No. 16-

In the Supreme Court of the United States

DARRELL I. BOLDEN,

Petitioner,

v.

MISSOURI,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when a defendant is deprived of his Sixth Amendment right to counsel at a pretrial competency proceeding, the appropriate remedy is reversal of his conviction.

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Petitioner Darrel I. Bolden respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is not yet published in S.W.3d, but is available at 2016 WL 7106291. (Mo. Ct. App. 2016). App 1a. The Missouri Supreme Court's order denying review is unpublished. App. 21a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on December 6, 2016. The Missouri Supreme Court denied review on February 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence."

STATEMENT

What is the appropriate remedy when a defendant is deprived of his Sixth Amendment right to counsel at a pretrial competency proceeding? The Second, Third, and Sixth Circuits hold that the defendant is entitled to a new trial. By contrast, the Tenth and D.C. Circuits hold that the appropriate remedy is a remand for a retrospective competency proceeding to

determine whether the defendant had been competent back when he was tried.

This case will allow the Court to resolve the conflict. Petitioner Darrell Bolden had no attorney during his pretrial competency proceeding, at which the trial court determined that he was competent to stand trial. The Missouri Court of Appeals correctly found that this was error. But the Court of Appeals chose the wrong remedy. Rather than reversing Bolden's conviction, the court remanded for a new competency proceeding, this time with counsel, to determine retrospectively whether Bolden had been competent when he was tried years before. This supposed remedy is contrary to this Court's repeated admonitions against retrospective competency proceedings. As the Court has explained several times, a retrospective competency hearing is not an adequate remedy.

1. Petitioner Darrell Bolden was charged with two counts of robbery and two counts of armed criminal action. App. 2a. He requested to represent himself at trial. App. 4a. The trial court granted this request. App. 4a.

Only then—after allowing Bolden to waive his right to an attorney—did the trial court begin consideration of the prosecutor's motion for a determination of whether Bolden was mentally competent to stand trial. App. 4a. As the prosecutor explained, Bolden "has written numerous letters [to the court], and I don't think that he's acting in his best interest. I don't know if that's due to a mental problem or not." Transcript of Motion Hearing (May 5, 2014), at

7. The trial court turned to Bolden, who was now representing himself. Bolden responded:

> First of all, I don't suffer from understanding the Constitution. You know what I'm saying? First of all, I'm a Moorish National, so Moorish Nationals don't allow lawyers because lawyers ain't nothing but a bounty hunter. And then another thing, too, I sent you all a letter, and I would like to know that I, Yussef El, claim my original nationality going back to my natural Moorish birth rights. I'm not a corporate person. The name Darrell Ivan Bolden Jr. is a corporate person. I, Yussef El, have power of attorney over Darrell Bolden Jr. Does this Court have jurisdiction over a natural person? Is there a jurisdiction over the subject matter? Does this Court have jurisdiction over the territory where the crime happened at? Does the Court or any officers of the Court have the capacity to rule over such? As to the case, against the corporate entity, as stated in U.S.C. 15 wondering if the Court has a summary trial and judgment without any permission of all parties, which means me, and if the Court doesn't produce per the bonds of all officers of the Court who are to be involved in the summary trial, which means the Court cannot punish, sentence, include court fees and fines against me. I, Yussuf El, request your Court's deligation authority to reinform for the purpose of being placed on the record it's evidence as proof of your authority. I also request your oath to office which indicates your agreement and

> responsibility and obligation taken under oath to support the Constitution as the Constitution is for your authority is derived. I demand to be released because this Court has no authority over me.

Id. at 7-8.

After hearing this speech, the trial court granted the state's request for a psychiatric examination. App. 4a. The court explained to Bolden:

> [T]his isn't to be demeaning to you[, b]ut because … there [are] four life terms hanging over your head, I don't find your behavior at this point to be particularly rational in denying the help that an attorney could give you. So I'm going to order a psychiatric examination, and the Department of Mental Health will prepare that and then report back to me the detailed findings as to whether or not you have a mental disease or defect and whether or not … you have or lack the capacity to understand the proceedings to assist in your defense. And a recommendation to me as to whether you have mental fitness to proceed.

App. 5a.

An employee of the state Department of Mental Health conducted a psychiatric examination and reported that Bolden was competent to stand trial, a conclusion the trial court accepted. App. 5a. Bolden did not request a hearing on his competency, and the trial court did not hold one. Bolden did not seek to cross-examine the author of the psychiatric report or to introduce any evidence that would contradict the

government psychiatrist's view. Bolden evidently considered himself competent, not just to stand trial but to represent himself. In any event, he was incarcerated, so he would have been in no position to gather and present evidence of his own incompetency even if he had wished to.

Bolden represented himself at his trial. App. 5a. He was found guilty on all charges and was sentenced to four consecutive prison terms, two for life and two for 25 years. App. 5a.

2. The Missouri Court of Appeals remanded in part. App. 1a-20a. The court agreed with Bolden that he had been deprived of his Sixth Amendment right to counsel during the competency proceeding. App. 6a-12a. But the Court of Appeals disagreed with Bolden's view that reversal was the appropriate remedy. App. 12a-13a. Instead, the Court of Appeals remanded to the trial court, with instructions to hold a retrospective competency hearing at which Bolden would be represented by counsel. App. 13a.[1]

The Court of Appeals acknowledged that "the trial court committed an evident, obvious, and clear error in allowing Defendant to waive counsel without representation of an attorney before determining his competency." App. 7a. The court held that when the defendant's "'competency is at issue,'" the defendant must "'be represented by counsel whose duty it is to assure that the evidence supporting competency is

[1] In a portion of its opinion not relevant to this certiorari petition, the Court of Appeals rejected Bolden's contention that his Sixth Amendment right to a speedy trial had been violated. App. 14a-19a.

closely examined.'" App. 11a (quoting *United States v. Ross*, 703 F.3d 856, 870 (6th Cir. 2012)).

The Court of Appeals concluded that "the trial court should have appointed counsel to represent Defendant at least until it had resolved the question of Defendant's competency." App. 11a-12a. "Defendants usually have or are appointed counsel before arraignment and certainly by the time a trial court is considering a waiver of counsel or determining the defendant's competency," the court observed. App. 12a. "Here, Defendant was unrepresented at the time he waived counsel and underwent a subsequent psychiatric examination, and therein lies the cardinal problem." App. 12a.

The Court of Appeals then turned to the appropriate remedy. The court held that while a new trial "is often the appropriate remedy where a defendant's Sixth Amendment right to counsel is violated, we do not find such a remedy necessary under the circumstances here." App. 12a. The court reasoned that "[t]his case is distinct from others where though it was clear the defendant's competency was in question, the trial court never ordered a competency evaluation. In such cases, courts rightly find that there are difficulties in determining competency retroactively and often a new trial is appropriate." App. 12a.

The Court of Appeals noted that in this case, "the trial court did in fact order a contemporaneous competency evaluation." App. 13a. The Court of Appeals thus remanded for "a hearing as to the validity of that report." App. 13a. The Court of Appeals instructed the trial court "to ensure Defendant is rep-

resented by counsel" at that hearing. App. 13a. "If, after the hearing, the trial court finds that the report cannot establish Defendant's competency at the time of trial, then the trial court shall set aside the judgment and sentence and grant a new trial." App. 13a. "If, however, the trial court determines from the evidence that Defendant was competent to stand trial and to conduct his own trial at the time," the trial court was to make that determination part of the record. App. 13a.

3. The Missouri Supreme Court denied review. App. 21a.

REASONS FOR GRANTING THE WRIT

The lower courts agree that defendants must be represented by counsel at pretrial competency proceedings, because competency proceedings are a critical stage of a prosecution. *See* 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, 242 & n.31 (2011) (collecting cases). But the lower courts disagree about the appropriate remedy when this right is violated. Three circuits reverse the conviction and order a new trial, as they would for the denial of counsel at any other critical stage. But two circuits have invented a different remedy. These courts remand to the trial court, to determine whether it is possible to hold a retrospective competency hearing—this time with counsel—to decide whether the defendant had been competent when he was tried several years before.

The traditional remedy is the correct one. A retrospective competency hearing several years after trial is an utterly inadequate remedy, because the passage of time makes it impossible for a defense lawyer to obtain a second opinion from another psychiatrist, to cross-examine the government's psychiatrist, or to gather additional evidence from family and friends contrary to the government psychiatrist's opinion. Constitutional remedies are supposed to cure constitutional violations, but a retrospective competency hearing is no cure at all.

I. The lower courts are divided over the appropriate remedy where a defendant is denied counsel at a pretrial competency hearing.

The Second, Third, and Sixth Circuits hold that reversal is the appropriate remedy where a defendant is denied counsel at a pretrial competency hearing. *United States v. Purnett*, 910 F.2d 51, 56 (2d Cir. 1990) ("Because here the district court accepted Purnett's waiver of the right to counsel prior to making such a determination [of competency] and allowed Purnett to proceed without counsel at pretrial proceedings when his competency was at issue, we must reverse the judgment of conviction and remand for a new trial."); *Appel v. Horn*, 250 F.3d 203, 217 (3d Cir. 2001) ("retrospective competency hearings are not an appropriate remedy for Sixth Amendment violations"); *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012) ("We see no reason to create an exception to our established rule that complete deprivation of counsel during a critical stage warrants au-

tomatic reversal without consideration of prejudice.").

The Third and the Sixth Circuits have discussed the issue at greatest length. Both courts determined that retrospective competency hearings are an inadequate remedy. The Third Circuit noted that "the Supreme Court has disapproved of retrospective hearings on competency," because of "'the difficulty of retrospectively determining an accused's competence to stand trial.'" *Appel*, 250 F.3d at 217 (quoting *Pate v. Robinson*, 383 U.S. 375, 387 (1966)). The appropriate remedy, the Third Circuit held, was thus to vacate the defendant's conviction and remand for a new trial. *Appel*, 250 F.3d at 218.

The Sixth Circuit likewise rejected the view that a retrospective competency hearing is an appropriate remedy. *Ross*, 703 F.3d at 874 (acknowledging the conflict and agreeing with the Third Circuit, while disagreeing with the view of the Tenth and D.C. Circuits that retrospective competency hearings are the appropriate remedy). The Sixth Circuit concluded that the absence of counsel at a competency hearing "is a *per se* Sixth Amendment violation warranting reversal of a conviction." *Id.* at 873 (citation and internal quotation marks omitted).

By contrast, the Tenth and D.C. Circuits hold that the appropriate remedy is a remand to determine whether it is possible to conduct a retrospective competency hearing at which the defendant is represented by counsel.

The Tenth Circuit rejects the view that reversal is the appropriate remedy. *United States v. Bergman*,

599 F.3d 1142, 1148 (10th Cir. 2010). "Although Bergman asks us to reverse her conviction," the Tenth Circuit explained, "a Sixth Amendment violation requires automatic reversal only when the constitutional violation pervades the entire criminal proceeding." *Id.* (citation and internal quotation marks omitted). Because "[d]eprivation of the right to counsel at a competency hearing affects the entire proceeding only if the defendant stands trial while incompetent," the court reasoned, "we must determine whether Bergman's Sixth Amendment violation resulted in the district court erroneously concluding that she was competent to stand trial." *Id.* The Tenth Circuit acknowledged that retrospective competency hearings are "generally disfavored," but suggested that they are "not forbidden." *Id.* The court accordingly remanded the case "to the district court for an evidentiary hearing to determine whether it can make a retrospective competency determination." *Id.* at 1148-49. *See also United States v. Collins*, 430 U.S. 1260, 1266-68 (10th Cir. 2005) (same).

The D.C. Circuit likewise rejects the view that reversal is the appropriate remedy. *United States v. Klat*, 156 F.3d 1258, 1263-64 (D.C. Cir. 1998). The D.C. Circuit reasoned that not all "non-trial denials of counsel require automatic reversal of a defendant's conviction." *Id.* at 1263. The D.C. Circuit recognized that "[t]he Supreme Court has expressed reluctance to permit retrospective hearings on questions of mental competency," but concluded that remanding in this context was merely "to determine whether counsel might have made certain decisions

or arguments which could have changed the result of the competency hearing." *Id.* at 1264. "If the district court determines on remand that counsel could not have changed the outcome of the competency hearing, reversal is not required." *Id.*[2]

This conflict has recently been the topic of three law review notes. *See* Jenny Fehring, *Letting One Fly Over the Cuckoo's Nest: Why Automatic Reversal is the Only Effective Remedy for Denial of Counsel at a Mental Competency Hearing*, 67 Okla. L. Rev. 289, 300-12 (2015) (describing the conflict); Justin Rand, *Pro Se Paternalism: The Contractual, Practical, and Behavioral Cases for Automatic Reversal*, 163 U. Pa. L. Rev. 283, 297-302 (2014) (same); T. McLean Bramlett, *Recent Development*, 36 Am. J. Trial Advoc. 671, 677 (2013) (same). The conflict has also been discussed by the Sixth Circuit, the most recent of the federal courts of appeals to address the issue. *Ross*, 703 F.3d at 874 ("Other circuits are divided, however, as to whether automatic reversal is required when there has been a deprivation of counsel at a competency hearing.").

These conflicting cases cannot be reconciled on the theory suggested by the court below—that a retrospective competency hearing is appropriate where a competency evaluation was prepared before trial, but not otherwise. *See* App. 12a-13a. In all of the cases on both sides of the conflict, a competency evaluation was prepared before trial. *See Purnett*, 910 F.2d at

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[2] The California Supreme Court takes a similar view as a matter of state law. *People v. Lightsey*, 279 P.3d 1072, 1099-1104 (Cal. 2012).

53 ("The psychiatric staff at the prison examined him for about two weeks and concluded in a December 23, 1987 report that Purnett was competent to stand trial."); *Appel*, 250 F.3d at 206 ("Appel was examined by Dr. Janet Schwartz, a psychiatrist …. [who] found Appel to be competent."); *Ross*, 703 F.3d at 866 ("the court held the competency hearing based on the report of a court-appointed psychologist and the court's own observations and found Ross to be competent"); *Bergman*, 599 F.3d at 1145-46 ("The court indicated that it had received a report from the Bureau of Prisons ('BOP') opining that Bergman was competent to proceed …. [T]he government informed the court that it was ready to proceed with a competency hearing and requested that the court take judicial notice of the BOP's report …. [T]he court found Bergman competent to stand trial."); *Klat*, 156 F.3d at 1262 ("On January 16, 1997, the district court held a hearing to determine whether appellant was competent to stand trial …. Based on Dr. Shadduck's report and its own observation of appellant's behavior at this hearing, the district court found that appellant was in fact competent.").

The relevant facts are thus identical in the cases on both sides of the conflict. On both sides, there was a competency evaluation performed when the defendant was unrepresented by counsel. The split is over the legal consequences of those facts. Is a retrospective competency hearing an adequate remedy? Or does the error require reversal and a new trial?

II. Reversal is the appropriate remedy.

The point of a remedy is to cure the harm caused by the violation of the law. Constitutional remedies are "necessarily designed, as all remedies are, to restore the victims of [constitutional violations] to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). A remedy for the deprivation of counsel at a competency hearing must therefore restore the defendant to the position in which he would have been, had he been afforded counsel at the competency hearing.

A retrospective competency hearing, several years after trial, is not an adequate remedy. The only contemporaneous evidence of the defendant's past competency is the report prepared before the trial by the government's psychiatrist. Because the defendant was not represented by counsel when that report was prepared and introduced, the psychiatrist was never cross-examined. The defense never sought a second opinion from a different psychiatrist. And no effort was ever made to gather and introduce evidence contradicting the government psychiatrist's view.

Those are basic, obvious tasks that any defense lawyer would perform. Psychiatry is not an exact science, and reasonable mental health professionals can thus disagree in their diagnoses. *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). For this reason, the

American Bar Association's Criminal Justice Standards on Mental Health contemplate that in a competency proceeding, the defense will be able "to fully cross-examine witnesses, to call independent expert witnesses, [and] to have compulsory process for the attendance of witnesses." ABA Criminal Justice Standards on Mental Health Standard 7-4.9(a)(i).[3] A defense lawyer would never passively accept the government psychiatrist's view as to the defendant's competence. As one guide for defense attorneys advises, "it is always best to have a privately retained psychiatrist examine your client. It is a rare case where the prosecution's or the court-appointed psychiatrist or psychologist renders an opinion of mental incompetency." 1 F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* § 3:15 (Westlaw ed. 2016).

At a retrospective competency hearing several years after trial, effective cross examination of the government psychiatrist will be impossible. The psychiatrist will be very unlikely to remember examining this particular defendant several years earlier, because the psychiatrist will doubtless have examined countless other defendants in the interim.

Worse, it will no longer be possible for defense counsel to obtain a second opinion from a different psychiatrist. The issue at a retrospective competency hearing is the defendant's mental state several years in the past, not his mental state at the time of the

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[3] The ABA Standards are available at www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf.

hearing. No ethical mental health professional would opine on the mental condition of a criminal defendant whom the professional has not personally interviewed. Richard J. Bonnie and Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 496 (1980). But a defense psychiatrist would need a time machine just to conduct an interview.

The passage of time will likewise prevent defense counsel from calling lay witnesses who could speak to the defendant's mental state. Friends and family can often provide the most useful information about a person's competency in the present, but they are very unlikely to be able to provide information about his competency at a specific point in time several years in the past.

For these reasons, providing a retrospective competency hearing, even one with counsel, does not put the defendant in the position he would have occupied had he been provided a lawyer at his pretrial competency proceeding. A retrospective competency hearing is a poor substitute for a normal present-tense competency hearing. A retrospective competency hearing does not cure the constitutional violation.

This is why the Court has always admonished lower courts not to use retrospective competency hearings as a remedy. The Court has emphasized the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago." *Dusky v. United States*, 362 U.S. 402, 403 (1960). Where competency is at issue, there is a need for "concurrent determination," the Court has explained,

because in a retrospective hearing "witnesses would have to testify solely from information contained in the printed record." *Pate v. Robinson*, 383 U.S. 375, 387 (1966). "Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances," the Court has held, "we cannot conclude that such a procedure would be adequate" to determine whether a defendant was competent to stand trial several years before. *Drope v. Missouri*, 420 U.S. 162, 183 (1975).

A new trial is the conventional remedy for the deprivation of counsel at a critical stage, *United States v. Cronic*, 466 U.S. 648, 659 (1984), and that is the appropriate remedy here, because a new trial is the only remedy that puts the defendant in the position he would have occupied had the constitutional violation never occurred. At a new trial, the trial court can conduct a hearing to determine the defendant's competency in the present, at which the defendant can cross-examine the state's psychiatrist and introduce evidence of his own—just as he would have been able to do had he been represented by counsel the first time.

The Tenth and D.C. Circuits take the erroneous view that retrospective competency hearings are compelled by *Satterwhite v. Texas*, 486 U.S. 249 (1988). *See Collins*, 430 F.3d at 1266-67; *Klat*, 156 F.3d at 1263-64. In *Satterwhite*, a government psychiatrist testified, at the penalty phase of the defendant's capital trial, that the defendant would commit future violent acts if he were not executed. *Satterwhite*, 486 U.S. at 253. The admission of this testimony was error, because the defendant had not

been provided counsel before the psychiatrist examined him. *Id.* at 254-55. The Court held that harmless error analysis was appropriate, because the error in admitting the psychiatrist's testimony did not "pervade the entire proceeding." *Id.* at 256. Rather, the prejudice caused by the error could be determined simply by subtracting the erroneously admitted testimony and weighing the evidence that was left, as courts normally do when reviewing erroneously admitted evidence. *Id.* at 257-59. The Tenth and D.C. Circuits have drawn from *Satterwhite* the lesson that the deprivation of counsel at a mental health examination must be reviewed for harmlessness, and that a retrospective competency hearing is the way to perform this review.

The Tenth and D.C. Circuits misunderstand *Satterwhite*. The holding of *Satterwhite* is that where the consequence of a Sixth Amendment violation is merely the erroneous introduction of evidence, the error should be reviewed for harmlessness. But we are not alleging that any evidence was erroneously introduced. In our case, the harm caused by the Sixth Amendment violation is that the government conducted a one-sided competency proceeding, the outcome of which was unreliable because Darrell Bolden, without the help of a lawyer, may have lacked the competency to prove his own incompetency. The effect of this error cannot be evaluated, as in *Satterwhite*, by subtracting one piece of evidence and calculating the strength of the rest. *Satterwhite* thus does not support the view that retrospective competency hearings are an appropriate remedy.

III. This case is a good vehicle for resolving the conflict.

The judgment below is final for jurisdictional purposes under 28 U.S.C. § 1257(a) even though the Missouri Court of Appeals remanded for a retrospective competency hearing. "The general rule is that finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989); *see also Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."). This is not an interlocutory appeal. Darrell Bolden was convicted and sentenced to consecutive life terms in prison, App. 5a, so the judgment is final.

Indeed, the Court routinely decides criminal cases in which the court below ordered a remand for further proceedings. Virtually every case in which the government is the petitioner meets that description, because in virtually every such case, the government seeks review of a judgment reversing a conviction and remanding for a new trial. If the judgment below in our case is not final, much of the Court's criminal docket will disappear.

Even if Bolden's conviction and sentence did not by themselves render the judgment final, the judgment would be final under the fourth category of cases described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). These are cases

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review

> here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83.

Our case fits this description perfectly. The federal issue—whether a retrospective competency hearing is an adequate remedy for the deprivation of counsel at a competency proceeding—was finally decided in the state courts. The state court ordered further proceedings—the retrospective competency hearing—at which Darrell Bolden might theoretically prevail on the merits by being found retrospectively incompetent, which would render this Court's review of the federal issue unnecessary. Reversing the state court on the federal issue—that is, agreeing with our view that a retrospective competency hearing is an inadequate remedy—will be preclusive of any further litigation over whether Bolden was competent when he was tried. Refusing to review the decision below now will seriously erode the federal policy against retrospective competency hearings set

forth in the Court's decisions in *Dusky*, *Pate*, and *Drope*, because failing to review the decision below will license lower courts in jurisdictions such as Missouri to continue authorizing retrospective competency hearings as a remedy for Sixth Amendment violations. This case would thus fall squarely within *Cox Broadcasting*'s fourth category, even if it were not already final by virtue of Bolden's conviction and sentence.

The real question is not jurisdictional but prudential—whether it is wiser to grant certiorari now or to wait until after Missouri has conducted the retrospective competency hearing ordered by the court below and after Bolden has appealed this case back up the ladder of Missouri courts. The better course is to grant certiorari now.

The issue in this case is whether a retrospective competency hearing is an adequate remedy, or whether it is an illusory remedy that could never substitute for a real competency hearing because the passage of time makes it impossible to obtain the evidence necessary to contest the opinion of the government's psychiatrist. That issue will not be resolved at the hearing ordered by the court below. Our argument is not that our particular retrospective competency hearing will be conducted unfairly; it is that *any* retrospective competency hearing, by its nature, is an inadequate remedy, because it is inherently slanted toward accepting the report of the government's psychiatrist, which is the only contemporaneous record of whether the defendant was competent to stand trial at the moment he was tried.

There is no reason to wait for Bolden to go through the charade of a retrospective competency hearing and then a fruitless appeal up through Missouri's court system, when the question presented is whether he should be forced into this ersatz remedy in the first place. Waiting will not yield any useful information, but will only delay the resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Missouri Court of Appeals, Eastern District,
DIVISION FOUR

State of Missouri, Respondent,

v.

Darrell I. Bolden, Appellant.

ED 102965

Filed: December 6, 2016

Appeal from the Circuit Court of St. Charles County, 1211–CR04906–01, Honorable Daniel G. Pelikan

Introduction

This case presents the issue of whether a trial court may constitutionally allow an unrepresented defendant to waive his right to counsel when the trial court at the same time has reason to doubt the defendant's competency to stand trial and has not yet resolved that issue. We conclude a trial court cannot.

Darrell I. Bolden (Defendant) appeals the judgment entered upon his conviction of two counts of first-degree robbery and two counts of armed criminal action. His primary argument concerns the trial court's decision to allow him to proceed *pro se* in this case. We note at the outset the irony here: during the pendency of the present case, Defendant was convicted of multiple counts of first-degree robbery and armed criminal action in St. Louis County, after a trial at which he was represented by counsel because the trial court denied his request to proceed *pro se*.[1] Defendant appealed his St. Louis County convictions to this Court, arguing that the trial court

[1] We take judicial notice of this Court's file in *State v. Bolden*, 489 S.W.3d 821 (Mo. App. E.D. 2015) (per curiam).

erred in denying his request to proceed pro se, and this Court affirmed. Now we address the opposite claim by Defendant: that the trial court here erred in *granting* his request to proceed *pro se*. We consider the limited question of whether Defendant should have been permitted to waive counsel while unrepresented during the pendency of his competency determination, prior to trial.

Due to the overriding importance of the right to counsel generally, and specifically as it relates to the determination of a defendant's competency, not only in this case but in every case, we cannot overlook the violation of Defendant's right to counsel during his competency determination, regardless of the fact that it was Defendant's desire to remain unrepresented and that the ultimate result of the competency determination confirmed his desire that he could proceed *pro se*. However, we do not find that a new trial is necessary at this point, given that Defendant did undergo a competency examination at the time of the determination of whether he could proceed *pro se*. We remand to the trial court to conduct an evidentiary hearing on the sufficiency of the competency report, with Defendant represented by counsel, and to make a new finding as to whether Defendant was competent to proceed *pro se* at the time of his trial in this matter.

Background

The State charged Defendant with two counts of first-degree robbery and two counts of armed criminal action based on an incident that took place on May 5, 2012. Viewed in the light most favorable to

the verdict,[2] the evidence showed that Defendant entered a Check n' Go store in St. Peters holding a gun and wearing a heavy coat and a ski mask. There were two women inside, one was an employee and one was a customer. The customer had placed $400 in cash on the counter to pay for a wire transfer transaction.

Defendant ordered the women to get behind the counter and forced them to kneel. He took the $400 on the counter and removed an additional $1500 in cash from the cash drawer. He demanded that the employee open the safe. She entered the code for the safe and informed Defendant that the safe had a delay and would not open for five minutes. Defendant left the store, and the employee pressed the panic button to summon the police.

Police were not initially able to determine Defendant's identity, but approximately four months after the robbery occurred, they received information implicating Defendant. At that time, Defendant was detained in the St. Louis County Jail on other charges.[3] After waiving his *Miranda* rights, Defendant admitted to the robbery, gave a written statement, and made notations on still photographs from the store's surveillance video indicating that he was the man who committed the robbery.

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[2] *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005).

[3] We note that resulting from this arrest in St. Louis County, Defendant was eventually convicted after a trial in February of 2014 of three counts of first-degree robbery, a count of attempted first degree robbery, and three counts of armed criminal action. This resulted in a cumulative sentence of life plus a consecutive term of 25 years, which this Court upheld on appeal.

While awaiting trial, it appears Defendant was not represented by an attorney, and nothing in the trial court's docket sheet indicated whether Defendant had appointed counsel during the several months before the trial court considered his request to waive counsel. The reason for this is unclear from the record, but Defendant filed several motions and letters with the court *pro se* over an approximately nine-month period between his indictment and a pretrial hearing on May 5, 2014. At that May 5, 2014 hearing, the trial court took up Defendant's request to waive counsel and represent himself. After informing Defendant of the ranges of punishment he faced for each offense if convicted, and after ensuring Defendant understood that he was entitled to appointment of a public defender as well as what the assistance of an attorney might provide to his defense, the trial court stated the following:

> The Court finds the Defendant has made a knowing and intelligent waiver of his right to assistance of an attorney. The Court permits the Defendant to waive the right to representation and the Court considers whether to—whether or not to permit the [D]efendant to try without legal counsel depending on the current motion[4] the State has filed. ... [T]he State has filed an order for psychiatric examination of [Defendant].

The trial court heard argument from both the State and Defendant on the State's motion, and proceeded to grant the State's motion, giving the following rationale:

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[4] This motion is not included in the legal file on appeal.

> [T]his isn't to be demeaning to you[, b]ut because ... there[are] four life terms hanging over your head, I don't find your behavior at this point to be particularly rational in denying the help that an attorney could give you. So I'm going to order a psychiatric examination, and the Department of Mental Health will prepare that and then report back to me the detailed findings as to whether or not you have a mental disease or defect and whether or not ... you have or lack the capacity to understand the proceedings to assist in your defense. And a recommendation to me as to whether you have mental fitness to proceed.

After receiving the report from this examination, the trial court followed the report's recommendation and found Defendant competent. The trial court allowed Defendant to proceed to trial without an attorney. The jury found Defendant guilty of all charges, and the trial court sentenced him as a prior and persistent offender to consecutive terms of life in prison for each count of first-degree robbery, and 25 years for each count of armed criminal action. This appeal follows.

Discussion

Defendant raises two points on appeal. First, Defendant argues that the trial court erred in allowing him to proceed *pro se* before determining he was mentally competent to stand trial. In Point II, Defendant argues that the trial court erred in failing to dismiss the charges against him due to excessive delay by the State in bringing him to trial, thus violating federal and Missouri constitutional protections,

as well as Missouri statute, Section 545.780, RSMo. (2000). We discuss each in turn.

Point I

Defendant argues that the trial court violated his right to counsel under the Sixth Amendment to the United States Constitution and Article I, section 18(a) of the Missouri Constitution, by determining he had knowingly and intelligently waived his right to counsel before ordering an examination under Section 552.020, RSMo. (Supp. 2011), to determine Defendant's mental fitness to proceed, which left him deprived of his right to counsel during his competency determination. On this point, we must remand.

As an initial matter, Defendant requests that we review his claim for plain error under Rule 30.20[5] because his error is unpreserved. "A constitutional claim must be made at the first opportunity to be preserved for review." *State v. Murray*, 469 S.W.3d 921, 925 (Mo. App. E.D. 2015) (citing *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. banc 2008)). This Court has held that we cannot expect a defendant to object to his own motion to represent himself. *Murray*, 469 S.W.3d at 925. In *Murray*, however, the defendant had standby counsel, who included the claim that the trial court erred in allowing the defendant to represent himself in the motion for new trial; thus, this Court concluded the issue was raised at the first opportunity. *Id.* at 925–26. Here, the trial court eventually appointed standby counsel for Defendant's trial, but this issue was not included in his mo-

[5] All rule references are to Mo. R. Crim. P. (2016) unless otherwise indicated.

tion for new trial. Thus, we find it was not preserved in this instance.

Generally, our review of unpreserved error under Rule 30.20 is a two-step process. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). First, we determine "whether the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *Id.* (quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995)) (internal quotation omitted). "[P]lain errors are those which are evident, obvious, and clear." *Baumruk*, 280 S.W.3d at 607 (quoting *State v. Scurlock*, 998 S.W.2d 578, 586 (Mo. App. W.D. 1999)). If we find plain error, then we "proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice." *Baumruk*, 280 S.W.3d at 607–08. In the case of a Sixth Amendment violation, courts have found this to be a structural error that is presumptively prejudicial and not subject to harmless error analysis. *State v. Kunonga*, 490 S.W.3d 746, 766–67 (Mo. App. W.D. 2016) (citing *U.S. v. Gonzalez–Lopez*, 548 U.S. 140, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Strong v. State*, 263 S.W.3d 636, 647 (Mo. banc 2008)). Drawing from this authority, where such a violation constitutes a plain error, we presume manifest injustice or a miscarriage of justice occurred.

Here, we find the trial court committed an evident, obvious, and clear error in allowing Defendant to waive counsel without representation of an attorney before determining his competency. The right to counsel, along with the converse right to self-representation, are both protected by the Sixth

Amendment. *See Faretta v. California*, 422 U.S. 806, 818–21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *see also State v. Black*, 223 S.W.3d 149, 153 (Mo. banc 2007) (applying same analysis to dual claim of violation of Sixth Amendment and Mo. Const. art. I § 18(a); recognizing Missouri Constitution protects right of self-representation). However, because the right to counsel is so critical to the defense of an accused, the Constitution requires that "a defendant choosing self-representation must do so 'competently and intelligently.'" *Godinez v. Moran*, 509 U.S. 389, 400, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (quoting *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525). This requires a trial court to undergo a "two-part inquiry," determining both that the defendant is competent to stand trial and additionally that the waiver of counsel is knowing and voluntary. *Godinez*, 509 U.S. at 400–01, 113 S.Ct. 2680; *see also U.S. v. Turner*, 644 F.3d 713, 721 (8th Cir. 2011) ("Before permitting a defendant to waive counsel, the trial court must be satisfied that the defendant is competent to stand trial"). Only the first part, competency, is at issue here.

Three different types of competency can come into play regarding a particular defendant: competency to stand trial, competency to waive counsel, and competency or ability to conduct the defendant's own defense without assistance of an attorney. The standard for determining a defendant's competency to stand trial is the same for competency to waive counsel. *Godinez*, 509 U.S. at 396–97, 113 S.Ct. 2680 (rejecting the idea that "the competency standard for ... waiving the right to counsel is higher than the competency standard for standing trial"). Under this

standard, a court must find that the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Godinez*, 509 U.S. at 396, 113 S.Ct. 2680 (quoting *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)) (internal quotation omitted). Essentially, a defendant who is competent to stand trial is also competent to waive counsel.

Regarding the third type of competency, this issue arises when a defendant who has validly waived counsel desires to proceed to trial, rather than pleading guilty. The United States Supreme Court has held that the "Constitution permits States to insist upon representation by counsel for those competent enough to stand trial... but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 554 U.S. 164, 178, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). Thus, the United States Supreme Court has indicated that states may choose to impose a higher competency standard upon *pro se* defendants who wish to conduct their own trials. The Missouri Supreme Court has acknowledged this principle and reiterated that it is the role of trial courts "to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant," *State v. Baumruk*, 280 S.W.3d 600, 610 (Mo. banc 2009) (quoting *Edwards*, 554 U.S. at 177, 128 S.Ct. 2379); *see also State v. Osborn*, 318 S.W.3d 703, 710 (Mo. App. S.D. 2010) (noting "Edwards treats mental competency to stand tri-

al as a threshold issue to consideration of a defendant's mental competency to self-represent at trial").

Here, the trial court found Defendant to have made a knowing and voluntary waiver of counsel while unrepresented, but immediately thereafter the trial court ordered an examination to determine Defendant's competency. We note the State's argument that the trial court did not order the examination to determine Defendant's threshold competency to stand trial or waive counsel, but rather did so out of concern for Defendant's ability to conduct a trial on his own, in other words, that the trial court was seeking to determine only the third type of competency we identified above, and had implicitly found Defendant to be competent to stand trial and waive counsel. However, the trial court also told Defendant that it would receive a report regarding whether "you have or lack the capacity to understand the proceedings to assist in your defense." The trial court's order was for a report pursuant to Section 552.020, which relates to the threshold competency standard to stand trial and to waive counsel. Thus, even assuming part of the trial court's concern was Defendant's ability to conduct his own trial without an attorney, the trial court also expressed concern regarding Defendant's threshold competency. Thus, the issue remains whether Defendant was competent to proceed *pro se* at that point.

While we find no Missouri or United States Supreme Court case dealing with facts similar to those here, the United States Court of Appeals for the Sixth Circuit addressed a similar situation in *U.S. v. Ross*, 703 F.3d 856 (6th Cir. 2012). The district court there had determined the defendant validly waived

counsel while unrepresented, yet then ordered a hearing to ensure the defendant was competent to stand trial. *Id.* at 870. The Sixth Circuit reversed, noting the following:

> We do not dispute the wisdom of a judge's compliance with the duty to assure throughout the proceedings that a defendant is competent to stand trial. But when that competency is at issue, both the Constitution and governing statutes require that the defendant be represented by counsel whose duty it is to assure that the evidence supporting competency is closely examined.

Id. The *Ross* court found this particularly important in a case where the defendant is arguing he is competent, "leaving no one to examine and challenge the evidence." *Id.* at 871. Thus, the court concluded that "the Constitution requires a defendant to be represented by counsel at his own competency hearing, *even if he has previously made a knowing and voluntary waiver of counsel*." *Id.* (emphasis added). The court noted that the fact that the district court doubted the defendant's competency "should have triggered appointment of counsel at least until the competency to stand trial issue was resolved." *Id.* at 869.

This is exactly the situation we have here: though the trial court determined Defendant's waiver of counsel was knowing and voluntary even though Defendant was unrepresented, it is clear from the record that the trial court believed Defendant's threshold competency was in question. Thus, the trial court should have appointed counsel to represent Defendant at least until it had resolved the question of De-

fendant's competency. *See id.*; *U.S. v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998) (finding defendant was denied right to counsel where trial court doubted defendant's competency yet failed to appoint counsel during pendency of competency issue).

We note that the trial court was not required to order a competency evaluation and certainly could have made its own finding that Defendant was fit to proceed, but the trial court chose to order an examination out of an abundance of caution and for Defendant's own protection, and taking this action to ensure Defendant's competency in such a context was very appropriate and commendable here. But our case here is very unique in that Defendant was unrepresented. Defendants usually have or are appointed counsel before arraignment and certainly by the time a trial court is considering a waiver of counsel or determining the defendant's competency. Here, Defendant was unrepresented at the time he waived counsel and underwent a subsequent psychiatric examination, and therein lies the cardinal problem.

Turning to the remedy, Defendant argues he is entitled to a new trial due to the deprivation of counsel here. While this is often the appropriate remedy where a defendant's Sixth Amendment right to counsel is violated, we do not find such a remedy necessary under the circumstances here. This case is distinct from others where though it was clear the defendant's competency was in question, the trial court never ordered a competency evaluation. In such cases, courts rightly find that there are difficulties in determining competency retroactively and often a new trial is appropriate. *See Pate v. Robinson*,

383 U.S. 375, 387, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (finding, where court had denied defendant competency hearing before trial, determination of competency six years after the fact unworkable). However, here, the trial court did in fact order a contemporaneous competency evaluation. *Cf. Eley v. Bagley*, 604 F.3d 958 (6th Cir. 2010) ("Retroactive determinations of competency are difficult, and any such determination must be based on evidence derived from knowledge contemporaneous to trial" (internal quotation omitted)).

Because here there does exist a contemporaneous report regarding Defendant's competency, we find the trial court can conduct a hearing as to the validity of that report and make a finding under the procedures set forth in Section 552.020. We also instruct the trial court to ensure Defendant is represented by counsel, either private counsel or appointed counsel, at that hearing. If, after the hearing, the trial court finds that the report cannot establish Defendant's competency at the time of trial, then the trial court shall set aside the judgment and sentence and grant a new trial. *See Pate*, 383 U.S. at 387, 86 S.Ct. 836. If, however, the trial court determines from the evidence that Defendant was competent to stand trial and to conduct his own trial at the time, then the trial court "shall certify the transcript of the hearing and its determination and findings to this court to be made a part of the transcript in the cause for determination and disposition of the appeal upon the record as supplemented." *State v. Nebbitt*, 455 S.W.3d 79, 89 (Mo. App. E.D. 2014) (quoting *State v. Mitchell*, 611 S.W.2d 211, 214 (Mo. banc 1981)). Point granted.

Point II

Though we remand, we must also consider Defendant's argument that the trial court should have dismissed the charges against him altogether due to the State's delay in bringing his case to trial. We find it to be without merit.

We review *de novo* whether Defendant's right to a speedy trial has been violated, while at the same time giving deference to the trial court's factual findings in ruling on a motion to dismiss. *State v. Sisco*, 458 S.W.3d 304, 313 (Mo. banc 2015). "The United States and Missouri Constitutions provide equivalent protection for a defendant's right to a speedy trial." *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 729 (Mo. banc 2007). There is no bright-line test to determine a violation of this right, but rather a "court must balance four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 533, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). Section 545.780 "[does] not... expand the constitutional right to a speedy trial, but rather ... provide[s] a mechanism for bringing a case to trial when a defendant seeks a timely resolution of his or her case." *McKee*, 240 S.W.3d at 727.

Turning to the factors for determining a violation of the right to a speedy trial, until there has been a period of delay that is presumptively prejudicial, we need not consider the other three factors. *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907, 911 (Mo. banc 2010). In Missouri, that is a delay of eight months, and it begins at the time of a formal indict-

ment or information, or the arrest, whichever comes first. *See id.*

Here, Defendant was incarcerated beginning on September 12, 2012, in connection with other robbery incidents in St. Louis County. A grand jury in St. Charles County indicted Defendant in this case on August 23, 2013. Defendant's trial began on March 3, 2015. Beginning from the date of Defendant's indictment, this delay of over 18 months is presumptively prejudicial. *See id*. Thus, we consider the remaining three factors.

Regarding the second factor, the reason for the delay, different reasons weigh differently against the State:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Sisco, 458 S.W.3d at 314 (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). However, "[d]elays attributable to the defendant weigh heavily against the defendant." *Sisco*, 458 S.W.3d at 314 (internal quotation omitted).

Here, a number of circumstances contributed to the delay. On September 13, 2013, Defendant filed his first request for a speedy trial. Thereafter, he

filed a number of motions, including requests for discovery, motions to suppress, and motions to quash the indictment. Defendant also wrote several letters to the trial court during the pendency of his case. It also appears from the docket sheet that there was a problem in serving Defendant's warrant. The warrant was withdrawn in November of 2013 and eventually served on April 21, 2014.

On May 5, 2014, the court held a status hearing at which it considered Defendant's waiver of counsel and granted it. As discussed above, the trial court then ordered a psychiatric examination to determine Defendant's competency. The trial court also considered Defendant's motion to dismiss for violation of his right to a speedy trial. The State argued that there had been other pending robbery charges against Defendant in St. Louis County that had been disposed of in the meantime. The trial court denied Defendant's motion.

On August 11, 2014, the trial court held a hearing on a motion for continuance filed by the State requesting additional time to complete the psychiatric examination. The State claimed that Defendant had asked the doctor conducting the examination to review additional records, which Defendant disputed, but Defendant consented to the continuance until September 15, 2014.

On September 15, 2014, the trial court issued an order noting that the State was contacted by the Missouri State Hospital, which said they needed additional time to complete their report of Defendant's psychiatric examination. The trial court continued the case for good cause shown until November 17,

2014. On that date, the trial court found the report had not yet been completed.

On January 23, 2015, the trial court held a hearing at which it determined that Defendant was competent to stand trial based on the report of Defendant's psychiatric evaluation. The case proceeded to trial as scheduled on March 3, 2015.

In weighing the reasons for delay here, it appears that between the indictment on August 23, 2013, and the trial court's ordering of the psychiatric examination on May 5, 2014, several things contributed to the delay. Defendant had other charges pending in St. Louis County, which were resolved during this time period. This is a justifiable reason for delay and is not weighed heavily against the State. *See Sisco*, 458 S.W.3d at 314. Additionally, Defendant filed a number of motions during this time. While he has a legal right to do so, the delay caused by adjudication of these motions is attributable to Defendant. *See id.* at 316. Finally, during this time period, it appears at least some of the delay is due to the State's inability to serve the arrest warrant. This delay is attributable to the State, but because there is no evidence the State did so deliberately to hamper the defense, it is weighed less heavily against the State. *See State v. Fleer*, 851 S.W.2d 582, 597 (Mo. App. E.D. 1993).

The further delay between May 5, 2014, and Defendant's trial on March 3, 2015, was entirely due to the psychiatric examination of Defendant. This is a justifiable reason for delay and, although weighed

against the State, is weighed less heavily.[6] *See State v. Owsley*, 959 S.W.2d 789, 794 (Mo. banc 1997) (noting only delay attributable to State was request for competency exam and extension of time for completion of exam).

Weighing all of these, some of the delay is due to Defendant's pretrial motions, but beyond that, the reasons for delay were largely neutral and justifiable. Though such delays are weighed against the State, we see no delay that should weigh heavily against the State due to any deliberate attempt to hamper the defense.

The third factor is Defendant's assertion of his right to a speedy trial. Here, Defendant made multiple requests for a speedy trial, beginning on September 13, 2013. He asserted his right early in the proceedings, and this factor is therefore weighed in his favor. *See State v. Pate*, 469 S.W.3d 904, 909 (Mo. App. E.D. 2015).

Finally, the most important factor in our analysis is any resulting prejudice to Defendant. *State v. Newman*, 256 S.W.3d 210, 216 (Mo. App. W.D. 2008). We consider three additional factors in determining prejudice, the third of which is "the most vital to the analysis": (1) the oppressiveness of pretrial incarceration, (2) whether it unduly heightened the defendant's anxiety, and (3) the impairment of the defense. *Id.* (quoting *State v. Bell*, 66 S.W.3d 157, 165 (Mo. App. S.D. 2001)). "[F]ailure to present evidence of actual prejudice weighs heavily in favor of the gov-

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[6] We note the State's argument that this period of time should be excluded from the analysis; however, that applies only where the defendant himself puts his mental competency at issue. *See State v. Brown*, 502 S.W.2d 295, 301–02 (Mo. 1973).

ernment." *Newman*, 256 S.W.3d at 217 (quoting *State v. Perry*, 954 S.W.2d 554, 566 (Mo. App. S.D. 1997)).

Here, there is no evidence that Defendant's pretrial incarceration unduly heightened his anxiety, and he makes no argument to that effect. The incarceration was not unduly oppressive here, where he was incarcerated already as a result of other arrests and convictions. Finally, he does not argue his defense was impaired by the delay, nor do we see any evidence of impairment in the record. The fact of incarceration alone here is not sufficient to establish prejudice. *See State v. Greenlee*, 327 S.W.3d 602, 613 (Mo. App. E.D. 2010) (incarceration and anxiety may be insufficient to establish prejudice absent evidence of impairment of defense). The lack of evidence of prejudice weighs heavily in favor of the State. *See Newman*, 256 S.W.3d at 217.

Given all of the foregoing, particularly persuaded that Defendant was not prejudiced here by any delay, we find Defendant's constitutional right to a speedy trial was not violated. The trial court did not err in failing to dismiss the charges against Defendant for this reason. Point denied.

Conclusion

The trial court did not err in failing to dismiss the charges against Defendant for any violation of Defendant's right to a speedy trial, and we affirm the trial court's judgment in this respect. However, the trial court plainly erred in permitting Defendant while unrepresented to waive his right to counsel while at the same time finding that his competency was at issue. This constitutes a denial of Defendant's

Sixth Amendment right to counsel during the resolution of the issue of Defendant's competency. However, because the trial court did order a psychiatric evaluation under Section 552.020 of Defendant at the time, we remand to the trial court to conduct an evidentiary hearing on the sufficiency of the competency report, with Defendant represented by counsel, and to enter an order consistent with this opinion.

AFFIRMED IN PART; REMANDED WITH INSTRUCTIONS IN PART.

Gary M. Gaertner, Jr., Judge

James M. Dowd, P. J., concurs.
Kurt S. Odenwald, J., concurs.

APPENDIX B

SUPREME COURT OF MISSOURI
EN BANC
SC96180
ED102965
January Session, 2017

State of Missouri, Respondent,

vs. (TRANSFER)

Darrell I. Bolden, Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of the said Supreme Court, entered of record at the January Session, 2017, and on the 28th day of February, 2017, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 28th day of February, 2017.

/s/ Betsy AuBuchon, Clerk