MINIMIZING INVERTED PRIVILEGE: AN ARGUMENT FOR HIGHER STANDARDS FOR DEFENSE MOTIONS TO DETERMINE COMPETENCY

*By Bradley Hook**

I. INTRODUCTION

In the 1966 opinion *Pate v. Robinson*, the United States Supreme Court observed that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right."[1] If a court accepted a guilty plea and waiver of trial from a defendant that was incapable of understanding what was happening, the court would be committing a grave injustice. But what happens when an incompetent defendant's best interest is served by waiving one of his rights, such as attorney-client privilege? The holding in *Pate* prevents the incompetent defendant from waiving the right even if doing so would be beneficial to the defendant. This circumstance creates what can be called *inverted privilege*—the seemingly absurd result of a prosecutor objecting to the actions of defense counsel on the grounds that the defendant's privilege would be violated. Despite this absurdity, *Pate* may require the trial court and prosecution to enforce a defendant's own rights against him.[2]

Inverted privilege can arise when a defense attorney files an unsupported motion to determine competency in a criminal trial. If the motion is granted, the presumption of the defendant's competence has been rebutted and the *Pate* rule takes effect, preventing a potentially incompetent defendant from waiving rights. Until competency is determined, protections like attorney-client privilege become a hindrance not only to the prosecution, but also to the defense.

In 2010, the Kansas Supreme Court broadened the protections for attorney-client privilege in state courts through application of the rules of professional

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1. Pate v. Robinson, 383 U.S. 375, 384 (1966).

2. *See id.*

conduct in *State v. Gonzalez*.[3] Under *Gonzalez*, it is extremely difficult to obtain even non-privileged information through defense counsel testimony.[4] When the *Gonzalez* rule is applied during a competency hearing, the inversion effect of the *Pate* rule can be amplified.[5]

The Kansas case *State v. Ford* illustrates what can happen when privilege becomes inverted.[6] *Ford* is a 1992 murder case, but it is still pending in 2018.[7] The last six years of *Ford* are related to a 1992 defense motion to determine competency.[8] During a hearing in 2016, the inverted privilege arose when the court, in protecting the defendant's due process rights, prevented one of Ford's previous defense attorneys from answering questions posed by Ford's current defense attorney.[9]

Kansas courts should mitigate inverted privilege by granting motions to determine competency only when the motion is adequately supported.[10] While this solution to inverted privilege is fairly straightforward, defense attorneys often seek motions to determine competency "out of an abundance of caution," and district courts grant the motions.[11] Because of inverted privilege resulting from *Pate* and *Gonzalez*, the granting of an unsupported motion to determine competency tends to work against the fair administration of justice.[12] This article analyzes the inverted privilege that arose in *Ford* and concludes that a simple affidavit should be required at the submission of a defense motion to determine competency. In order to reduce the effects of inverted privilege, Kansas courts ought to adhere strictly to this policy of requiring actual support to rebut the presumption of a defendant's competency.

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3. State v. Gonzalez, 234 P.3d 1, 13–14 (Kan. 2010).

4. *See id.*

5. *See* Order at 4–10, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016) (applying the holdings of both Pate v. Robinson, 383 U.S. 375 (1966), and State v. Gonzalez, 234 P.3d 1, 13–14 (Kan. 2010)).

6. *See* State v. Ford, 353 P.3d 1143 (Kan. 2015) (holding that procedural errors invalidated a retrospective competency hearing that was intended to cure the originally defective competency hearing), *remanded to* No. K0072610 (Dist. Ct. Johnson Cty., Kan. 2015).

7. *See* Register of Actions, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan.), http://www.jococourts.org (enter case number, then select "Case Number/Exact Name Search," then select "CASE HISTORY (ROA)" button) (last visited Feb. 13, 2018).

8. *See* Order at 1–4, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

9. *See* Transcript of Proceedings at 196, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

10. This should not be taken as an assertion that defendants should be denied the right or opportunity to request a determination of competency or that the standard found in statute should be changed.

11. *See* Transcript of Proceedings at 186–87, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

12. *See* Order at 4–10, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016) (applying both rules); Transcript of Proceedings at 196, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016) (demonstrating the consequences of applying both rules).

II. BACKGROUND

The adversarial legal system in the United States depends on many concepts to ensure the fair administration of justice. The Fifth and Fourteenth Amendments of the Constitution impose due process protections on federal and state governments.[13] The United States Supreme Court has interpreted due process in criminal cases to require both that the defendant have assistance of counsel and that he be competent to stand trial.[14] Under certain conditions, these two critical protections can come into direct conflict with each other.[15]

Without the "guiding hand of counsel," defendants are likely to find themselves convicted of crimes they did not commit.[16] "Even an intelligent and educated layman" who understands the nature of the proceedings against him still has a substantial risk of an unfair conviction without an attorney.[17] A system that so easily convicts innocent defendants is clearly counter to the fair administration of justice. For this reason, the United States Supreme Court firmly established in *Gideon v. Wainwright* that assistance of counsel in criminal proceedings is a fundamental right protected by the Constitution.[18]

In *Upjohn Co. v. United States*, the United State Supreme Court stated that effective assistance of counsel depends on the privilege of the defendant to communicate with his attorney without fear of those communications being disclosed.[19] The attorney-client privilege is the oldest communications privilege because it is an essential aspect of the attorney-client relationship on which the United States legal system depends.[20] Access to counsel, along with its privileges, is only one of many protections necessary to ensure fair administration of justice.

Competency is another core protection of the United States legal system. The United State Supreme Court held in *Pate* that a criminal defendant must meet a minimum level of competency in order to stand trial.[21] The threshold for competency, in the context of a criminal trial, requires only that the defendant understand the nature of the proceedings against him and that he be able to assist in his own defense.[22] This is a very low standard,[23] but it demonstrates that even

13. U.S. CONST. amends. V, XIV.

14. Pate v. Robinson, 383 U.S. 375, 377 (1966) (holding that due process requires the defendant to be competent); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that assistance of counsel is a fundamental right).

15. *See generally* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207 (2008).

16. *Gideon*, 372 U.S. at 344–45.

17. *Id.*

18. *See id.*

19. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

20. *See id.*

21. Pate v. Robinson, 383 U.S. 375, 377 (1966).

22. *See, e.g.*, 18 U.S.C. § 4241 (2012); KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.).

23. Bruce J. Winick, *Criminal Law: Reforming Incompetency to Stand Trial and Plead*

with the assistance of counsel, justice cannot be fairly administered when a defendant cannot understand what is happening.

Because due process is a fundamental right, the requirement of competency to stand trial results in very strong protections. Once a defendant's competency is legitimately under dispute, his privileges are effectively frozen in place.[24] Under normal circumstances, privileges can easily be waived by accident. When the defendant's competency is at issue, the defendant cannot "knowingly or intelligently waive his right."[25] Thus, an incompetent defendant cannot even "deliberately" waive his rights because they are unwaivable unless and until the court finds the defendant has attained competency.[26]

When considered independently, the attorney-client privilege and competency both appear rational to the point of near-universal applicability. But what happens when a defendant's competency is legitimately in question and the best evidence of his ability to assist in his defense would come from his defense attorney? When this situation arises, the two protections interact in an unusually complicated manner. The prosecution may find itself raising objections on behalf of the defendant when the defense attorney's questions would result in a violation of privilege. This inversion of privilege, though counter-intuitive, actually does happen.[27]

Attorney-client privilege and the requirement of competency to stand trial are both rooted in the Constitution and common law, but they are also codified in Kansas statutes and regulations. The attorney-client privilege protections are found in both rules of evidence and rules of professional conduct, whereas the competency requirements are covered by the criminal procedure code.

A. Attorney-Client Privilege Under K.S.A. 60-426 and the Kansas Rules of Professional Conduct

The attorney-client privilege is codified at Kansas Statutes Annotated section 60-426 and protects against disclosure of certain communications between the defendant and his attorney.[28] Under section 60-426, the defendant can refuse to disclose privileged communications and can prevent his attorney or any other person from disclosing those privileged communications when certain criteria are satisfied.[29] There are five statutory exceptions to the privilege, but none apply directly to matters of competency.[30]

Guilty: A Restated Proposal and a Response to Professor Bonnie, 85 J. CRIM. L. & CRIMINOLOGY 571, 598 (1995).

24. *See Pate*, 383 U.S. at 384 (holding that it is "contradictory" for an incompetent defendant to "knowingly or intelligently 'waive' his right").

25. *Id.*

26. *Id.*; *see also* KAN. STAT. ANN. § 22-3303 (LEXIS through the 2017 Reg. Sess.).

27. *See, e.g.*, Order, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

28. KAN. STAT. ANN. § 60-426 (LEXIS through the 2017 Reg. Sess.).

29. *Id.*

30. *See id.*

The Kansas Supreme Court views the attorney-client privilege itself as fundamental as well as being associated with a fundamental right to assistance of counsel under United States Supreme Court precedent.[31] The court considers this privilege so sacrosanct that it has established a "near-total prohibition" on allowing defense attorneys to testify even for non-privileged information.[32] This extra caution protects against "the potential for damage" caused by inadvertent violations "if the relationship is too cavalierly invaded or compromised."[33] There are limited exceptions to this prohibition if the prosecution legitimately needs access to the testimony. But when the defense attorney actively creates a situation requiring his testimony, it is problematic to give the prosecution the burden of lifting the prohibition on making the defense attorney testify.[34]

In addition to the statutory privilege as an evidentiary rule, Kansas attorneys are bound to protect their client's confidential communications under the Kansas Rules of Professional Conduct.[35] While the attorney-client privilege and professional confidentiality are legally distinct concepts, they are closely related.[36] The central rule on confidentiality is rule 1.6 which states "[a] lawyer shall not reveal information relating to representation of a client" and requires "reasonable efforts to prevent the inadvertent or unauthorized disclosure" of that information.[37] There are also five exceptions to the ethical duty of confidentiality listed in the confidentiality rule, but again none of them apply directly to matters of competency.[38] In rule 1.14, an additional exception permits an attorney to disclose confidential information in taking protective action for a client with diminished capacity, but only to the extent that it is absolutely necessary.[39]

The rules of professional conduct prevent attorneys from disclosing confidential information, but there is also a rule preventing prosecutors from subpoenaing an attorney "to present evidence about a past or present client."[40] While rules of professional conduct are generally limited in scope to matters of attorney discipline,[41] in 2010 the Kansas Supreme Court held in *State v. Gonzalez* that the standard in rule 3.8(e) is the "analytical rubric" that judges

31. *See* KAN. R. PROF'L CONDUCT 1.6 cmt. 4 ("A fundamental principle . . . is that the lawyer maintain confidentiality . . . ."); *see also* State v. Gonzalez, 234 P.3d 1, 12 (Kan. 2010) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

32. *See Gonzalez*, 234 P.3d at 12–15 (holding that a judge may not issue subpoenas for defense counsel unless the prosecution satisfies a three-part test that goes beyond applicable privilege).

33. *Gonzalez*, 234 P.3d at 13.

34. *See id.* at 12, 14.

35. KAN. R. PROF'L CONDUCT Prefatory Rule.

36. *See Gonzalez*, 234 P.3d at 10.

37. KAN. R. PROF'L CONDUCT 1.6.

38. *See id.*

39. *Id.* at 1.14.

40. *Id.* at 3.8(e).

41. *Id.* at Prefatory Rule.

must use when testimony is sought from a defense attorney.[42] In effect, *Gonzalez* bars judges from issuing subpoenas to compel testimony from criminal defense counsel unless the prosecution establishes under rule 3.8(e) that the testimony will be non-privileged, essential, and not available through other means.[43]

The constitutional right to assistance of counsel therefore leads to three layers of protection for the criminal defendant's attorney-client communications. The layers come from statute, rules of professional conduct, and case law. It is primarily the last of these layers, firmly established by *Gonzalez* in 2010,[44] that presents a significantly problematic conflict with the due process requirement of defendant competence.

B. Competency to Stand Trial Under K.S.A. 22-3302

Due process requires that a criminal defendant be competent to stand trial.[45] Due process requirements are fundamental protections of our common law system.[46] For a defendant to be competent to stand trial, he must have the capacity to understand the nature of the criminal proceedings and to assist in the defense.[47] In this context, *competence* is defined very narrowly.[48]

The Kansas legislature established competency procedures in statute.[49] Courts presume all defendants are competent until the issue is raised.[50] Kansas Statutes Annotated section 22-3302 provides that "the defendant, the defendant's counsel or the prosecuting attorney may request a determination of the defendant's competency to stand trial" between the time of arraignment and sentencing.[51] In practice, this is done with a motion to determine competency.[52] In addition, the court may take action *sua sponte* on the "judge's own knowledge and observation."[53] This means that the defense, prosecution, and judge all have the ability to challenge the presumption of competency.

Once the presumption of competence has been challenged, the court must make a finding as to whether the challenge sufficiently rebuts the presumption

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42. State v. Gonzalez, 234 P.3d 1, 13–14 (Kan. 2010); *see also* KAN. R. PROF'L CONDUCT 3.8(e).

43. *Gonzalez*, 234 P.3d at 13–14.

44. *Id.*

45. State v. Ford, 353 P.3d 1143, 1149 (Kan. 2015) (quoting Medina v. California, 505 U.S. 437, 439 (1992)).

46. *See* Pate v. Robinson, 383 U.S. 375, 377 (1966); *see also* 4 HOOPER LUNDY & BOOKMAN, TREATISE ON HEALTH CARE LAW § 20.07[2][a] (2017), LexisNexis.

47. *See* KAN. STAT. ANN. § 22-3301 (LEXIS through 2017 Reg. Sess.); *see also* HOOPER LUNDY & BOOKMAN, *supra* note 46.

48. *See* HOOPER LUNDY & BOOKMAN, *supra* note 46, at § 20.07[2][c][i].

49. KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.).

50. *See* State v. Ford, 353 P.3d 1143, 1154 (Kan. 2015) (citing State v. Hedges, 8 P.3d 1259, 1263 (Kan. 2000)).

51. KAN. STAT. ANN. § 22-3302(1) (LEXIS through the 2017 Reg. Sess.).

52. *See* Transcript of Proceedings at 186–87, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

53. § 22-3302(1) (LEXIS).

and warrants a competency hearing. The statute allows this presumption to be overcome upon a finding that there is "reason to believe that the defendant is incompetent to stand trial."[54] This is a low standard and some judges will make the finding merely because a party requests a competency hearing.[55] If the court finds the challenge inadequate to rebut the presumption, the criminal proceedings continue as normal.[56] But if the court finds the challenge meets the statutory standard to overcome the presumption of competence, the court is obligated to conduct a competency hearing.[57] To complete the obligatory competency hearing, the court must follow very strict statutory procedures.[58]

The basic features of a competency hearing are described in section 22-3302.[59] Understanding the broader process for a competency hearing is essential to understanding the inverted privilege. The first and most fundamental aspect of the competency hearing is that all criminal proceedings against the defendant must be suspended until the court determines whether the defendant is competent.[60] The court, rather than the defendant, chooses whether the competency hearing will be heard before a jury.[61] The court also has the authority to order a competency evaluation by medical professionals who must return the report directly to the court rather than the parties.[62] A final and absolute requirement is that the defendant must be "personally present at all proceedings under [section 22-3302]."[63]

Once the presumption of competency is rebutted, under *Pate* the defendant is implicitly unable to waive any due process rights, even accidentally, unless and until the court finds the defendant competent.[64] The court and prosecution are also duty-bound to ensure that these due process rights of the defendant are not inadvertently violated.[65]

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54. *Id.*

55. Transcript of Proceedings at 162–207, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016) (reviewing the process that resulted in the court granting a defense motion to determine competency with nothing but a form motion).

56. *See* § 22-3302(1) (LEXIS).

57. *Id.*

58. *See* State v. Ford, 353 P.3d 1143, 1147 (Kan. 2015) (reversing for failure to have the defendant present, discussing previous error of failure to have a hearing, and warning against a future error of allowing waivers from a potentially incompetent defendant), *remanded to* No. K0072610 (Dist. Ct. Johnson Cty., Kan. 2015).

59. KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.).

60. *Id.* § 22-3302(1).

61. *Id.* § 22-3302(3).

62. *Id.*

63. *Id.* § 22-3302(7).

64. *See* State v. Ford, 353 P.3d 1143, 1157 (Kan. 2015) (reminding courts that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial" (quoting Pate v. Robinson, 383 U.S. 375, 384 (1966))), *remanded to* No. K0072610 (Dist. Ct. Johnson Cty., Kan. 2015).

65. *See* State v. Kleypas, 40 P.3d 139, 213 (Kan. 2001) (quoting State v. Cellier, 948 P.2d 616, 626 (Kan. 1997)).

C. Interactions Between Defendant Competency Hearings and Attorney-Client Privilege

In criminal matters, there is no question that both the courts and prosecutors have a legal duty to guard due process.[66] Due process includes ensuring that the attorney-client privilege is protected and the defendant is competent to stand trial.[67] Therefore, the judge and prosecutor are both required to ensure that these rights are not inadvertently violated.

The defense, on the other hand, need only express concerns of competency if the defendant benefits from raising the issue.[68] Hypothetically, if defense counsel has the option to get a case legitimately dismissed or risk having the defendant shipped off to a state institution for several months, it might be in the defendant's best interest to avoid going to the institution. When it comes to taking protective action, an attorney is merely permitted to take action.[69] There is no obligation on defense counsel to warn the court about a defendant's diminished capacity when revealing it would be detrimental to the defendant. In fact, the ethical rules limit the attorney from revealing anything not "reasonably necessary to protect the client's interest."[70]

In a somewhat interesting twist, defense counsel is only under an *ethical* duty to protect attorney-client communications and under no specific duty to ensure that a client is competent to stand trial.[71] However, defense attorneys have discretionary authority to raise the question of a defendant's competency in criminal proceedings under both statutory and ethical rules.[72] When defense attorneys exercise the discretionary authority to challenge competence, the two protected interests come into conflict.

It is not uncommon in practice for defense counsel to make a motion to

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66. *See* State v. Gonzalez, 234 P.3d 1, 14 (Kan. 2010); *Kleypas*, 40 P.3d at 213 (quoting *Cellier*, 948 P.2d at 626).

67. 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW § 13.01 (2017) ("Invasion of the Attorney-Client Privilege Violates Due Process"), Westlaw; Medina v. California, 505 U.S. 437, 439 (1992) ("[T]he Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial.").

68. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d (AM. LAW INST. 2000) ("A lawyer may bring the client's diminished capacity before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests . . . .").

69. KAN. R. PROF'L CONDUCT 1.14 (stating that the attorney "may" take action).

70. *Id.*

71. *See Gonzalez*, 234 P.3d at 10 (noting that "ethics rules do not impose legal duty on attorneys"); *Kleypas*, 40 P.3d at 213 (omitting defense counsel from the list of parties under "a duty to provide due process" (quoting *Cellier*, 948 P.2d at 626)). *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d (AM. LAW INST. 2000) ("In some jurisdictions, . . . the defendant's lawyer must bring the issue to the court's attention . . . .").

72. *See* KAN. STAT. ANN. § 22-3302(1) (LEXIS through the 2017 Reg. Sess.); KAN. R. PROF'L CONDUCT 1.14(b).

determine competency.[73] After all, defense counsel will probably notice whether the defendant is capable of assisting in his own defense.[74] The defense attorney is allowed to make the motion under the statutory scheme,[75] and the ethical rules do not interfere because of the implied consent to disclose information necessary to protect a client with diminished capacity.[76]

The defense attorney is the best person who can testify regarding support for the defense attorney's own motion to determine competency based on personal knowledge or observation.[77] The defense need only request a competency hearing in order to trigger the court's procedural obligation to decide whether there is reason to believe the defendant is incompetent.[78] However, the statute does not require any specific support for the motion.[79] Some attorneys use a template motion that lacks any specific support for calling competency into question.[80] If a court takes the defense counsel's bare motion, with no support, and finds that there is reason to believe the defendant might be incompetent, then a competency hearing becomes mandatory despite there never being any meaningful evidence submitted to indicate that the defendant was indeed incompetent.[81]

After a court grants an unsupported defense motion to determine competency, the rules for attorney-client privilege and defendant competency interact to create a conflict. Because the presumption of competency has been rebutted, the defendant cannot waive any rights.[82] The attorney-client privilege becomes unwaivable before the competency hearing begins and remains unwaivable, along with all other rights, unless and until the defendant is found competent.[83]

Going further, the defense attorney is the best witness to testify about competency and is also hedged behind the high protections of the *Gonzalez* analytical rubric.[84] If the prosecution fails to establish the required elements to call a defense attorney to the stand, the court is stuck trying to determine whether

73. *See, e.g.*, Transcript of Proceedings at 185–88, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016) (discussing the common practice in Johnson County).

74. *See* State v. Ford, 353 P.3d 1143, 1156 (Kan. 2015) ("[D]efense counsel is often in the best position to determine whether a defendant's competency is questionable." (quoting McGregor v. Gibson, 248 F.3d 946, 960 (10th Cir. 2001))).

75. KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.).

76. KAN. R. PROF'L CONDUCT 1.14(c).

77. *See Ford*, 353 P.3d at 1156.

78. *See* § 22-3302 (LEXIS).

79. *See id.*; *see also* Transcript of Proceedings at 185–88, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

80. Transcript of Proceedings at 188, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

81. *See, e.g.*, *Ford*, 353 P.3d at 1147–48. *See generally* KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.) (establishing the minimal procedural requirements for a competency hearing).

82. *Ford*, 353 P.3d at 1154, 1157.

83. *See id.*

84. *See generally* State v. Gonzalez, 234 P.3d 1 (Kan. 2010) (imposing the prosecutorial ethics rule on judicial decisions regarding defense attorneys testifying).

a defendant is competent without being able to inquire into the grounds on which incompetency was initially asserted.[85] Even if the prosecution succeeds in establishing the required elements, only unprivileged information may be sought from the defense counsel.[86] Despite any possible benefit, the defense attorney cannot disclose the privileged information because the privilege has become unwaivable and the court and prosecution are required to protect it in the interest of due process.[87] This reversal of roles in protecting attorney-client privilege can be called *inverted privilege*—a situation where the prosecutor must object to any attempt to waive the defendant's privilege.

III. AN EXAMPLE CASE: STATE V. FORD

The Kansas case *State v. Ford* provides an opportunity to assess attorney-client relationships between three different attorneys and a single defendant in relation to competency proceedings.[88] After two remands and more than twenty years, the *Ford* case is still pending in the district court in 2018.[89]

The details of the underlying facts are sparse in the record because the defendant, Harold Glen Ford, Jr., entered a plea agreement and never went to trial.[90] *Ford* took two decades to resolve matters related to competency and due process.[91] Over its long life, *Ford* has involved several defense attorneys, three of which are relevant to this analysis.[92] At the third competency hearing which was held in 2016, the prosecution sought to call all three defense attorneys as witnesses and triggered the *Gonzalez* rubric.[93] The periods of the attorney-client relationships in *Ford* are significant to understanding the interaction between the attorney-client privilege, the competency hearing, and the *Gonzalez* rubric.[94]

In 1992, the court appointed Charles Droege as the first defense attorney for Ford.[95] Concurrent with the Kansas case was a companion case pending in

85. *See generally* Order, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016) (analyzing the applicability of the *Gonzalez* rule to three different defense attorneys).

86. *Gonzalez*, 234 P.3d at 10.

87. *See Ford*, 353 P.3d at 1157; State v. Kleypas, 40 P.3d 139, 213 (Kan. 2001).

88. *See* State v. Ford, 353 P.3d 1143 (Kan. 2015) (holding that procedural errors invalidated a retrospective competency hearing that was intended to cure the originally defective competency hearing), *remanded to* No. K0072610 (Dist. Ct. Johnson Cty., Kan. 2015).

89. State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. July 29, 2016).

90. *See* Order at 1–2, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

91. The court ultimately concluded that Ford's competency could not be retrospectively determined. Ford was then found competent to stand trial in 2017 and proceedings continued from there. A preliminary hearing was held, Ford was bound over, and the case has been continued until March at Ford's request. *See* Register of Actions, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan.), http://www.jococourts.org (enter case number, then select "Case Number/Exact Name Search," then select "CASE HISTORY (ROA)" button) (last visited Feb. 13, 2018).

92. *See* Order at 3, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

93. *Id.* at 3–4.

94. *See generally id.* (relying on the periods of the attorney-client relationships as a core fact in the analysis).

95. *Id.* at 1.

Missouri in which Ford was also a defendant.[96] Sometime after the competency issue was raised in Ford's murder case in Kansas, J.R. Hobbs became the second attorney when he was appointed as defense counsel in the Missouri case.[97] The third attorney, Alex Tandy, was appointed to represent Ford several years later when he contested his sentence.[98]

The procedures leading to the need for a competency hearing in *Ford* are fairly straightforward.[99] Before trial, Droege raised the issue of competency in the Kansas case by filing a "form" motion with no supporting factual basis.[100] Following routine procedure, the district court found that there was "reason to believe the defendant is incompetent to stand trial," which triggered a mandatory competency hearing under section 22-3302.[101] The district court proceeded to order an evaluation by mental health professionals.[102] The evaluation was returned to the court and indicated the defendant was competent from a medical perspective.[103] But the competency hearing, required under section 22-3302, never happened.[104]

There is no record that the district court ever conducted a competency hearing in 1992 or 1993.[105] Presumably, the district court was satisfied with the mental health evaluation, dispensed with the formality of a competency hearing, and scheduled the plea hearing in which Ford entered a guilty plea.[106] Both the district court and the Kansas Supreme Court would later identify the omitted hearing as a significant due process error.[107] Ford's plea offer apparently allowed him to avoid the death penalty in Missouri too,[108] but the details of the Missouri case were never specifically included in the plea agreement or any other part of the record of the Kansas case.[109] Later in 1993, Ford entered a plea in the Missouri case with the assistance of Hobbs, his second attorney.[110] Ford was eventually sentenced to life in prison by the Kansas district court.[111]

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96. *Id.* at 2.

97. Transcript of Proceedings at 204–07, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

98. Order at 2, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

99. *See generally id.*

100. *Id.* at 1–2; Transcript of Proceedings at 188, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

101. *See* Order at 1–2, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

102. *Id.*

103. *Id.* at 2.

104. State v. Ford, 353 P.3d 1143, 1148 (Kan. 2015).

105. *Id.*

106. Transcript of Proceedings at 170–71, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

107. *See Ford*, 353 P.3d at 1154.

108. Transcript of Proceedings at 178, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

109. Order at 6, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

110. Transcript of Proceedings at 204–05, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

111. Order at 2, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

In 2010, Ford filed a motion to correct an illegal sentence with the assistance of Tandy, Ford's third attorney.[112] The district court granted the defense motion and found that the omission of a competency hearing had been a procedural error violating Ford's due process rights that made the sentence illegal.[113] The district court then attempted to conduct a retrospective competency hearing.[114]

When the retrospective competency hearing was held, Ford was not present as required in section 22-3302(7) of the competency hearing statute.[115] Once again, the district court had made an error that the Kansas Supreme Court would later find to be a significant violation of Ford's due process rights.[116]

With the assistance of yet another attorney, Ford appealed the result of the competency hearing to the Kansas Supreme Court because the hearing was retrospective and because Ford was not present.[117] The Kansas Supreme Court held that the competency hearing was feasible despite being retrospective, but that the absence of the defendant was a reversible procedural error.[118] The Kansas Supreme Court also clarified that the right to be present, as with other due process rights, was effectively unwaivable during a competency hearing as a matter of federal law established in *Pate*.[119]

Back in the district court, the prosecution sought to subpoena Droege, Hobbs, and Tandy, along with a long list of other witnesses, to establish whether Ford was competent in 1992 and 1993.[120] The defense objected, claimed attorney-client privilege, and invoked the *Gonzalez* analytical rubric.[121] Despite the same arguments being presented for all three attorneys, the court ultimately ruled that Droege could be subpoenaed, but that Hobbs and Tandy could not.[122]

All three of Ford's attorneys potentially had information that could have been useful to the court in determining Ford's competence 1992.[123] Despite this, the court ruled that the state had met its burden under *Gonzalez* only in relation to Droege.[124] The district court reaffirmed that Droege had the opportunity to directly observe Ford's "behavior and demeanor" during the 1992

112. *Id.*

113. *See id.*

114. *See id.*

115. State v. Ford, 353 P.3d 1143, 1157 (Kan. 2015). Interestingly, the court permitted the original defense counsel, Droege, to be called as a witness during this hearing without following the *Gonzalez* analytical rubric handed down earlier the same year. *See* Brief of Appellant at 3, State v. Ford, 353 P.3d 1143 (Kan. 2015) (No. 2013-109,806-S); *see also* State v. Gonzalez, 234 P.3d 1 (Kan. 2010).

116. *See Ford*, 353 P.3d at 1157.

117. *See id.* at 1148.

118. *Id.* at 1157.

119. *See id.*

120. Order at 3, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

121. *See id.*

122. *See id.* at 9–10.

123. *See id.* at 7–8 (analyzing essentiality of defense attorney testimony in this context).

124. *Id.*

proceedings.[125] Those observations are not protected by privilege and were essential, so the first two of the three elements in the *Gonzalez* test were easily satisfied.[126] The third *Gonzalez* element required that there be no feasible alternatives, and that element was satisfied because Droege's testimony about his observations of behavior and demeanor would not be admissible if they came from anyone other than Droege.[127]

The district court ruled that Hobbs could not testify under the *Gonzalez* test.[128] Hobbs may have had personal observations of "behavior and demeanor" at a time close enough to the original 1992 court proceedings to be relevant in the matter of Ford's competency, but there was no evidence in the record to demonstrate that fact.[129]

The third attorney, Tandy, failed the *Gonzalez* test in a fairly straightforward manner because he had no contact with Ford until the 2010 proceedings.[130] The court ruled that any information Tandy would have about the 1992 proceedings would be from privileged communication or inadmissible as hearsay.[131]

When the retrospective competency hearing was held in 2016 and before Droege's testimony began, the court gave an admonition on the record that the attorney-client privilege was not waived and that Droege[132] should not provide any information that would violate the privilege.[133] On direct examination, the prosecution asked for Droege's reasoning about his original motion to determine competency in Ford's case.[134] Droege testified that Ford's mother had questioned her son's competence and Droege, out of caution, asked for a competency determination.[135] Nothing regarding privileged communications was necessary to establish Droege's support for making the motion.[136]

On cross-examination, the inverted privilege situation presented itself. The defense asked a couple of questions to which Droege responded with a claim of attorney-client privilege.[137] The inverted privilege occurred because the current

125. *Id.* at 5.

126. Order at 10, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016); *see also* State v. Gonzalez, 234 P.3d 1 (Kan. 2010).

127. Order at 8–9, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

128. *Id.* at 9.

129. *Id.* at 6.

130. *Id.*

131. *Id.*

132. It is worth noting that the Honorable Charles Droege was particularly well qualified to assess privilege because he had been serving as a municipal court judge in the intervening time between the 1992–93 proceedings and the 2016 retrospective competency hearing. *See Judge James Charles Droege*, JOHNSON COUNTY DISTRICT CT., http://courts.jocogov.org/judge_droege.aspx [https://perma.cc/S2TK-R64B].

133. Transcript of Proceedings at 162, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

134. *Id.* at 186–87.

135. *Id.*

136. *See id.* at 162–207.

137. *Id.* at 196–97.

defense attorney was asking his client's prior defense attorney about attorney-client privileged communication.[138] To comply with the court's admonition, Droege essentially objected to the current defense counsel asking questions that violated the defendant's unwaivable privilege.[139]

As of this writing, the court found that Ford's competency could not be retrospectively determined and the case is anticipated to proceed to trial in 2018.[140] Despite this, the unusual fact pattern and proceedings conducted between 1992 and 2016 provide a useful basis for analysis.

IV. ANALYSIS

To determine whether to permit each attorney to be subpoenaed, the district court in *Ford* evaluated the three elements laid out in the *Gonzalez* analytical rubric.[141]

The first *Gonzalez* element is *privilege*.[142] The district court held that the nature of the information sought was generally not privileged.[143] In Kansas, and several other jurisdictions, observations of behavior and demeanor are generally not within the scope of privileged communications.[144] Despite this general rule, the court recognized that information about behavior and demeanor might be privileged if obtained through direct communication with the defendant.[145] Also, as an added precaution, the attorney-client privilege statute allows the prior attorney to invoke privilege if an inappropriate question is asked in a situation where the attorney is legitimately testifying about unprivileged information.[146]

The second *Gonzalez* element is *essentiality*.[147] The Kansas Supreme Court held in *State v. Newman* that information is essential if it "may be determinative of the case."[148] In addition, the Kansas Supreme Court has recognized that the defense attorney is usually in the best position to testify about competency to stand trial.[149] The district court held broadly that testimony of a defense attorney

138. *See id.*

139. *Id.*

140. No criminal trial was ever held because the court in *Ford I* accepted a plea and entered a sentence. With the plea and sentence being overturned, the defendant is still entitled to a full criminal trial before a jury. The case is currently in the pre-trial process and will likely proceed to trial in 2018. *See* Register of Actions, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan.), http://www.jococourts.org (enter case number, then select "Case Number/Exact Name Search," then select "CASE HISTORY (ROA)" button) (last visited Feb. 13, 2018).

141. Order at 4, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

142. State v. Gonzalez, 234 P.3d 1, 7 (Kan. 2010).

143. Order at 5, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

144. State v. Kleypas, 40 P.3d 139, 216 (Kan. 2001).

145. *See* Order at 6, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

146. *See* KAN. STAT. ANN. § 60-426 (LEXIS through the 2017 Reg. Sess.).

147. *Gonzalez*, 234 P.3d at 7.

148. State v. Newman, 680 P.2d 257, 260 (Kan. 1984) (quoting Judicial Council comment on KAN. STAT. ANN. § 22-3603).

149. *See* State v. Ford, 353 P.3d 1143, 1156 (Kan. 2015).

serves as strong evidence of the defendant's competency to stand trial, therefore making it determinative of the issue in dispute and essential.[150]

The third *Gonzalez* element is the *feasibility of alternative sources*.[151] The district court held that information about the defense attorney's personal knowledge and observations of the defendant's behavior and demeanor, if obtained through the other means plausibly available, would not be admissible due to hearsay rules, and therefore the alternatives were not feasible.[152] In doing so, the district court referenced the Kansas hearsay statute and the general prohibition on waivers of due process rights during competency hearings.[153]

A. Three Different Attorneys and Three Different Reasons

The court differentiated the three potential witnesses in *Ford* in part based on whether the attorney-client privilege protected the potential testimony.[154] Despite the general finding that all of the witnesses might be able to provide essential testimony, the court allowed only Droege to be subpoenaed.[155]

1. Counsel for the Principle Case

The prosecution sought non-privileged information from Droege about his direct observations of Ford's behavior and demeanor.[156] As the defense attorney for the case in which the motion to determine competency was presented, Droege's testimony was relevant to determining whether the defendant could assist in his own defense.[157] As the attorney who made the motion, Droege was also the best witness to testify about the reasoning behind a motion which declared Droege's own personal knowledge and belief as the basis for that motion.[158] Alternatives, including the recorded testimony from the previous competency hearing, were barred by due process.[159] The *Gonzalez* elements of non-privileged information, essentiality, and no-alternatives were therefore satisfied.[160]

The result was that Droege was subpoenaed and testified at the retrospective competency hearing.[161] During that hearing, Droege was able to give testimony about the original motion, the status of the Missouri companion case, and common practice for criminal proceeding at the time Droege was

150. *See* Order at 7–8, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

151. *Gonzalez*, 234 P.3d at 7.

152. Order at 8–9, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

153. *Id.*

154. *See id.* at 6.

155. *See id.* at 7–8.

156. *See id.* at 5–6.

157. *See id.* at 8.

158. Order at 8, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

159. *Id.*

160. *See id.* at 10.

161. Register of Actions, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan.), http://www.jococourts.org (enter case number, then select "Case Number/Exact Name Search," then select "CASE HISTORY (ROA)" button) (last visited Feb. 13, 2018).

representing the defendant.[162] None of these disclosures appear to have violated attorney-client privilege. There were, however, multiple objections about potential violations of attorney-client privilege.[163] The prosecution asked why the defendant was in negotiations for a plea and the defense objected.[164] When the judge asked "how does that [question] not get into attorney-client matters," the prosecution simply answered "I don't know."[165] The judge sustained the objection.[166] Because the prosecution could not ask the question, even though the answer might not be privileged, the court may have deprived itself of unprivileged and essential evidence which could not be feasibly obtained from other sources.

During the defense's cross-examination, application of the attorney-client privilege was not as straightforward. Droege refused to answer questions multiple times to comply with the judge's verbal order to protect the defendant's privilege.[167] Even though the district court had acknowledged that "the privilege only belongs to [Ford]," the duty of protecting that privilege had shifted to include the court and the prosecution during a competency hearing.[168] This shows the highly unusual nature of the situation.

2. Counsel for the Companion Case in Missouri

The defense counsel in the companion case in Missouri was Hobbs.[169] However, the court noted that the prosecution in the Kansas case failed to present any evidence showing that Hobbs was in fact the defendant's attorney.[170] There was nothing in the record, other than the mention of a Missouri case number in the plea agreement, to support the premise that Hobbs would have any knowledge or observation of the defendant's behavior, demeanor, or ability to contribute to his own defense.[171]

The court denied a subpoena for Hobbs because there was a lack of support showing Hobbs had any information that could be admitted through testimony.[172] If the state had submitted evidence showing that Hobbs was defense counsel in a concurrent case, then the court may have permitted the prosecution to seek testimony about Hobbs's unprivileged observations. After the subpoena was denied, the prosecution provided evidence that would link

162. Transcript of Proceedings at 186, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

163. *E.g.*, *id.* at 172.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 196–97.

168. *See* Transcript of Proceedings at 185–86, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016); State v. Kleypas, 40 P.3d 139, 213 (Kan. 2001) (quoting State v. Cellier, 948 P.2d 616, 626 (Kan. 1997)).

169. Transcript of Proceedings at 204–05, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

170. Order at 6, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

171. *See id.*

172. *See id.*

Hobbs to the Missouri case.[173]

As it turns out, testimony from Droege later revealed that Hobbs was likely not appointed to the Missouri case until after the plea deal in the Kansas case had been accepted.[174] This fact, if available to the court earlier, might have led to a conclusion that the information from Hobbs would not be essential. Even if Hobbs were to have testified about personal observation and knowledge of Ford's behavior and demeanor, that testimony would have been primarily relevant only to a determination of competency weeks or months after Ford's competency was challenged and his plea was entered. However, the court did suggest that Hobb's observations might have happened close enough to the Kansas proceedings to be partially determinative in a retrospective hearing.[175]

The court denied the subpoena for Hobbs due to lack of evidence supporting the non-privileged nature of the information,[176] but if the evidence had been available, the court might have had reason to deny the subpoena for non-essentiality of the testimony.

3. Counsel for the Motion to Correct Illegal Sentence

Seventeen years after the original proceedings, Tandy was appointed to assist the defendant in a motion attacking the procedural error that happened when the court dispensed with a formal competency hearing.[177] Again, nothing in the record indicated that this attorney was working with Ford at the time between the motion to determine competency and the plea hearing.[178]

The court inferred that Tandy could only have acquired information pertaining to the relevant time period by privileged communication or inadmissible hearsay.[179] Therefore, the court denied the subpoena for Tandy on the basis of privilege.[180]

Only one out of three subpoenas survived analysis under the Gonzalez rubric, but the testimony of that one defense attorney was sufficient to demonstrate the problems of inverted privilege in competency hearings. Without changing the principles behind the attorney-client privilege or competency requirements, the possibility of inverted privilege will continue to exist. However, there may be solutions that can avoid creating situations where inverted privilege might lead to injustice.

B. Requiring a Supporting Affidavit is a Possible Solution

As *Ford* demonstrates, when the defense makes a motion to determine

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173. *See* Transcript of Proceedings at 126, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 20, 2016).

174. *Id.* at 206.

175. *Id.* at 126–27.

176. *See* Order at 6, State v. Ford, No. K0072610 (Dist. Ct. Johnson Cty., Kan. June 16, 2016).

177. *See id.* at 2.

178. *See id.* at 6.

179. *Id.*

180. *Id.*

competency, the resulting inversion of privilege can be quite perplexing. But the problem is not insurmountable. It can be resolved by requiring an affidavit with defense motions to determine competency. *Ford* shows the system in place might be workable, yet unnecessarily complex and burdensome. It should not take years, or decades, to resolve questions of competency. The simple inclusion of an affidavit can be achieved by legislative mandate, judicial action, or the voluntary modification of standard defense practice.

As mentioned above, the criminal competency statute offers no standard against which a judge ought to make a finding of "reason to believe a defendant is incompetent to stand trial."[181] But, the Kansas Supreme Court has stated "[it] is in the trial court in whose mind a real doubt of sanity . . . must be created **before** that court is **required** to order an inquiry."[182] Something must be presented to a court to create any real doubt about competency, so a problem results when courts act without any information on a motion to determine competency by the defense. By skipping over the requirement of something to create a real doubt about competency, a court can create a burden on itself to investigate competency while simultaneously depriving itself of access to critical information in that investigation.

To resolve the issue, defense counsel ought to fully disclose the relevant non-privileged factual basis that supports a motion to determine competency at the time the motion is submitted. This is readily achieved by way of one or more affidavits. There is Kansas precedent for defense attorneys supporting a motion to determine competency by concurrently submitting an affidavit.[183] Without a supporting affidavit, a court should not make the finding that triggers the competency hearing on the basis of a motion by the defense.

The problem of inverted privilege does not arise if the prosecution, or the court *sua sponte*, seeks a determination of competency. There are no rules of privilege or professional conduct hindering a prosecutor from disclosing the factual basis supporting his motion to determine competency. Similarly, the court is not limited from disclosing its factual basis for acting *sua sponte*. Inverted privilege can only arise when the defense makes a motion to determine competency because this defense most uniquely limits subsequent inquiry into the factual basis supporting the motion through the interaction of attorney-client privilege and the requirement of competency to stand trial.

The content of the affidavit should still generally pass the test in *Gonzalez*.[184] First, the information disclosed should not fall within the attorney-client privilege. Second, the information should have the potential to be determinative, at least in part, of the competency hearing. And third, the information should not be available from another source if it is coming from the

181. KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.).

182. Van Dusen v. State, 421 P.2d 197, 204 (Kan. 1966) (emphasis added).

183. *E.g.*, State v. Shopteese, 153 P.3d 1208, 1211 (Kan. 2007) ("Shopteese's counsel submitted a new motion to determine competency, accompanied by an affidavit from . . . an expert hired to testify concerning a mental disease or defect defense.").

184. *See generally* State v. Gonzalez, 234 P.3d 1 (Kan. 2010).

defense attorney.

1. No Attorney-Client Privileged Information

If the content of the affidavit includes only unprivileged information such as observation of behavior and demeanor, then it remains consistent with the notion that the defendant cannot reasonably waive the attorney-client privilege in pursuit of a ruling that could potentially undermine the defendant's ability to waive that privilege. By submitting the testimony in written form, defense counsel can be careful to ensure that the privilege is not inadvertently violated.

Because the defense attorney would be forced to consider this rule prior to making the motion, it has the added benefit of more clearly delineating when an attorney can raise a question of competency and when the attorney cannot. If the attorney can only raise a reasonable question of competency by violating privilege, then the situation may not be ripe for a motion to determine competency. Many attorneys face difficulty when trying to decide how to move forward with a potentially incompetent client.[185] Drawing this bright line may assist in overcoming this difficulty while simultaneously aiding courts in the proper and efficient administration of justice.

2. Only Essential Information

The information provided in the affidavit ought to aid the judge in determining whether there is a reasonable question of competency as well as in determining whether the defendant is in fact competent. The information should not need to be completely determinative of these questions. It is sufficient for the information to be only partially determinative so long as there is adequate support to rebut the presumption of the defendant's competence.

When evaluating the essentiality of material to include in the affidavit, the defense attorney ought to be guided by the rules of professional conduct regarding confidentiality. Rule 1.6 requires the attorney to keep his client's information confidential, while rule 1.14 permits limited disclosure to protect a client with diminished capacity, but only to the extent that necessary to effectively take protective measures.[186] Thus, if non-privileged yet confidential information does not aid the judge in determining the defendant's current competency, it should not be disclosed.

3. Only Information Not Feasibly Available from Alternate Sources

The rule against alternatives is somewhat different when approaching the problem with an affidavit. When the information supporting a motion comes from a person with whom the defendant has no privileged communication, the *Gonzalez* test does not apply no test for feasible alternatives is required. Feasible alternatives must be considered when the defense attorney might have to directly attest to personal observations. When the defense attorney is the only person who has witnessed relevant unprivileged information, no feasible alternative can

185. *See generally* Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65 (1988); King, *supra* note 15.

186. KAN. R. PROF'L CONDUCT 1.6, 1.14.

exist.

If the defense attorney can raise the issue of competency only by pointing exclusively to observations of behavior and demeanor that has been witnessed by the prosecution, the court, or both, then the defense attorney should not need to act. Under the *Gonzalez* test, the defense attorney probably *should not* file a motion to determine competency when the prosecution or court has observed questionable behavior and demeanor. The prosecution and court are duty-bound to protect against trying an incompetent defendant, and they have no conflicting rule of privilege or professional conduct hindering the performance of that duty. The defense attorney, on the other hand, has a conflict between protecting due process and protecting the client's confidentiality.

In fact, under the combination of Kansas precedent discussed above, if the prosecution, the court, or both, fail to raise the question of competency after witnessing an obvious display of questionable behavior or demeanor, the defense ought to be able to raise a due process challenge for the first time immediately after final judgment is entered in the district court. If this situation were to arise, the prosecutor or court would have failed in a duty to protect the due process rights of the defendant under Kansas law. If adopted, this approach would require the prosecution and court to be vigilant to avoid reversal based merely on the defendant's courtroom behavior.

C. Counterarguments

There are two anticipated counterarguments to the proposal that an affidavit be required to support a defense motion to determine competency. The first is that the current process, while burdensome, is necessary to protect the due process rights of criminal defendants. The second argument is that medical professionals, not defense attorneys, are best qualified to assist the court in determinations of competency. Neither of these counter-arguments sufficiently address the problems presented by the conflict of these two competing interests.

Competency proceedings suspend the criminal process for the defendant, and that suspension can potentially be indefinite.[187] If the process becomes overly burdensome, the case can drag on for years without a valid final judgment. With two (or more) competency hearings and proceedings spanning over two decades, *Ford* is a prime example of this judicial inefficiency.[188]

Impairing the ability to freely investigate a defendant's competency, including relevant non-privileged information from defense attorneys, increases the likelihood of error in making the determination. When errors happen, they could easily lead to inaccurate findings of competence and violations of due process. That result is counter to the effective, efficient, and fair administration of justice. Because there is an easy way to avoid the problem with an affidavit,

187. *See* KAN. STAT. ANN. § 22-3302 (LEXIS through the 2017 Reg. Sess.) (requiring suspension but giving no time limit).

188. *See generally* State v. Ford, 353 P.3d 1143 (Kan. 2015), *remanded to* No. K0072610 (Dist. Ct. Johnson Cty., Kan. 2015).

it does not make much sense to argue that the current practice is good enough.

Some courts look mostly or solely to the medical profession to determine competency.[189] This is reflected in Kansas by the practice of supporting a motion to determine competency with a medical expert's affidavit[190] and the courts routinely exercising the statutory authority to order a medical competency evaluation.[191] While the involvement of medical professionals is beneficial, and perhaps essential, their expert opinions should not be the sole basis for a court to determine whether a defendant is competent to stand trial.

In an article on assessing competence, Michael Burt and John Philipsborn make the argument that competency to stand trial is not something that can be left solely to medical practitioners.[192] Few psychiatrists and psychologists are qualified to defend a criminal case, so it is unlikely that they are qualified to independently determine whether a criminal defendant can contribute to his own defense.[193] Instead, expert medical opinions should be used in conjunction with the assessment made by the defense attorney.[194] Both legal and medical expert opinions should be evaluated to determine competence before proceeding with a criminal case.

This dual-expert approach aligns with, rather than contradicts, the idea of easing access to the defense attorney's non-privileged information pertaining to competency. The counter-argument fails to provide any justification for avoiding a minor adjustment to procedures in a way that minimize the burden and maximize the court's access to critical information in competency proceedings.

V. CONCLUSION

When a criminal defense attorney submits a motion to determine competency without an adequate factual basis, and the court grants the motion, an inversion of privilege can arise. Attorney-client privilege and competency to stand trial are both essential to due process. In the scope of a competency hearing, the attorney-client privilege becomes unwaivable. *Gonzalez* extends the protections of attorney-client privilege to some non-privileged information by further limiting access to testimony from defense attorneys. The court and prosecution are duty-bound to protect due process and its related privileges and protections. In some cases, this inverted privilege might undermine the process to determine competency. The fact that the privilege becomes unwaivable during a competency hearing is unavoidable, but the negative effects of inverted privilege can be reduced for both the defendant and the courts if defense attorneys are required to provide an adequate factual basis when submitting a

189. *See generally* Michael N. Burt & John T. Philipsborn, *Assessment of Client Competence: A Suggested Approach*, 22 CHAMPION 18 (1998).

190. *See* State v. Shopteese, 153 P.3d 1208, 1211 (Kan. 2007).

191. *Ford*, 353 P.3d at 1149.

192. *See generally* Burt & Philipsborn, *supra* note 189.

193. *Id.* at 19.

194. *Id.* at 20–23.

motion to determine competency.

When supporting affidavits come from defense attorneys, the content should comply with the analytical rubric from *Gonzalez*. Under *Gonzalez*, the information should be non-privileged, essential, and not available through feasible alternatives. Application of *Gonzalez* to the supporting affidavit limits the likelihood that a defense attorney will seemingly waive a privilege while simultaneously arguing that the defendant is legally incapable of waiving privileges.