagni III, *Contesting the Constitutionality of Restricting Criminal Defendant Opening Statements*, 53 R.I. B.J. 5, 9 (2005) (explaining that due process guarantees defendants fundamental right to fair trial that includes right to present complete, meaningful defense and opportunity to speak in court); Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125, 152 n.184 (1995) (exploring Justice Blackmun's belief that defendant must be present at beginning of trial before it can commence). But cf. Gerald Bennett, *A Guided Tour*

fundamental part of criminal procedure guaranteed by the Sixth Amendment.<sup>36</sup> In *Washington v. Texas*, the Supreme Court found this right to be a fundamental component of due process of law protected by the Fourteenth Amendment.<sup>37</sup>

Due process of law, as guaranteed by the Fifth and Fourteenth Amendments, also requires that defendants be able to assist in their own defense.<sup>38</sup> Accordingly, defendants who cannot assist in their defense because of mental incapacity are incompetent to stand trial.<sup>39</sup> In *Pate v. Robinson*, the Supreme Court found that trying an incompetent defendant violates his due process right to a fair trial.<sup>40</sup>

Although competency is an elusive standard, the Supreme Court articulated a twofold definition in *Dusky v. United States*.<sup>41</sup> First, defendants must have sufficient present ability to consult with a lawyer.<sup>42</sup> In other words, the defendant must be able to assist in preparing a defense.<sup>43</sup> Second, defendants must have a rational and factual understanding of the proceedings against them.<sup>44</sup>

This definition effectively distinguishes legal incompetency to stand trial from legal insanity.<sup>45</sup> A competency hearing emphasizes a

---

*Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 407 (1985) (arguing that not all proceedings, such as motions to dismiss and discovery, require presence of competent defendant to resolve issues fairly and accurately).

<sup>36</sup> See U.S. CONST. amend. VI; *Washington v. Texas*, 388 U.S. 14, 19 (1967) (explaining that right to confront witnesses and compel their appearance amounts to right to present defense, and finding this right fundamental); see also *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (finding that Fourteenth Amendment incorporates fundamental provisions of Bill of Rights against states).

<sup>37</sup> See *Washington*, 388 U.S. at 19 (declaring that right to present defense is fundamental component of due process of law).

<sup>38</sup> See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (establishing definition of competence requiring that defendant be able to assist in her defense); see also U.S. CONST. amend. V (stating that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV, § 1 (stating that “nor shall any State deprive any person of life, liberty, or property, without due process of law”).

<sup>39</sup> See 18 U.S.C. § 4241(a) (2006); *White v. Estelle*, 459 U.S. 1118, 1121 (1983) (Marshall, J., dissenting) (arguing that Due Process Clause requires defendant to understand proceedings against him, to be able to consult with counsel, and to assist in his defense); *Dusky*, 362 U.S. at 402 (articulating test for competency).

<sup>40</sup> *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

<sup>41</sup> See *Dusky*, 362 U.S. at 402.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Medina v. California*, 505 U.S. 437, 448-49 (1992) (explaining difference

defendant's ability to aid in his own defense and to understand the proceedings.<sup>46</sup> An insanity defense, by contrast, turns on a defendant's criminal responsibility at the time of the crime.<sup>47</sup> An insanity defense presupposes that a defendant is competent to stand trial and enter a plea.<sup>48</sup> That is, when a defendant using an insanity defense enters his plea, he is competent to stand trial.<sup>49</sup> When proffering an insanity defense, the defendant argues that although he is competent now, he was insane at the time of the crime.<sup>50</sup>

The Due Process Clause of the Fourteenth Amendment requires states to afford an incompetent defendant the right to avoid trial.<sup>51</sup> Thus, a man charged with attempted rape can avoid trial if he is a paranoid schizophrenic and cannot understand the legal proceedings against him.<sup>52</sup> However, due process does not require states to

---

between finding defendant incompetent to stand trial and finding defendant not guilty by reason of insanity). Compare 18 U.S.C. § 4241(d) (2006) (providing definition of incompetence as unable to understand legal proceedings or to assist in preparing defense), with 18 U.S.C. § 17(a) (2006) (establishing affirmative insanity defense as defendant being unable to understand nature or wrongness of act during commission of crime).

<sup>46</sup> See 18 U.S.C. § 4241(a) (authorizing competency hearing to determine if defendant has mental disease or defect rendering him unable to understand proceedings or assist in his defense); *Medina*, 505 U.S. at 448-49 (discussing difference between incompetence and insanity); *Pate v. Robinson*, 383 U.S. 375, 388-89 (1966) (Harlan, J., dissenting) (observing that test for incompetency is different from test used to determine criminal responsibility at time of crime).

<sup>47</sup> See *Medina*, 505 U.S. at 448-49 (observing difference between incompetency determination and insanity defense); *State v. Johnson*, 399 A.2d 469, 471-76 (R.I. 1979) (tracing evolution of definition of insanity and legal tests for determining criminal responsibility). See generally *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966) (discussing history of legal determinations of insanity and providing detailed criticisms of various legal definitions).

<sup>48</sup> See *Medina*, 505 U.S. at 449; *McIntosh v. Pescor*, 175 F.2d 95, 98 (6th Cir. 1949) (observing that jury hears insanity defense during trial, while competency to stand trial considers accused's mental capacity to enter plea); *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (explaining that insane person cannot plead at arraignment, face trial, or receive judgment and punishment after conviction).

<sup>49</sup> See *Medina*, 505 U.S. at 448.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 457 (Blackmun, J., dissenting) (explaining that right to trial while competent underpins defendant's other rights in criminal trial); *White v. Estelle*, 459 U.S. 1118, 1120 (1983) (Marshall, J., dissenting) (explaining that Due Process Clause requires defendant to be competent as prerequisite to defendant's trial); *Pate*, 383 U.S. at 387 (observing that defendant's conviction could stand only if he was competent).

<sup>52</sup> Cf. *Williams v. State*, 685 N.E.2d 730, 733-34 (Ind. Ct. App. 1997) (reversing defendant's attempted rape conviction because trial court admitted into evidence deposition taken while he was incompetent).

recognize insanity as a defense.<sup>53</sup> Similarly, states need not bear the burden of proving a defendant competent to stand trial.<sup>54</sup> The Supreme Court ruled in *Medina v. California* that due process allows states to place the burden of proving incompetency on a criminal defendant.<sup>55</sup> For instance, in *Medina*, the Court upheld a California statute providing for a per se presumption of competence.<sup>56</sup>

Although states need not recognize insanity as a defense, common law and constitutional doctrine has long protected the right of incompetent defendants to avoid trial.<sup>57</sup> Statutory law has mirrored this right.<sup>58</sup> Title 18 U.S.C. § 4241 represents the federal codification of both common law and constitutional principles.<sup>59</sup>

#### B. 18 U.S.C. § 4241

Congress promulgated the Insanity Defense Reform Act of 1984 in the wake of John Hinckley's attempted assassination of President Reagan.<sup>60</sup> A jury had found Hinckley not guilty by reason of insanity, a

---

<sup>53</sup> See *Medina*, 505 U.S. at 449; *Powell v. Texas*, 392 U.S. 514, 535-37 (1968) (finding that Constitution has never required particular mens rea, and refusing to define insanity test in constitutional terms); Andrew M. Levine, Note, *Denying the Settled Insanity Defense: Another Necessary Step in Dealing with Drug and Alcohol Abuse*, 78 B.U. L. REV. 75, 83 (1998) (exploring dicta in two Supreme Court decisions suggesting that defendants do not have constitutional right to insanity defense).

<sup>54</sup> *But see Medina*, 505 U.S. at 458 (Blackmun, J., dissenting) (arguing that defendant's right to avoid trial while incompetent is so fundamental that it requires affirmative procedures to safeguard it).

<sup>55</sup> *Id.* at 448 (majority opinion).

<sup>56</sup> See *id.* at 442.

<sup>57</sup> See *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (acknowledging that only competent criminal defendant can proceed to trial); *Medina*, 505 U.S. at 439 (recognizing that Due Process Clause of Fourteenth Amendment forbids prosecution of persons incompetent to stand trial); *White v. Estelle*, 459 U.S. 1118, 1121 (1983) (Marshall, J., dissenting) (explaining that Due Process Clause requires defendant to be competent before trial); *Pate v. Robinson*, 383 U.S. 375, 387 (1966) (observing that only if defendant was competent could his conviction stand).

<sup>58</sup> See, e.g., 18 U.S.C. § 4241 (2006) (providing for competency hearings to determine defendant's mental status); CAL. PENAL CODE § 1368 (2008) (establishing procedure for determining if defendant is competent to stand trial); UTAH CODE ANN. § 77-15-3 (2008) (authorizing party to petition for competency hearing to determine defendant's or prisoner's competency to proceed with trial).

<sup>59</sup> See sources cited *supra* note 58.

<sup>60</sup> See Phillip E. Johnson, *The Turnabout in the Insanity Defense*, 6 CRIME & JUST. 221, 224 (1985) (explaining that verdict in Hinckley trial was likely cause for revolution in thinking about insanity defense); Shari N. Spitz, *Psychiatric and Psychological Examinations for Sentencing: An Analysis of Caselaw from the Second Circuit in Comparison with Other Federal Circuits and the Governing Federal Statutes*, 6

verdict that incensed the public.<sup>61</sup> In light of the public outcry regarding Hinckley's verdict, Congress recognized a need to overhaul the legal determinations of insanity and competency.<sup>62</sup> One provision of the Insanity Defense Reform Act, codified at 18 U.S.C. § 4241, specifically addresses the issue of competency.<sup>63</sup>

Relying on the common law, § 4241 adopts the standard for competence that the Supreme Court articulated in *Dusky v. United States*.<sup>64</sup> Section 4241(a) identifies which parties may challenge competency and on what grounds.<sup>65</sup> Effectively, it authorizes any party in a criminal proceeding to bring a motion to determine the defendant's competency.<sup>66</sup> The court must grant the motion, or raise the issue on its own motion, if there is reasonable cause to believe that the defendant suffers from a mental disease or defect.<sup>67</sup>

Subsection (a) identifies two definitions of mental disease or defect as grounds for the motion.<sup>68</sup> First, defendants are incompetent if they are incapable of understanding the nature and consequences of the proceedings they face.<sup>69</sup> Second, defendants are incompetent if they

---

QUINNIPIAC HEALTH L.J. 133, 137 (2003) (observing that Congress introduced Insanity Defense Reform Act of 1984 after attempted assassination of President Reagan); Jonathan B. Sallet, Book Note, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1546 (1985) (reviewing LINCOLN CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* (1984)).

<sup>61</sup> See Johnson, *supra* note 60, at 223-24 (explaining how jury verdict inspired public outcry over results of Hinckley trial and focused attention on legal definitions of insanity); *cf.* Sallet, *supra* note 60, at 1552 (detailing historical impetus for Insanity Defense Reform Act).

<sup>62</sup> See Spitz, *supra* note 60, at 137 (noting that Insanity Defense Reform Act was first codification of insanity defense); Sallet, *supra* note 60, at 1552 (discussing purpose of Insanity Defense Reform Act). See generally Norman J. Finkel, *The Insanity Defense Reform Act of 1984: Much Ado About Nothing*, 7 BEHAV. SCI. & L. 403 (2006) (explaining that Insanity Defense Reform Act modified definition of insanity, but that definition of insanity given to jurors during study does not significantly change verdict).

<sup>63</sup> See 18 U.S.C. § 4241.

<sup>64</sup> See *id.* § 4241(a) (defining incompetency as inability to understand proceedings or assist in defense); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (establishing definition of incompetence as not being able to understand process or to assist counsel in preparing defense); *United States v. Patel*, 524 F. Supp. 2d 107, 110 (D. Mass. 2007) (observing that § 4241 uses Supreme Court's definition of incompetence).

<sup>65</sup> 18 U.S.C. § 4241(a).

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

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

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

are incapable of assisting in their defense.<sup>70</sup> Subsection (a) also establishes the right to a judicial hearing to determine a defendant's mental status, and subsection (b) provides for a psychiatric examination and report prior to any such hearing.<sup>71</sup>

Section 4241(d) mandates hospitalization of defendants suffering from mental disease or defect and removes district courts' discretion in this determination.<sup>72</sup> Subsection (d) requires a preponderance of the evidence to establish the defendant's competency, but does not allocate that burden to either party.<sup>73</sup> The language of subsection (d) is silent regarding which party bears the burden of proof, and addresses only the evidentiary standard.<sup>74</sup> The statute's silence on burden allocation mirrors a corresponding silence in the legislative history.<sup>75</sup> The congressional record offers merely the language of the statute itself.<sup>76</sup> Some circuit courts have attempted to fill the interpretive void with dicta from the Supreme Court.<sup>77</sup> Thus, the question of which party bears the burden of proof in a competency hearing has no clear answer, and the circuits have split on that issue.<sup>78</sup>

### C. Cooper v. Oklahoma

Some circuits have looked to Supreme Court dicta for guidance in interpreting 18 U.S.C. § 4241.<sup>79</sup> In *Cooper v. Oklahoma*, the Court evaluated the constitutionality of an Oklahoma statute requiring a

---

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 4241(b).

<sup>72</sup> *See id.* § 4241(d); *United States v. Donofrio*, 896 F.2d 1301, 1302 (11th Cir. 1990) (holding that hospitalization is mandatory and district courts have no power to circumvent hospitalization under § 4241(d)).

<sup>73</sup> *See* 18 U.S.C. § 4241(d) (providing that court must find incompetence by preponderance of evidence); *United States v. Patel*, 524 F. Supp. 2d 107, 110 (D. Mass. 2007) (noting existence of question regarding whether government or defendant bears burden of proof); *United States v. Riggins*, 732 F. Supp. 958, 963 (S.D. Ind. 1990) (observing that competency statutes do not allocate burden of proof in contrast to statutes establishing insanity defense which do allocate burden of proof).

<sup>74</sup> *See* 18 U.S.C. § 4241(d); *Patel*, 524 F. Supp. 2d at 110.

<sup>75</sup> *See Patel*, 524 F. Supp. 2d at 110.

<sup>76</sup> *See United States v. Gigante*, 996 F. Supp. 194, 199 (E.D.N.Y. 1997).

<sup>77</sup> *See Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996); *see also United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005) (relying on language from *Cooper*).

<sup>78</sup> *See Patel*, 524 F. Supp. 2d at 112-14; *United States v. Dodds*, No. CR 04-951-PHX-DGC, 2006 U.S. Dist. LEXIS 13521, at \*2 n.1 (D. Ariz. Mar. 24, 2006) (finding that Supreme Court language was dictum and applying Ninth Circuit holding).

<sup>79</sup> *See infra* Part III.C (refuting argument that Supreme Court decided that accused bears burden of proof).

defendant to prove incompetence by clear and convincing evidence.<sup>80</sup> The Court found that placing such a high burden on the defendant is incompatible with the dictates of due process.<sup>81</sup> In determining what due process required, the Court surveyed contemporary practices in state and federal jurisdictions.<sup>82</sup> The Court found that forty-six federal and state jurisdictions did not impose the elevated “clear and convincing” standard on the defendant.<sup>83</sup> In the context of competency hearings, such a standard would require the court to find that it is “highly probable” that a defendant is incompetent.<sup>84</sup> A preponderance of the evidence standard, by comparison, would only require a court to find that it is “more likely than not” that a defendant is incompetent.<sup>85</sup> Some jurisdictions placed no burden at all on the defendant, instead allocating it entirely to the prosecution.<sup>86</sup>

The *Cooper* Court then observed that a defendant in a federal prosecution must prove incompetence by a preponderance of the evidence.<sup>87</sup> This observation has generated confusion among district courts because it is anomalous in a case deciding what level of proof is necessary in competency proceedings.<sup>88</sup> The Court’s statement appears in one sentence at the end of a paragraph in a decision about the level of proof.<sup>89</sup>

In *United States v. Dodds*, an Arizona district court recognized the Supreme Court’s statement in *Cooper* as dicta and declined to follow

---

<sup>80</sup> *Cooper*, 517 U.S. at 350.

<sup>81</sup> *Id.* at 369.

<sup>82</sup> *Id.* at 360.

<sup>83</sup> *Id.* at 361.

<sup>84</sup> See BALLENTINE’S LAW DICTIONARY 208 (3d ed. 1969); BLACK’S LAW DICTIONARY 596 (8th ed. 2004); see also RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS §12.1 cmt. e (Tentative Draft No. 1, 1995) (defining clear and convincing standard and discussing differences with lower preponderance of evidence standard).

<sup>85</sup> See BALLENTINE’S LAW DICTIONARY, *supra* note 84, at 980; BLACK’S LAW DICTIONARY, *supra* note 84, at 1220; see also RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS §12.1 cmt. e (defining preponderance of evidence standard as needing to establish that it is more likely than not that assertion is true).

<sup>86</sup> *Cooper*, 517 U.S. at 361-62.

<sup>87</sup> *Id.* at 362.

<sup>88</sup> See *United States v. Patel*, 524 F. Supp. 2d 107, 110 (D. Mass. 2007); *United States v. Dodds*, No. CR 04-951-PHX-DGC, 2006 U.S. Dist. LEXIS 13521, \*2 n.1 (D. Ariz. Mar. 24, 2006) (following Ninth Circuit holding because Supreme Court language was dicta). See generally *Cooper*, 517 U.S. at 350 (describing issue in case as whether requiring proof of incompetence by clear and convincing evidence violates defendant’s constitutional rights).

<sup>89</sup> See *Cooper*, 517 U.S. at 362.

it.<sup>90</sup> Instead, the court applied the Ninth Circuit's standard, which places the burden of proof on the Government.<sup>91</sup> In *United States v. Patel*, a Massachusetts district court similarly declined to follow the *Cooper* dictum.<sup>92</sup> The court in *Patel* found that because the Government must meet other prerequisites to trial, it also bore the burden of proving the defendant's competence.<sup>93</sup> Currently, therefore, circuit and district courts assign the burden of proof to a party without any systematic justification.<sup>94</sup> Thus, the outcome of cases frequently depends not on a uniform system of ordered justice, but rather on the jurisdiction in which the hearing occurs.<sup>95</sup>

#### D. Psychiatric Evidence and Burden Shifting

In contrast to the general confusion regarding burden allocation, no such controversy attaches to the admissibility of statements made during a psychological examination.<sup>96</sup> In *Estelle v. Smith*, the Supreme Court acknowledged that the Fifth Amendment right against self-incrimination applies to pretrial psychiatric examinations.<sup>97</sup> The Court found that the defendant had a right to know that his statements to a doctor would be admissible against him during a capital sentencing trial.<sup>98</sup>

However, in *Buchanan v. Kentucky*, the Court limited *Estelle's* holding to situations where the defendant does not initiate the

---

<sup>90</sup> *Dodds*, 2006 U.S. Dist. LEXIS 13521, at \*2 n.1.

<sup>91</sup> *Id.* at \*2; *see also* *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (noting that Government must prove competency by preponderance of evidence).

<sup>92</sup> *See Patel*, 524 F. Supp. 2d at 114.

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

<sup>94</sup> *See id.* at 110; *Dodds*, 2006 U.S. Dist. LEXIS 13521, at \*2 n.1 (finding that Supreme Court language was dicta and instead following contrary Ninth Circuit holding).

<sup>95</sup> *See infra* Part II (discussing split of authority).

<sup>96</sup> *See generally* *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (concluding that harmless error test applies to psychiatric testimony admitted in violation of Sixth Amendment); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (holding that Fifth Amendment only renders defendant's statements made during psychiatric examination inadmissible if defendant did not seek examination); *Estelle v. Smith*, 451 U.S. 454 (1981) (finding that Fifth Amendment precludes admission of defendant's un-Mirandized statements made during psychiatric examination).

<sup>97</sup> *See Estelle*, 451 U.S. at 467-68 (noting that reasons for requiring warnings about right against self-incrimination during custodial interrogation apply with equal force during psychiatric examinations).

<sup>98</sup> *See id.* at 469 (explaining that prosecution can only introduce defendant's statements at trial if he knowingly waived Fifth Amendment rights).

psychiatric examination.<sup>99</sup> In *Buchanan*, the Court found that defendants' statements are only inadmissible in situations where the defendants do not initiate psychiatric examinations.<sup>100</sup> That is, even without a warning about the defendant's right to remain silent, if the defendant commences the examination, the statements are admissible.<sup>101</sup> If the defendant did not seek the examination, the unwarned statements made during the examination are inadmissible.<sup>102</sup> After *Buchanan*, defendants' decisions to place their own mental health at issue do not implicate the Fifth Amendment privilege against self-incrimination.<sup>103</sup>

In addition to addressing pretrial psychiatric examinations, the Supreme Court has discussed burden-shifting procedures during pretrial proceedings.<sup>104</sup> Notably, in *Parke v. Raley*, the Court validated a complex burden-shifting framework for challenging a prior conviction through a suppression motion.<sup>105</sup> Kentucky's procedure involved proving the existence of a judgment on which it intended to rely.<sup>106</sup> Once prosecutors proved the judgment existed, the burden shifted to the defendant.<sup>107</sup> The defendant then had to establish an infringement of her rights or show that some other irregularity occurred in the earlier proceeding.<sup>108</sup> After the defendant refuted the presumption of regularity, the burden shifted back to the Government.<sup>109</sup> The Government then carried the burden of showing that the court entered the judgment in a manner protective of the defendant's rights.<sup>110</sup>

---

<sup>99</sup> See *Buchanan*, 483 U.S. at 422-23.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *Parke v. Raley*, 506 U.S. 20, 24 (1992) (describing procedure used in Kentucky to challenge validity of prior conviction).

<sup>105</sup> See *id.* at 29-30 (reviewing Raley's habeas corpus petition and upholding state court's presumption that prosecution validly obtained final judgment of conviction).

<sup>106</sup> See *id.* at 24.

<sup>107</sup> See *id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

II. THE CIRCUIT SPLIT: *UNITED STATES V. ROBINSON* AND *UNITED STATES V. HOSKIE*

Given the morass of case law deriving from *Cooper v. Oklahoma* and the absence of clear congressional intent regarding competency hearings, confusion among circuit courts is unsurprising.<sup>111</sup> In *United States v. Robinson*, the Fourth Circuit placed the burden of proving incompetency on the defendant.<sup>112</sup> The Ninth Circuit, in *United States v. Hoskie*, placed the burden of showing competency on the Government.<sup>113</sup>

A. *United States v. Robinson*

*United States v. Robinson* involved a juvenile offender who committed a string of armed robberies.<sup>114</sup> After an initial arrest and release, fifteen-year-old Robinson continued to rob banks and grocery stores.<sup>115</sup> After Robinson's second arrest and subsequent confession, a clinical psychologist subjected him to a thorough psychiatric examination.<sup>116</sup> Both the Government and defense counsel filed motions seeking psychiatric examinations.<sup>117</sup> The psychologist determined that Robinson had an IQ of 70, and opined that he was competent to stand trial.<sup>118</sup> At the ensuing hearing, the district court agreed and ordered him to stand trial.<sup>119</sup> A jury convicted Robinson of nineteen counts of conspiracy and other charges related to armed robbery.<sup>120</sup>

---

<sup>111</sup> Compare *Battle v. United States*, 419 F.3d 1292, 1298 (11th Cir. 2005) (holding that defendant must demonstrate incompetency), and *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005) (finding that defendant has burden of proving incompetency), with *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (holding that Government must prove competency by preponderance of evidence), *United States v. Velasquez*, 885 F.2d 1076, 1089 (3d Cir. 1989) (stating that Government bears burden of establishing competency), and *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (holding that state bears burden of proving competency to stand trial).

<sup>112</sup> See *Robinson*, 404 F.3d at 856 (relying on language from *Cooper* when addressing question of competency).

<sup>113</sup> See *Hoskie*, 950 F.2d at 1392 (stating that Government bears burden but did not meet that burden).

<sup>114</sup> *Robinson*, 404 F.3d at 852-53.

<sup>115</sup> *Id.* at 854.

<sup>116</sup> *Id.* at 855.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *id.* at 855-56.

On appeal, Robinson challenged his conviction on the ground that he was not competent to stand trial.<sup>121</sup> The court stated that federal law places on the defendant the burden of proving incompetence.<sup>122</sup> The court cited both 18 U.S.C. § 4241(d) and *Cooper v. Oklahoma* for this proposition.<sup>123</sup> Accordingly, the defendant had the burden to prove, by a preponderance of the evidence, that he suffered from a mental disease or defect.<sup>124</sup>

The Fourth Circuit conceded that Robinson appeared to possess low intelligence and to suffer from several mental disorders.<sup>125</sup> It noted that the lower court relied exclusively on the clinical psychologist's testimony that Robinson was competent.<sup>126</sup> Ultimately, however, the Fourth Circuit found that Robinson had not definitively produced any evidence to support a finding that he was incompetent.<sup>127</sup> Thus, in the Fourth Circuit, the defendant must prove incompetency, regardless of which party injects the question of competency into the case.<sup>128</sup>

#### B. *United States v. Hoskie*

In *United States v. Hoskie*, prosecutors charged Hoskie with several violent crimes.<sup>129</sup> Hoskie filed a § 4241(a) motion, arguing that he was incompetent to stand trial.<sup>130</sup> At the hearing, two psychologists concurred in testifying that Hoskie's IQ was between 62 and 65, indicating mild mental retardation.<sup>131</sup> However, the experts differed in their opinions as to Hoskie's competence.<sup>132</sup> The Government's psychologist indicated that Hoskie was competent to stand trial; the defense psychologist indicated that he was not.<sup>133</sup>

Given the conflicting expert testimony, the district court considered Hoskie's inability to conceptualize or to think in abstract terms.<sup>134</sup> It characterized his understanding of court proceedings as extremely

---

<sup>121</sup> *Id.* at 856.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 858.

<sup>126</sup> *See id.* at 857.

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> *United States v. Hoskie*, 950 F.2d 1388, 1389 (9th Cir. 1991).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See id.* at 1389-90.

<sup>134</sup> *Id.* at 1390.

limited, yet determined that he was minimally able to understand the process against him.<sup>135</sup> It also found that he was able to assist in his defense through an interpreter.<sup>136</sup> The court therefore found Hoskie competent to stand trial, and a jury convicted him.<sup>137</sup>

On appeal, Hoskie again challenged his competence to stand trial, and the Ninth Circuit reversed his conviction on that ground.<sup>138</sup> The court drew its definition of competence from 18 U.S.C. § 4241(d) and *Dusky v. United States*.<sup>139</sup> The court then applied that definition to Hoskie, and determined that the district court committed clear error in finding that the Government met its burden of proof.<sup>140</sup> The court concluded that no testimony refuted the defense's evidence of incompetence.<sup>141</sup> The Ninth Circuit ruled that the district court erred in finding Hoskie competent to stand trial.<sup>142</sup> The court thus placed the burden of proving competency on the Government, an allocation with which the *Robinson* court disagreed.<sup>143</sup>

### III. ANALYSIS

A burden-shifting regime resolves the split between *Hoskie* and *Robinson*, and is appropriate for three reasons.<sup>144</sup> First, a burden-allocation procedure dependent on the identity of the moving party comports with Supreme Court precedent.<sup>145</sup> Following Court precedent, either party is capable of bearing the burden of proof.<sup>146</sup>

---

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1390-91.

<sup>138</sup> *Id.* at 1391-92.

<sup>139</sup> *See id.* at 1392.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1394.

<sup>142</sup> *Id.* at 1394-95.

<sup>143</sup> *See supra* Part II.A (reviewing *Robinson's* facts and holding).

<sup>144</sup> *See infra* Part III.A (examining Supreme Court precedent and finding that burden allocation is consistent with Court case law); *infra* Part III.B (explaining that placing burden on defendant is permissible under Constitution and Supreme Court precedent); *infra* Part III.C (articulating argument that Government may constitutionally bear burden of proving competency).

<sup>145</sup> *Cf.* *Parke v. Raley*, 506 U.S. 20 (1992) (approving procedure that shifts burden of proof twice in same hearing); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (holding that right against self-incrimination applies only when defendant did not initiate psychiatric examination); *Estelle v. Smith*, 451 U.S. 454 (1981) (finding Fifth Amendment privilege against self-incrimination applies to statements made during psychiatric examination).

<sup>146</sup> *See infra* Part III.A.

Moreover, a burden-shifting procedure ensures adversarial proceedings where each party argues a position consistent with its interests.<sup>147</sup> Second, the U.S. Constitution and *Medina v. California* indicate that the defendant may bear the burden of proof.<sup>148</sup> Accordingly, the *Robinson* court correctly held that the burden of proof in a competency hearing may lie with the defendant.<sup>149</sup> Due process does not prohibit the federal government from placing the burden of proof on the defendant.<sup>150</sup> Finally, assigning the burden of proof to the Government is consistent with assigning other burdens to the Government.<sup>151</sup> Thus, *Hoskie* correctly found that the Government may bear the burden of proof, although the court misallocated the burden of proof in that case.<sup>152</sup> Because the defense brought the competency motion, it should have borne the burden of proof.<sup>153</sup>

A. *Allocating the Burden to the Party Raising the Competency Issue Comports with Supreme Court Precedent*

Requiring the moving party to bear the burden of proof is consistent with Supreme Court precedent.<sup>154</sup> In *Buchanan v. Kentucky*, the Supreme Court considered the admissibility of un-Mirandized statements made by a defendant during a psychiatric examination.<sup>155</sup> In *Buchanan*, the Court found that a defendant's statements to a psychiatrist may be admitted at trial when the defendant has initiated a psychiatric examination.<sup>156</sup> That is, even without *Miranda* warnings about the defendant's right to remain silent, if the defendant seeks the examination, the statements he makes during the exam are

---

<sup>147</sup> See *infra* Part III.A; see also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2003) (explaining that American legal system pits advocates against each other in contentious legal proceedings to resolve disputes).

<sup>148</sup> See *infra* Part III.B.

<sup>149</sup> See *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005) (stating that defendant has burden of proving incompetency).

<sup>150</sup> See *infra* Part III.B.

<sup>151</sup> See *infra* Part III.C.

<sup>152</sup> *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (holding that Government must show that defendant is competent to stand trial by preponderance of evidence); see *infra* Part III.C.

<sup>153</sup> See *Hoskie*, 950 F.2d at 1389; *infra* Part III.C; see also *infra* Part III.B (explaining that defendant may constitutionally bear burden of proof).

<sup>154</sup> Cf. *infra* Part III.B (arguing that defendant may bear burden under *Medina* and U.S. Constitution).

<sup>155</sup> See *Buchanan v. Kentucky*, 483 U.S. 402, 404 (1987) (articulating issue in case as admissibility of defendant's statements made during psychiatric examination).

<sup>156</sup> See *id.* at 422-23.

admissible.<sup>157</sup> If the defendant did not initiate the examination, his statements during the psychiatric examination are inadmissible.<sup>158</sup>

*Buchanan* provides a framework for admitting or suppressing psychological evidence that depends on the identity of the moving party.<sup>159</sup> A defendant's statements receive less protection if the defendant initiates the psychiatric examination.<sup>160</sup> Allocating the burden of proof to a defendant who initiates a competency hearing is analogous to the Supreme Court's treatment of incriminating statements in *Buchanan*.<sup>161</sup> Both procedures revolve around the identity of the moving party, and both impose substantive requirements on the moving party.<sup>162</sup> Under *Buchanan*, if the state initiates a psychiatric examination, it must Mirandize the defendant.<sup>163</sup> Under a burden allocation procedure, if the state initiates a competency hearing, it must bear the burden of proof in that hearing.<sup>164</sup> Under *Buchanan*, if the defendant initiates a psychiatric examination, she risks having her statements admitted against her at trial.<sup>165</sup> Under a burden allocation procedure, if the defendant moves for a competency hearing, the defendant must similarly bear the burden of proof.<sup>166</sup> Conditioning the burden of proof on the moving party is therefore consistent with *Buchanan*.<sup>167</sup>

---

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* See generally *Estelle v. Smith*, 451 U.S. 454, 469 (1981) (finding Fifth Amendment privilege against self-incrimination applies to criminal defendant's statements made during psychiatric examination); Bennett, *supra* note 35, at 398 (discussing possible approaches to burden allocation).

<sup>162</sup> See *Buchanan*, 483 U.S. at 422-23 (explaining that ability of prosecution to introduce statements from psychiatric examination depends on whether defendant initiated examination); Bennett, *supra* note 35, at 398 (noting general legal principle that party raising issue bears burden of proof on that issue); cf. Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 125-26 (2002) (describing identity of moving party as major difference between motions to dismiss and other dispositive motions).

<sup>163</sup> See *Buchanan*, 483 U.S. at 422.

<sup>164</sup> Cf. *infra* Part III.C (arguing that state may bear burden of proof).

<sup>165</sup> See *Buchanan*, 483 U.S. at 422-23 (explaining that defendant has no Fifth Amendment privilege against introduction of statements when defendant requests psychiatric examination).

<sup>166</sup> Cf. *infra* Part III.B (arguing that it is constitutional to place burden of proof on defendant).

<sup>167</sup> Cf. *Drope v. Missouri*, 420 U.S. 162, 174 (1975) (recognizing that states have power to shift individual and Government burdens in post conviction proceedings); *infra* Part III.B (explaining that burden-allocating rule is consistent with Fifth and

However, some may argue that a burden-shifting rule undermines the stability of hearings.<sup>168</sup> According to this argument, assigning a burden to a party based solely on which party raises the competency issue may be destabilizing and unfair.<sup>169</sup> Generally, uniform presumptions of competence or incompetence allow parties to predict the challenges of their roles and to plan their tactics accordingly.<sup>170</sup> Some may further object that while courts regularly suppress evidence, such suppression creates less instability than a burden-shifting rule.<sup>171</sup>

The argument that burden shifting destabilizes court hearings necessarily fails.<sup>172</sup> In *Parke v. Raley*, the Supreme Court validated a procedure that shifts the burden between the Government and defendant twice during the same proceeding.<sup>173</sup> However, a rule placing the burden of proof on the moving party under 18 U.S.C.

---

Fourteenth Amendments and *Medina*); *infra* Part III.C (arguing that burden-shifting procedure reaches better, more logically consistent outcomes).

<sup>168</sup> Cf. Denny Chin, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 659 (1998) (describing burden-shifting procedure as “ping pong match” and “yo-yo rule”); Charles M. Yablon, *A Theory of Presumptions*, 2 LAW, PROBABILITY & RISK 227, 232 (2003) (arguing that litigators view correct allocation of burden of persuasion as important part of substantive law). *But cf.* Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. 255, 280 (1937) (arguing that practical disadvantages outweigh theoretical advantage of presumptions).

<sup>169</sup> Cf. Bennett, *supra* note 35, at 399 (explaining theory that incompetent defendants are not competent to prove anything, including competence to stand trial); Chin, *supra* note 168, at 659 (describing burden-shifting procedure in negative terms). *See generally* Alexander L. Broadfoot, Note, *Presumptions Under Arizona Law: Divining the Standards*, 35 ARIZ. L. REV. 1073 (1993) (examining role of presumptions in Arizona law).

<sup>170</sup> Cf. FED. R. EVID. 301 (providing that presumptions in civil cases leave burden of persuasion on original party even if burden of production shifts); Yablon, *supra* note 168, at 234 (describing how burden of proof creates presumption that can bring uniformity and stability to fact-finding process); Martin McHenry, Note, *Federal Rule of Evidence 301 and Congressional Acts: When Does an Act “Otherwise Provide”?*, 67 CORNELL L. REV. 1085, 1085 (1982) (explaining that presumptions are important because they can affect outcome of trial by shifting burden of proof). *But see* Morgan, *supra* note 168, at 280 (describing presumptions as causing confusion, error, and potential for error).

<sup>171</sup> Cf. Yablon, *supra* note 168, at 234 (concluding that presumption may function as cognitive frame, bringing greater uniformity and predictability to complex and uncertain factual inquiries). *See generally* GEORGE FISHER, EVIDENCE (2d ed. 2008) (arguing that purpose of evidence rules is to limit flow of information to jury).

<sup>172</sup> *See generally* *Parke v. Raley*, 506 U.S. 20 (1992) (detailing procedure for challenging conviction that shifts burden of proof numerous times); *Drope*, 420 U.S. at 174 (recognizing state’s authority to shift individual and government burdens in proceedings after defendant’s conviction).

<sup>173</sup> *Parke*, 506 U.S. at 24.

§ 4241(a) provides even greater stability than the *Parke* procedure.<sup>174</sup> Such a rule does not shift the burden during a proceeding.<sup>175</sup> Instead, the burden attaches only if a party brings a § 4241(a) motion.<sup>176</sup> The party controls the burden through its decision to bring the motion.<sup>177</sup> Similarly, the motion does not disadvantage the opposing party because the filer bears the burden of proof.<sup>178</sup> Therefore, the proposed procedure is simpler and provides greater certainty than the burden-shifting framework the Supreme Court validated in *Parke*.<sup>179</sup>

Moreover, a rule allocating the burden to the moving party ensures that each party is arguing for its interests.<sup>180</sup> The party bringing a § 4241(a) motion wishes to prove the defendant incompetent to stand trial.<sup>181</sup> The opposing party should want to prove the defendant competent to stand trial.<sup>182</sup> Without a burden-allocating rule, the

---

<sup>174</sup> See *id.*; see also *infra* Part III.C (explaining that proposed burden allocation procedure would have resulted in more persuasive and logically consistent outcome); *cf. Drope*, 420 U.S. at 174 (observing that states have power to shift individual and government burdens).

<sup>175</sup> *But cf.* *United States v. Brown*, No. 07-CR-202 (JBW), 2007 U.S. Dist. LEXIS 75105, at \*4-5 (E.D.N.Y. Oct. 10, 2007) (establishing rule that once defendant has made preliminary showing of incompetence, burden shifts to Government to prove that defendant is competent). See generally 18 U.S.C. § 4241 (2006) (authorizing competency hearings and establishing level of proof needed to prove competency); *Parke*, 506 U.S. at 24 (describing procedure for attacking conviction wherein burden shifts several times in course of proceeding).

<sup>176</sup> *But cf.* *Brown v. Warden*, 682 F.2d 348, 349 (2d Cir. 1982) (holding that once defendant has called competency into question, burden shifts to prosecution to prove competency). See generally 18 U.S.C. § 4241(a) (authorizing any party to bring motion to determine competency); *id.* § 4247(d) (2006) (establishing procedures for hearings brought pursuant to Title 18).

<sup>177</sup> *Cf. infra* Part III.B (arguing that placing burden of proof on defendant is constitutional); *infra* Part III.C (illuminating reasons why government may bear burden of proof).

<sup>178</sup> *Cf. infra* Part III.B (explaining that Constitution allows placement of burden of proof on defendant); *infra* Part III.C (arguing that Government may bear burden of proof).

<sup>179</sup> *Cf. infra* Part III.C (explaining that burden allocation procedure would have reached more consistent outcome than uniform allocation in face of conflicting expert testimony).

<sup>180</sup> See *infra* note 185 and accompanying text.

<sup>181</sup> See, e.g., 18 U.S.C. § 4241(a) (authorizing any party to challenge defendant's competency); *United States v. Robinson*, 404 F.3d 850 (4th Cir. 2005) (showing that defendant brought motion to challenge his own competency); *United States v. Hoskie*, 950 F.2d 1388 (9th Cir. 1991) (detailing how defendant brought three motions to challenge competency).

<sup>182</sup> See, e.g., *United States v. McDade*, 263 F. App'x 324, 326 (4th Cir. 2008) (showing that defendant and Government had expert witnesses offering opposing opinions regarding defendant's competency); *United States v. Wiggin*, 429 F.3d 31,

Government might bring a motion to determine incompetence in a jurisdiction that requires it to prove the defendant's competence.<sup>183</sup> The Government would subsequently have to prove that the defendant is competent even though it brought the motion challenging the defendant's competence.<sup>184</sup> Such a situation violates the canon of statutory construction against illogical outcomes.<sup>185</sup> It also runs counter to the American legal credo that the adversarial process is the best vehicle through which to arrive at the truth.<sup>186</sup>

B. *Allocating the Burden of Competency to a Defendant Correctly  
Construes the U.S. Constitution and Medina v. California*

Burden shifting may allocate the burden either to the Government or to a federal defendant, both of whom may constitutionally bear such a burden.<sup>187</sup> In *Robinson*, the Fourth Circuit held that the

---

34-35 (1st Cir. 2005) (noting that Government put on forensic psychologist to rebut defendant's proof of incompetence); *United States v. Baker*, 807 F.2d 1315, 1317-18 (6th Cir. 1986) (explaining that defendant argued on appeal that he was not incompetent and that his attorney should have objected to Government's proof of incompetence).

<sup>183</sup> See, e.g., *Hoskie*, 950 F.2d at 1392 (holding that Government must establish defendant's competence by preponderance of evidence); *United States v. Velasquez*, 885 F.2d 1076, 1089 (3d Cir. 1989) (stating that Government must establish competency); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (holding that state bears burden of proving competency to stand trial).

<sup>184</sup> Cf. sources cited *supra* note 183.

<sup>185</sup> See, e.g., *Small v. United States*, 544 U.S. 385, 404 (2005) (Thomas, J., dissenting) (explaining that canon against absurdities applies where result of following plain language would be genuinely absurd); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (stating that courts should follow plain language of statute unless doing so would lead to patently absurd consequences); *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting) (arguing that Court may reject plain language of statute when such language would lead to absurd consequences).

<sup>186</sup> See Michael Bonsignore, *Rules Exist for a Reason: A Commentary on Lawyers Hiring Investigators to Partake in Deceptive Tactics*, 21 GEO. J. LEGAL ETHICS 655, 663 (2008) (explaining that adversarial process encourages attorneys to engage in opposition to reach refined truth); Melanie D. Wilson, *Finding a Happy and Ethical Medium Between a Prosecutor Who Believes the Defendant Didn't Do It and the Boss Who Says That He Did*, 103 NW. U. L. REV. 65, 69 n.27 (2008) (noting that adversary process should theoretically expose truth). See generally Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) (discussing roles and responsibilities of attorneys in adversarial system and addressing assumption that adversarial proceedings lead to accurate factual determinations).

<sup>187</sup> See *infra* Part III.C (explaining that Government may bear burden); see also *Hoskie*, 950 F.2d at 1392 (finding that Government has burden to prove competency).

defendant in a federal prosecution bore the burden of proving his incompetence to stand trial.<sup>188</sup> There, Robinson raised his mental status as a defense.<sup>189</sup> Accordingly, the court reached the correct outcome, but without any supporting rationale linking the burden to the moving party.<sup>190</sup>

The Fourteenth Amendment permits placing the burden of proof on a defendant in a state proceeding.<sup>191</sup> Such an allocation does not violate the defendant's due process rights under the Fourteenth Amendment.<sup>192</sup> In *Medina v. California*, the Supreme Court ruled that a state may allocate the burden of proof to a defendant.<sup>193</sup> In *Medina*, the Court discussed the power of a state to assign the burdens of producing evidence and persuasion.<sup>194</sup> The Court reasoned that such power is not subject to proscription under the Due Process Clause unless it offends a fundamental principle of justice.<sup>195</sup> Assigning the burden of proof to a defendant is not such an offense.<sup>196</sup> A similar burden allocation at the federal level would not offend a fundamental

---

*See generally* *Medina v. California*, 505 U.S. 437 (1992) (holding that states may allocate burden to criminal defendant consistently with Fourteenth Amendment).

<sup>188</sup> *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005).

<sup>189</sup> *Id.* at 856.

<sup>190</sup> *See id.*

<sup>191</sup> *See Medina*, 505 U.S. at 447-48; *cf. Leland v. Oregon*, 343 U.S. 790, 798-99 (1952) (finding that placing burden of proving insanity on defendant does not violate fundamental principle of fairness or due process). *See generally* Benjamin James Vernia, Note, *The Burden of Proving Competence to Stand Trial: Due Process at the Limits of Adversarial Justice*, 45 VAND. L. REV. 199 (1992) (reviewing current state of competency jurisprudence and *Medina*).

<sup>192</sup> *Medina*, 505 U.S. at 453.

<sup>193</sup> *See id.* at 447.

<sup>194</sup> *See id.* at 445-46.

<sup>195</sup> *See id.* at 446.

<sup>196</sup> *See id.*; *see also* *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (finding that state regulations are subject to proscription under due process only when they offend fundamental principles of justice); *Speiser v. Randall*, 357 U.S. 513, 523 (1958) (stating that it is within state's powers to regulate procedures for carrying out its laws unless doing so offends nation's traditions and conscience).

principle of justice.<sup>197</sup> Therefore, under *Medina*, a federal statute may allocate the burden of proof to a criminal defendant.<sup>198</sup>

The U.S. Constitution similarly permits the allocation of the burden of proof to a federal defendant.<sup>199</sup> Although the Court has been silent on allocating the burden to a federal defendant, it has held that Fifth and Fourteenth Amendment protections are equivalent.<sup>200</sup> The Fourteenth Amendment protects defendants from state infringement of due process rights.<sup>201</sup> The Fifth Amendment Due Process Clause similarly protects defendants from federal infringement of their rights.<sup>202</sup> The protections of the Fifth Amendment are coextensive with the protections of the Fourteenth Amendment.<sup>203</sup> Therefore, because a

---

<sup>197</sup> *But see Medina*, 505 U.S. at 453-54 (O'Connor, J., concurring) (arguing that courts must balance historical analysis against considerations of fairness in operation to determine due process violations); *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring) (describing due process as most changeable concept in law and most reflective of progressive society); Bennett, *supra* note 35, at 399 (outlining argument that incompetent defendants cannot prove anything and therefore cannot prove competence while potentially incompetent).

<sup>198</sup> *See Medina*, 505 U.S. at 453 (holding that California law placing burden of proof on defendant does not violate due process, which only requires most basic procedural safeguards); *cf. supra* Part III.A (explaining that burden allocation procedure is consistent with Supreme Court precedent). *See generally* U.S. CONST. amend. XIV (protecting against state deprivation of rights without due process of law).

<sup>199</sup> *See Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (stating in dicta that Congress has placed burden on accused); *cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (explaining that state sovereignty does not offer guidance regarding line between state and federal power); *supra* Part III.A (concluding that federal statute may allocate burden of proof to either party).

<sup>200</sup> *See Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) (observing that due process does not mean one thing when speaking of powers of states and another when applied to powers of federal government); Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 322 n.99 (2001) (discussing assumption of *Hurtado* Court that Fifth and Fourteenth Amendment due process clauses had same content). *But cf.* Russell N. Watterson, Jr., Note, *Adarand Constructors v. Pena: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Raceconscious Legislation*, 1996 BYU L. REV. 301, 312-14 (explaining that although due process clauses of Fifth and Fourteenth Amendments are identical, Fifth Amendment lacks Fourteenth Amendment's Equal Protection Clause).

<sup>201</sup> *See* U.S. CONST. amend. XIV; *cf. Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) (observing that Fourteenth Amendment applies protections of first eight amendments against states).

<sup>202</sup> *See* U.S. CONST. amend. V.

<sup>203</sup> *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (explaining that Fourteenth Amendment prohibits state invasions of same privileges that Fifth Amendment

state may constitutionally place the burden of proof on a defendant, the federal government may do so as well.<sup>204</sup> Notably, the Due Process Clauses in the two amendments use identical language.<sup>205</sup> As the Court has explained, to read the same phrases differently in different amendments would be untenable.<sup>206</sup>

C. *Allocating the Burden of Competency to the Government Is Consistent with Placing Other Burdens on the Government*

Although the defendant may bear the burden of proof, the Constitution does not mandate such an allocation in all situations.<sup>207</sup> The Government may bear the burden of proof when it challenges the defendant's competency.<sup>208</sup> In *United States v. Hoskie*, the Ninth Circuit acknowledged that the Government may bear the burden of proof, and assigned it to the Government in that case.<sup>209</sup> Such allocation to the Government is consistent with assigning other burdens to the Government.<sup>210</sup> Additionally, requiring the Government to establish a

---

protects from federal infringement); *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) (stating that to read same language in two due process clauses differently would be absurd). Compare U.S. CONST. amend. V (providing that federal government cannot deprive citizens of rights without due process of law), with U.S. CONST. amend. XIV (providing that state governments cannot deprive citizens of rights without due process of law).

<sup>204</sup> Cf. *Malloy*, 378 U.S. at 8; *Malinski*, 324 U.S. at 415 (Frankfurter, J., concurring); *supra* Part III.A (arguing that burden-shifting procedure is consistent with Supreme Court precedent that places burden on defendant).

<sup>205</sup> See *Hurtado*, 110 U.S. at 534 (reading parity of language in Fifth and Fourteenth Amendments as meaning that they contain same substance); Israel, *supra* note 200, at 321-22 (summarizing *Hurtado*'s argument to Court that Fifth and Fourteenth Amendments have identical language and must contain same requirements). Compare U.S. CONST. amend. V, with U.S. CONST. amend. XIV.

<sup>206</sup> See *Malinski*, 324 U.S. at 415 (Frankfurter, J., concurring) (calling idea of reading same language in two amendments differently absurd); *Hurtado*, 110 U.S. at 541 (Harlan, J., dissenting) (explaining that due process does not mean one thing in Fourteenth Amendment and another in Fifth Amendment); see also Jennie G. Arnold, Comments and Casenotes, *United States v. Extreme Associates, Inc.: The Substantive Due Process Death of Obscenity Law*, 74 U. CIN. L. REV. 607, 621 (2005) (arguing that challenges to state and federal laws on due process grounds are identical because each applies different provision of same guarantees).

<sup>207</sup> Cf. *supra* Part III.A (arguing that burden-shifting framework that is dependent on identity of moving party comports with Supreme Court precedent).

<sup>208</sup> See *Cooper v. Oklahoma*, 517 U.S. 348, 361-62 (1996).

<sup>209</sup> See *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (stating that Government has burden to prove competency).

<sup>210</sup> See, e.g., *United States v. Wade*, 388 U.S. 218, 224 (1967) (observing that law enforcement involves critical confrontations at pretrial proceedings which can turn

defendant's competency is logical and consistent with the canon of statutory construction prohibiting illogical outcomes.<sup>211</sup>

Requiring the Government to prove a defendant competent to stand trial is consistent with imposing other pretrial obligations on the government.<sup>212</sup> Before trying a defendant, the Government must obtain arrest warrants and grand jury indictments.<sup>213</sup> The Government must also prove a defendant's guilt beyond a reasonable doubt, the most stringent standard available in the criminal justice system.<sup>214</sup> Accordingly, the *Hoskie* court correctly found that the burden of proof under 18 U.S.C. § 4241 may rest with the Government.<sup>215</sup>

Although the Government may bear the burden of proof, the Ninth Circuit erred in so allocating the burden in *Hoskie*.<sup>216</sup> The Government should not have borne the burden because *Hoskie*, not the

---

trial into formality); *United States v. Patel*, 524 F. Supp. 2d 107, 114 (D. Mass. 2007) (explaining that proving competency is same as meeting other trial prerequisites); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 7 (4th ed. 2007) (discussing hurdles that prosecutor must overcome before trial commences, often including preliminary hearing).

<sup>211</sup> See, e.g., sources cited *supra* note 185.

<sup>212</sup> See *Wade*, 388 U.S. at 224 (explaining need for counsel in pretrial context because critical pretrial confrontations are often more important than trial); *Patel*, 524 F. Supp. 2d at 114 (holding that proving competency is just like meeting other trial prerequisites); DRESSLER, *supra* note 210, at 7 (describing how pretrial process often includes preliminary hearing to determine sufficiency of evidence against accused); cf. Ernest Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PA. L. REV. 401, 424 (1968) (discussing prerequisite for fair trial that government disclose information to respondent).

<sup>213</sup> See *Jones v. United States*, 526 U.S. 227, 232 (1999) (stating that prosecution must charge elements of offense in indictment, submit them to jury, and prove them beyond reasonable doubt); DRESSLER, *supra* note 210, at 7 (explaining that prosecutors must often obtain indictment from grand jury); JAMES J. TOMKOVICZ & WELSH S. WHITE, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF*, at ix-xii (6th ed. 2008) (detailing pretrial process, including need for warrants and indictments).

<sup>214</sup> See, e.g., *Jones*, 526 U.S. at 232 (explaining that prosecution must charge crime in indictment, submit elements to jury, and prove elements beyond reasonable doubt); *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995) (holding that Fifth and Sixth Amendments require convictions to rest on jury determination that defendant is guilty of every element of crime beyond reasonable doubt); *In re Winship*, 397 U.S. 358, 361 (1970) (discussing history of requirement that prosecution prove all elements of offense beyond reasonable doubt).

<sup>215</sup> See *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991).

<sup>216</sup> Cf. *Hoskie*, 950 F.2d at 1394 (explaining that in light of experts' agreement about diagnosis, lower court erred in giving government expert's testimony more weight); *supra* Part III.A (arguing for burden-shifting procedure dependent on identity of moving party); *supra* Part III.B (explaining that allocating burden of proof to federal defendant is consistent with Supreme Court case law and Constitution).

Government, raised the issue.<sup>217</sup> Placing the burden on the defendant would have resolved the conflicting expert testimony and exposed the Government's failure to refute Hoskie's incompetence.<sup>218</sup>

The psychological experts concurred in diagnosing Hoskie's low intelligence, but disagreed about its consequences.<sup>219</sup> In light of this disagreement, the court's finding that the Government proved more likely than not that Hoskie was competent is illogical.<sup>220</sup> A logical ruling from the court would have concluded that Hoskie failed to prove more likely than not that he was incompetent.<sup>221</sup> A burden-allocating procedure would have reached a better, more consistent outcome than the lower court reached.<sup>222</sup>

However, some argue that the Supreme Court has already decided which party bears the burden of proof under 18 U.S.C. § 4241.<sup>223</sup> In *Cooper v. Oklahoma*, the Court mentioned in dicta that Congress has placed the burden of proving incompetence on the accused.<sup>224</sup> The Court compared § 4241 to Oklahoma's statute requiring the defendant to prove incompetence by clear and convincing evidence.<sup>225</sup> The Court explained that the vast majority of states, as well as the federal

---

<sup>217</sup> See *Hoskie*, 950 F.2d at 1391-92.

<sup>218</sup> See *Medina v. California*, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring); *Hoskie*, 950 F.2d at 1389, 1392. See generally BALLENTINE'S LAW DICTIONARY, *supra* note 84, at 980 (defining preponderance of evidence standard).

<sup>219</sup> See *Hoskie*, 950 F.2d at 1389, 1392-93 (describing conflicting expert testimony).

<sup>220</sup> Cf. *Medina*, 505 U.S. at 455 (O'Connor, J., concurring) (arguing that inconclusive examination will benefit defendant, not Government); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (explaining that conflicting expert testimony can lead jurors to discount all experts). See generally ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* (1994) (arguing against parties introducing psychiatric jargon at trial).

<sup>221</sup> Cf. *Medina*, 505 U.S. at 455 (O'Connor, J., concurring) (explaining that indeterminate psychiatric examination will generally benefit defendant). See generally *Hoskie*, 950 F.2d at 1392 (holding that district court committed clear error in finding that Government met its burden); BLACK'S LAW DICTIONARY, *supra* note 84, at 1220 (defining preponderance of evidence standard as requiring proof of fact's existence more likely than not).

<sup>222</sup> See *Hoskie*, 950 F.2d at 1392 (holding that district court committed clear error in finding that Government met its burden); cf. *Medina*, 505 U.S. at 455 (O'Connor, J., concurring); *United States v. Brown*, No. 07-CR-202 (JBW), 2007 U.S. Dist. LEXIS 75105, at \*4-5 (E.D.N.Y. Oct. 10, 2007) (detailing procedure where once defendant has made prima facie showing of incompetence, burden shifts to Government to prove defendant's competence).

<sup>223</sup> See *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996).

<sup>224</sup> See *id.*

<sup>225</sup> See *id.*

government, used the lower preponderance of the evidence standard.<sup>226</sup> In mentioning § 4241, the Court stated that the statute required the accused to prove incompetence by a preponderance of the evidence.<sup>227</sup>

Nevertheless, the Court's statement in *Cooper* is dictum.<sup>228</sup> The Court's reference to § 4241 was unnecessary to the outcome because *Cooper* decided only the evidentiary standard to apply in state statutes.<sup>229</sup> The Court referred to the federal system only to note that the federal system had a lower burden in competency hearings.<sup>230</sup> Furthermore, several federal courts have recognized the statement as dictum and have allocated the burden under § 4241 to the Government.<sup>231</sup>

#### CONCLUSION

The burden of establishing incompetency should rest with whichever party brings the motion to determine competence under 18 U.S.C. § 4241(a).<sup>232</sup> Allocating the burden of proof to the party raising the competency issue comports with Supreme Court precedent.<sup>233</sup> Such a procedure is analogous to the Court's treatment of the admissibility of psychological evidence and is more stable than other burden-shifting procedures that the Court has already validated.<sup>234</sup> Additionally, allowing either party to bear the burden of proof also avoids illogical outcomes from following the plain language of the statute.<sup>235</sup> By ensuring that each party argues for its interests, attaching the burden to whichever party brings the motion honors the American

---

<sup>226</sup> See *id.* at 361.

<sup>227</sup> See *id.*

<sup>228</sup> See *United States v. Patel*, 524 F. Supp. 2d 107, 110-11 (D. Mass. 2007); *United States v. Dodds*, No. CR 04-951-PHX-DGC, 2006 U.S. Dist. LEXIS 13521, at \*2 n.1 (D. Ariz. Mar. 24, 2006) (finding that Supreme Court language was dictum and applying Ninth Circuit holding). See generally *Cooper*, 517 U.S. at 362 (explaining that federal law only requires preponderance of evidence for accused to establish incompetency).

<sup>229</sup> See *Patel*, 524 F. Supp. 2d at 111.

<sup>230</sup> *Id.*; see also *Cooper*, 517 U.S. at 362.

<sup>231</sup> See *Patel*, 524 F. Supp. 2d at 111; *Dodds*, 2006 U.S. Dist. LEXIS 13521, at \*2 n.1.

<sup>232</sup> See *supra* Part III (analyzing circuit split and case law for reasons why Supreme Court should adopt burden-shifting procedure).

<sup>233</sup> See *supra* Part III.A.

<sup>234</sup> See *supra* Part III.A; see also *Parke v. Raley*, 506 U.S. 20, 24 (1992) (approving procedure that shifts burden of proof twice in same hearing).

<sup>235</sup> See *supra* Part III.C.

tradition of adversarial legalism.<sup>236</sup> Allocating the burden to a defendant correctly construes the U.S. Constitution and *Medina v. California*.<sup>237</sup> The Fifth and Fourteenth Amendments allow placing the burden of proof on a defendant in a federal prosecution.<sup>238</sup> Moreover, the Supreme Court has validated placing the burden on criminal defendants.<sup>239</sup> Allocating the burden to the Government is consistent with making it establish other prerequisites to trial.<sup>240</sup> Therefore, the burden of proof should fall on the party bringing the motion to determine competency.<sup>241</sup>

---

<sup>236</sup> See *supra* Part III.A.

<sup>237</sup> See *supra* Part III.B.

<sup>238</sup> See *supra* Part III.B.

<sup>239</sup> See *supra* Part III.B.

<sup>240</sup> See *supra* Part III.C.

<sup>241</sup> See *supra* Part III.