NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES PELLO,	)	Appeal from United States Court of Appeals, for the SEVENTH Circuit, No. 17-1698
Appellant *(Petitioner below)*,	)	
v.	)	
DUSHAN ZATECKY,	)	Appeal from United States District Court, Southern District of Indiana, Cause No. 1:16-cv-1355-RLY-DLM
Appellee *(Respondent below)*.	)	

PETITION FOR WRIT OF CERTIORARI

Petitioner:

JAMES PELLO
Petitioner / *pro se*
DOC# 964800
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit, along with the Indiana State Court of last resort, have entered a decision in conflict with decision's of other United States Court of Appeals and this Court's own decisions on these same important matters. These other courts have so far departed from accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power:

I. Pello was denied effective assistance of trial and appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. In that there was a complete failure to ensure that the jury returned unanimous jury verdicts which amounted to fundamental error.

II. Due to the seriousness of said charges filed against Pello the State of Indiana in the Elkhart area violated the petitioner's Fifth, Sixth, and Fourteenth Amendments of the United States Constitution to Due Process. In that there was a complete failure to ensure, Defendants Due Process Rights were protected.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix E to the petition and is-**17-1698**

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is- **1:16-cv-1355-RLY-DLM**

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is- **20A04-1603-SP-596**

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

The opinion of the Elkhart Superior Court III appears at Appendix A to the petition and is- **20D03-1212-PC-118**

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States court of appeals decided my case was May 18, 2018.
A copy of that decision appears at Appendix E.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____ ____, 20___, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 30, 2017.
A copy of that decision appears at Appendix B.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

A Petitioner's rights are indispensable to the far administration of our adversarial system of justice. As manifested in the Pledge of Allegiance, a commitment to justice for all is the cornerstone of the American Social Contract and our democratic system. We entrust our government with the administration of a judicial system that guarantees equal justice before the law - - assuring victims, the accused, and the general public that the resulting are not in violation of the constitution. However no system is 100% perfect 100% of the time. Here in the case at hand "Due Process" was not afforded to a defendant who has a history of mental issues that are clearly outlined in the Pre-sentence report.

The purpose of Habeas Corpus review is to ensure that individuals are not imprisoned in violation of the United States Constitution. See Herrera v. Collins, 506 U. S. 390 (1993); Barefoot v. Estello, 463 U. S. 880 (1983). Habeas Corpus relief is a type of post-conviction challenge filed by prisoner objecting to his imprisonment and seeking review of his conviction or sentence in federal court. This means that state prisoners are going into federal court to have convictions and sentences issued by the State Courts reviewed (*Collateral Review).* Again Schwartz would urge this Court to review the decisions of the lower courts, because their failure to review his claims has *"resulted in a fundamental miscarriage of justice".*

State Courts are bound to enforce Federal Law. Under our federal system, both the federal and state courts are entrusted with the protection of constitutional rights. See Ex parte Royal, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed 868 (1886). It has been held, in Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), that due to longstanding polices of comity and respect between State and Federal Courts, a petitioner must give the state courts the first opportunity to consider and rule upon the claims the prisoner wishes to use to attack his

state court conviction. Id. at 275. A petitioner need not cite federal law, "book and verse' to fairly present a claim. Id. at 278. Also in Picard, at 276-78, the court said: in order to present a claim to the state court in a manner sufficient to satisfy exhaustion concerns, a petitioner must inform the state court of both factual and legal underpinnings of the claim. The test is substantive: was the claim presented in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question? While the answer to the question must not be made to depend on "ritualistic formality," *Nadworny* v. *Fair*, 872 F.2d 1093, 1097 (1st Cir. 1989).

"Even the intelligent and educated layman has small and sometimes no skill in the science of law." Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

Pello would contend that all of the lower courts proceedings are open to collateral attack because they have resulted in a fundamental miscarriage of justice. In that the errors have amounted to violations of the constitution or to say an omission inconsistent with the rudimentary demands of fair procedure. The lower courts did not follow the rules directed by the U.S. Constitution, more particularly, the Bill of Rights, as a citizen you are born with some very specific rights. These are inalienable rights and are basic rights that automatically belong to every human being and cannot be taken from you, nor can you give it away, sell it, or lose it.

STATEMENT OF THE CASE

The Indiana Supreme Court denies transfer without any reasoning. [Appx. C] The State, in its order to show cause failed to address all issues presented and twisted what happened. Everyone is trying to avoid Pello's Pate/ Drope challenge, none of the courts have addressed this issue nor have the addressed his 1st, 5th, 6th, 8th and 14th Amendment Rights which has created a complete miscarriage of justice.

PROCEDURAL ISSUES

I. Failure to ensure, jury returned unanimous jury verdicts amounted to fundamental error.

II. Failure to ensure, Defendants Due Process Rights were protected.

REASONS FOR GRANTING THE WRIT

Grounds for Relief

GROUND ONE: Constitutionally infirm convictions for Class "A" Felony, Child Molesting; Class "C" Felony, Child Molesting; and Class "D" Felony, Distributing Material Harmful to a Minor, from the Hon. George W. Biddlecome of Elkhart Superior Court III. Who after violating petitioner's constitutional rights in January 18, 2008, imposed the following terms of sentence; class "A" felony, fifty (50) years; class "C" felony, eight (8) years and class "D" felony three (3) years all to run consecutively, for a total of 61 years.

Argument

Pello would argue that his Post-Conviction Counsel refused to argue all issues available and failed to argue the one issue that he did cover well. Pello states that this is how his Post-Conviction counsel should have argued the issue of duplicity:

Pello was denied effective assistance of trial and appellate counsel as guaranteed by the 6th and 14th Amendments to the U.S. Constitution and Article One, section 12 and 13 of the Indiana Constitution.

Pello was charged by information with two (2) counts of child molesting. Count I alleged that Pello had caused the victim "to perform or submit to deviant sexual conduct, to-wit: oral sex". Count II alleged Pello had caused the victim "to perform or to submit to any fondling or touching of either the victim or Pello, with the intent to arouse or to satisfy the sexual desires of either the victim or Pello". See Exh. B, C; Tr. App. 12

An indictment is duplicitous of it charges two or more offenses in one count. *U.S. v. Marshall*, 75 F.3d 1097, 111 (7th Cir. 1996), where the court finds that the defendant has been prejudiced,

however, dismissal of the indictment is the appropriate remedy. *U.S. v. Bowline*, 593 F.2d 944, 947-48 (10th Cir. 1979).

The rule against duplicity derives from a number of concerns, including the risk of inadequate notice, prejudicial evidentiary rulings, impairment of ability to plead prior jeopardy, conviction by non-unanimous juries. *U.S. v. Buchmeier*, 255 F.3d 415, 425 (7th Cir. 2001).

The Southern District of New York had occasion to offer instructions as to the nature and implications of duplicity. The instruction came in the form of an opinion issued in *U.S. v. Kearney*, 444 F. Supp. 1290 (S.D. N.Y. 1978). The court began its consideration of Kearney's motion by offering a definition of duplicity; citing F.R. Crim. P. 8(a), requires that two or more offenses, if contained in the same indictment, be charged in a separate count for each offense. Duplicity is the joining of two or more separate offenses in the same count in contravention of that rule. Id. at 1292, see also *U.S. v. Kimberlin*, 781 F.2d 1247 (7th Cir. 1985); *U.S. v. Bartemio*, 510 F.2d 341 (7th Cir. 1974). The court then discussed the reasons why duplicity cannot be tolerated:

"The prohibition against duplicity has constitutional underpinnings in the Sixth Amendments guarantee that an accused be adequately informed of the nature and cause of the accusation and the Fifth Amendment interdiction against double jeopardy, and integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. *Ashe v. Swenson*, 397 U.S. 436 (1970). The possibility that a less then unanimous verdict will be returned by the jury is an additional danger sought to be obviated by the rule. 444 F. Supp. At 1292; citing *U.S. v. Zeidman*, 540 F.2d 314 (7th Cir. 1976); *U.S. v. Tanner*, 471 F.2d 128 (7th Cir. 1972); *U.S. v. Isaacs*, 347 F. Supp. 743 (N.D. Ill. 1972), aff'd, 493 F.2d 1124 (7th Cir.); *Kerner v. U.S.*, 417 U.S. 976 (1974). See also *Abney v. U.S.*, 431 U.S. 651 (1977); *U.S. v. Pavloski*, 574 F.2d 933 (7th

Cir. 1978); *U.S. v. Orzechowski*, 547 F.2d 978 (7th Cir. 1976); *U.S. v. Dorfman*, 532 F. Supp 1118 (N.D. Ill. 1981). See also Fed. R. Crim. P. 7(c). (The indictment or the information shall be plain, concise and definite written statement of the essential facts constituting the offense charged.) An additional concern is that the defendant may be prejudiced by evidentiary rulings, in that evidence may be admissible to establish one offense but inadmissible to establish the commission of another. See *e.g. U.S. v. Berardi*, 675 F.2d 894 (7th Cir. 1982); *U.S. v. Pavloski*, 574 F.2d 933, 98 L.R.R.M. (BNA) 2383 (7th Cir. 1978).

Duplicity must be distinguished from a superficially similar practice: The doctrine of duplicity is a result-oriented one; it prohibits the charging of multiple offenses in a single count. As noted by the courts although Rule 8(a) permits offenses to be joined in the same indictment, separate offenses must be charged in separate counts, "a separate count for each offense". *Berardi* at 898 n.5. If an indictment charges two or more offenses in a single count, it is defectively duplicitous, and must be challenged as such. The bases for the challenge are that the duplicity (a) denies the defendant the right to apprised of the charges against him, pursuant to the Sixth Amendment and/or Fed. R. Crim. P. 7(c); (b) eviscerates the defendant's Fifth Amendment rights against double jeopardy by making it difficult to determine for what offenses the defendant has been put in jeopardy; (c) exposes the defendant to the threat of a conviction based on something other than a unanimous verdict; and (d) raises the possibility of prejudice resulting from evidentiary rulings that are predicated upon the distinct offenses contained in a single count. See also *Pavloski* at 933; *U.S. v. Aguilar*, 756 F.2d 1418 (9th Cir. 1985).

In Indiana jury verdicts must be unanimous not only as to whether the defendant is guilty or not guilty, but also if the defendant is indeed guilty as to what specific act the defendant committed. Therefore, a duplicitous charge—that is, a charge that alleges multiple crimes in a single count—

is forbidden. *Townsend v. State*, 632 N.E. 2d 727 (Ind. 1994); *Scuro v. State*, 849 N.E. 2d 682 (Ind. Ct. App. 2006); *Castillo v. State*, 734 N.E. 2d 299 (Ind. Ct. App. 2000). See also *Smith v. State*, 459 N.E. 2d 355 (Ind. 1984) (An element instruction is essential and must be considered in conjunction with the verdict instructions).

In this case, Count I was duplicitous because forcing a child to perform criminal deviate conduct and forcing a child to submit to criminal deviate conduct are separate crimes. *Collins v. State*, 717 N.E. 2d 108, 110 (Ind. 1999) (When separate and distinct criminal deviate conduct crimes occur, even when they are similar acts done many times to the same victim, they are chargeable individually as separate and distinct criminal conduct) (quoting *Brown v. State*, 459 N.E. 2d 376, 378 (Ind. 1984)). Count II was also duplicitous because forcing a child to perform fondling or forcing a child to submit to fondling are separate crimes. See *Scott-Gordon v. State*, 579 N.E. 2d 602, 604 (Ind. 1991) (These two separate and distinct touching, constitute separate and distinct offenses) (citing *Riggs v. State*, 508 N.E. 2d 1271 (Ind. 1987)).

At the ensuing jury trial, the victim testified during the State's case-in-chief that Pello had forced her to submit to oral sex. On re-direct examination, the prosecutor asked the victim whether Pello had ever forced her to perform oral sex. Objections by trial counsel lead to the following sidebar:

The Court: What's the relevance of this?
DPA Snyder: Your Honor, we are ---
Mr. Stevens: We've already got ---
The Court: Don't interrupt me. It doesn't fit within any of the charges that I ---
DPA Snyder: oral sex, your Honor.
The Court: You proved that with cunnilingus. Now you're trying to prove fellatio too?
DPA Snyder: I do understand that I have done it by that, and the answer is yes, I was going to do both of them.
The Court: I'll allow the question.
DPA Snyder: Thank You.

Tr. Vol.II, 52-53. The victim then went on to testify that Pello had indeed forced her to perform oral sex. The victim further testified that Pello had forced her to perform and submit to fondling.

During her closing argument, the prosecutor said to the jury "there's another Count I element, whether you choose to see the oral sex in the form of licking her vagina, or the oral sex in the form of having his penis placed in her mouth. Tr. Vol. II 110. There is the evidence for Count I". The prosecutor also said to the jury, "as far as the second count, the fondling and touching, you will remember in the video, that he would cause her to take her hand and place it on his penis. You also remember in the video through his own words that he would take his penis and he would rub it on her belly. He would rub it by her butt and he would rub also on her front area. That's touching and fondling". Tr. Vol. II,111.

Tr. Vol. II, 121, Tr. App. 84. The trial court's instructions to the jury included the language of the charging information as well as the elements of each offense. However, nothing in the instructions indicated that a specific act formed the basis of Count I or Count II. The jury was also instructed that its verdicts were to be unanimous. Tr. vol. 131, Tr. App 108.However, the jury was not instructed that unanimity as to the specific act committed by Pello was also required. See Exh. D, E, F.

In the case at bar, the record reveals blatant violations of basic and elementary principles and the harm or potential for harm cannot be denied, the court will review a issue which was not properly raised and preserved. *Webb v. State,* 437 N.E. 2d 1330, 1332 (Ind. 1982); *Nelson v. State*, 409 N.E. 2d 637, 638 (Ind. 1980). This case is one in which the error rises to what is known as fundamental error, one which, if not rectified would deny the defendant fundamental due process. *Nelson*, at 638.

The duplicity of Counts I and II were not harmless in this case. The prosecutor did not make clear to the jury that a specific act formed the basis of each charge, rather, she urged the jury to "choose" between the various acts that had been described by the victim. *Cf. Castillo*, 734 N.E. 2d at 304. (Furthermore, in closing argument, the prosecutor told the jury they had "a choice" in convicting Castillo of dealing in cocaine. He told them he had proved it twice but that they only had to find it either happened at Garcia's home or later at Castillo's home.) Moreover, while the jury was instructed that its verdicts were to be unanimous, it was not instructed that unanimity as to a specific act was required. Therefore, there is no way to know whether the jury was unanimous at too what specific act Pello committed. See *Richardson v. U.S.*, 526 U.S. 813, 817 (1999)) (declaring "a jury cannot convict unless it unanimously find that the government has proved each element".) Because it is unclear which offense the jury convicted upon, potential double jeopardy problems arise. *U.S. v. Atiyeh*, 330 F. Supp. 2d 499 (E.D. Pa. 2004) (duplicitous counts may obscure or confuse the issue of juror unanimity); *U.S. v. Powell*, 495 U.S. 939 (7th Cir. 1990) (duplicity cannot be determined by same evidence test); *Franklin v. U.S.*, 330 F.2d 205, 207 (D.C. Cir. 1964) (one count of rape embraced four rapes, resulting in dismissal due to duplicity).

The jury found Pello guilty as charged. The trial court later imposed an aggregate sentence of sixty-one (61) years. See Tr. App.110-112, 115

Pello's trial counsel performed deficiently, by not objecting to the prosecutor's argument and by not tendering a more specific instruction regarding the requirement of unanimity. Pello was prejudiced by these deficiencies. Pello was therefore denied effective assistance of counsel. See *Strickland v. Washington*, 446 U.S. 668 (1984)

Pello would argue that he did not waive any rights that P.C.R. Counsel did what he wanted without consulting with Pello. When, counsel fails to preserve claims for the defendant that amounts to ineffective assistance of counsel.

There are three basic ways in which P.C.R. Counsel may be considered ineffective: 1) when council's actions deny the defendant his right of appeal; 2) *when counsel fails to raise issues that should have been raised on appeal*; and 3) *when counsel fails to present claims adequately and effectively* such that the defendant is in essentially the same position after appeal as they would be had counsel waived the issue. Bieghler v. State, 690 N.E.2d 188, 192-195 (Ind. 1997)

In the Elkhart Superior Courts ORDER dated November 22nd, 2013 Page 6, the Court held that P-C.R. attorney Jonathan O. Chenoweth's misplaced reliance on a 2011case law to establish ineffective assistance of counsel, would have forced the trial attorney to prophesy a case that was not decided until almost a year after Pello's direct appeal. The lower court said that Chenoweth used the wrong case law, to argue an issue. Therefore Pello was prejudiced by Chenoweth's botched attempt to argue an issue on ineffective assistance of counsel.

Although States are under no obligation to provide mechanisms for post conviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause, see Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), by providing litigants with fair opportunity to assert their state-created rights. For instance, though a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. See Goldberg v Kelly, 397 US 254, 262, 25 L Ed 2d 287, 90 S Ct 1011 (1970). In short, When a state opts to act in a field where its action has significant discretionary elements, such as the establishment of a system of review as of right although not required to do so, it must

nonetheless act in accord with the dictates of the Constitution, and, in particular, in accord with the due process clause of the Fourteenth Amendment. Because Pello P.C.R. Counsels failure to present available issues on P.C.R. prejudiced Pello to the extent that he should have had his conviction vacated, the court should conclude he is entitled to successive post-conviction relief as to it. Grinstead v. State, 845 N.E.2d 1027; 2006 Ind.

The trial court's verdict from instruction is diametrically opposed to the element instruction. It relieved the State of the need to prove the charge. This anomaly acted to deny the defendant a fair trial and the process that was due to him. This is fundamental error, and because the error is fundamental, the court should bypass any procedural default to address the substantive merits of the issue. Pello respectfully asks that his convictions on Counts I and II be vacated and for all just and proper relief.

GROUND TWO: Trial court is obligated to conduct a psychiatric examination and competency hearing where 'reasonable grounds' exist for believing the defendant is incompetent to stand trial. Appellant's competency is an issue in this case.

Argument

Due to the seriousness of said charges filed against Pello the State of Indiana in the Elkhart area violated the petitioner's Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article One, Section Twelve and Thirteen of the Indiana Constitution to Due Process. Pello states that a trial court is obligated to conduct a psychiatric examination and competency hearing "where 'reasonable grounds' exist for believing the defendant is incompetent to stand trial." (citing Ind. Code 35-36-3-1). The statutes of most jurisdictions provide that a psychiatric examination of the defendant may be ordered by the court in aid of an inquiry into the defendants competence, pursuant to the courts own motion. Pello asserts that the Court failed

to protect his Due Process Rights, when the Court failed in the furtherance of justice to have the proper evaluations done.

Pello asserts this issue is a Pate/Drope inquiry, which focuses solely on the facts known to the trial judge. See Speedy v. Wyrick, 702 F.2d 723, 725 (8th Cir. 1983).

Many statutes simply require a court ordered examination whenever the court has reason to doubt the defendants' competence, without requiring a motion by either party, *See, e.g.,* Mass. Gen. L. ch. 123, 15(a); N.Y Civ. Prac. L. & R. 730.30(1); Wis. Stat 971.14(2). Californias statute expressly places the burden on the court to inquire of defense counsel whether the defendant may not be competent. Cal. Penal Code 1368(a)[Deering's]; or upon motion by the prosecution or defense. *See, e.g.,* 18 U.S.C. 4241(b) authorizing the court to order a psychiatric or psychological examination of the defendant prior to the date of a competence hearing ordered on motion of the defendant, or the attorney for the Government (or) on its own motion.; Fla. R. Crim. P. 3.210 (b); Mo. Ann. Stat. 552.020(2); N.J Rev. Stat. 2C:4-5 (a). In practice, most motions are made by defense counsel. *See, e.g.,* United States v. Duran-Duran, 1990 U.S. Dist. LEXIS 4851 (N.D.N.Y 1990) (NOR); United States v. Holmes, 671 F. Supp. 120 (D. Conn. 1987), *affd without op.,* 867 F.2d 1425 (2d Cir. 1988). Independently of state statutory prescriptions, the federal constitution requires any trial court sua sponte to conduct a meaningful inquiry into the defendants competence whenever information known to the court, or events at trial raise a bona fide doubt, The basis of mandatory judicial inquiry, variously described as a bona fide doubt, Pate v. Robinson, 383 U.S. at 385; sufficient doubt, Drope v. Missouri, 420 U.S. at 180; good faith doubt, Darrow v. Gunn, 594 F.2d 767 (9th Cir.), *cert. denied,* 444 U.S. 849, 100 S. Ct. 99, 62 L. Ed. 2d 64 (1979); genuine doubt, United States v. Clark, 617 F.2d 180 (9th Cir. 1980); and reasonable doubt, deKaplany v. Enomoto, 540 F.2d 975, 98081 (9th Cir.), *cert. denied,* 429 U.S.

1075, 97 S. Ct. 815, 50 L. Ed. 2d 793 (1977); have been held to define a single standard equivalent to the reasonable cause to believe required by the federal statute. *See* Chavez v. United States, 656 F.2d 512, 517 n.1 (9th Cir. 1981). Whether, the defendant is competent even though the defendant has neither made a formal motion nor raised the issue of competence to stand trial. Pate v. Robinson, 383 U.S. at 385; Drope v. Missouri, 420 U.S. at 180. *And see* Demos v. Johnson, 835 F.2d 840, 843 (11th Cir.), *cert. denied,* 486 U.S. 1023, 108 S. Ct. 1998, 100 L. Ed. 2d 229 (1988) (*where defendant had a history of irrational, frequently criminal behavior, and two occasions of prior psychiatric treatment,* related to history of drug abuse, it was constitutional error for the state court to deny defense counsels motion for a competence examination). The defendant is not privileged from examination where such a doubt exists. *Compare* Holmes v. King, 709 F.2d 965, 968 (5th Cir.), *cert. denied,* 464 U.S. 984, 104 S. Ct. 428, 78 L. Ed. 2d 362 (1984) (defendant has no 5th Amendment privilege against compelled competence examination by the court or by psychiatrists), Randleman v. State, 310 Ark. 411, 837 S.W.2d 449 (Ark. 1992) (because defendant had filed three motions for continuances based on fact that she was undergoing extensive psychological testing, trial court had reason to doubt defendants fitness to proceed to trial and to contemplate that her mental condition might become issue in case, and thus acted appropriately in compelling her to receive psychiatric evaluation). Evidence of the defendant's incompetence at one phase of the prosecution may necessitate inquiry into competence at another, previous, For example, *doubt raised in a presentence report,* may require inquiry into the defendants' competence at the recently concluded trial, *See* United States v. Polisi, 514 F.2d 977 (2d Cir. 1975), or subsequent, for example, evidence of the defendants' incompetence to enter a plea should lead to an examination into the defendants' competence to stand trial. Holloway v. State, 257 Ga. 620, 361 S.E.2d 794,

79596 (Ga 1987). The court may order such an examination over the defendant's objection even though the court may be compelled to declare a mistrial in order to implement the examination procedures. *See* Hamm v. Jabe, 706 F.2d 765 (6th Cir. 1983). Most statutes providing for psychiatric examination of an accused allow a motion for such examination to be made at any time after commencement of the prosecution and prior to sentencing. This means that the defendant may be examined at any time after arrest, including before indictment or arraignment. 84 Code Cong. & Ad. News 3416, *citing* United States v. Adams, 296 F. Supp. 1150 (S.D.N.Y. 1969) and Arco v. Ciccone, 359 F.2d 796 (8th Cir. 1966). The Supreme Court held, in *Pate v. Robinson* that it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court to determine his capacity to stand trial. Pate v. Robinson 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Thus, the issue must be heard by the court whenever it is raised. *See, e.g.,* United States v. Pellerito, 878 F.2d 1535, 1545 (1st Cir. 1989), *appeal after remand,* 931 F.2d 148, *cert. denied,* 502 U.S. 862, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991) (post plea and pre-sentence; hearing granted limited to competence at sentence.); United States v. Renfroe, 825 F.2d 763 (3d Cir. 1987), *affd after remand,* 935 F.2d 1283, *cert. denied,* 112 S. Ct. 419(1991) (posttrial); Featherston v. Mitchell, 418 F.2d 582 (5th Cir.), *cert. denied,* 397 U.S. 937, 90 S. Ct. 945, 25 L. Ed. 2d 117 (1970) (during trial); Mitchell v. United States, 316 F.2d 354 (D.C. Cir. 1963) (on the day of trial). Normally, the motion will be made before trial, shortly after arraignment.

One who has been convicted without having raised the issue of competence to stand trial may raise the issue by means of a post-conviction collateral attack. See Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). *See* Lee v. Alabama, 386 F.2d 97 (5th Cir. 1967) (en

banc). Since the error of trying an incompetent defendant is one of constitutional dimension, the issue may be raised in a petition for post-conviction by a defendant convicted in a state court. The failure to raise the issue prior to conviction cannot be construed as a waiver, since 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. See Pate v. Robinson, 383 U.S. at 384; *See* Silverstein v. Henderson, 706 F.2d 361, 36667 (2d Cir.), *cert. denied,* 464 U.S. 864, 104 S. Ct. 195, 78 L. Ed. 2d 171 (1983) (distinguishing Wainwright v. Sykes, 433 U.S. 72, 8587, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1982). *But see* United States *ex rel.* Lewis v. Lane, 822 F.2d 703, 705-06 (7th Cir. 1987) (Sykes waiver need not be knowing if defendant has counsel, and the proper inquiry may be effective assistance of counsel.). Two aspects of the constitutional right may be collaterally asserted, each of which requires separate analysis: the substantive right not to be tried while incompetent and the procedural right to meaningful inquiry into competence before being tried or sentenced. *See* White v. Estelle, 669 F.2d 973, 975 (5th Cir.), *cert. denied,* 459 U.S. 1118, 103 S. Ct. 757, 74 L. Ed. 2d 973 (1983); Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir. 1980).Substantial evidence that the defendant was tried while incompetent is always a proper ground for collateral review. *See* Nicks v. United States, 760 F.2d 292, 298 (S.D.N.Y. 1990) (coram nobis); Newfield v. United States, 565 F.2d 203 (2d Cir. 1977). The adequacy of the procedure used by the state to determine the defendant's competence is also collaterally reviewable. Therefore, if the petition alleges evidence of the defendants incompetence that was before the trial court and which, when objectively considered should have given it reason to believe that, defendant may have been incompetent, *See* Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir 1980); Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir.), *cert. denied,* 444 U.S. 943, 100 S. Ct. 299, 62 L. Ed. 2d 310 (1979); Demos v. Johnson, 835 F.2d 840

(11th Cir.), *cert. denied,* 486 U.S. 1023, 108 S. Ct. 1998, 100 L. Ed. 2d 229 (1988); such that it should have sua sponte conducted an inquiry, *See* United States *ex rel.* Lewis v. Lane, 822 F.2d 703, 70506 (7th Cir. 1987) (not necessarily a plenary hearing, as the court may rely on submitted reports), into the defendants competence, *See* Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); the failure to have done so will be grounds for collateral relief. The petitioner has the burden on either motion to show facts which would justify setting aside the judgment on grounds that the defendant was incompetent in fact when it was entered. *See* Newfield v. United States, 565 F.2d 203, 207 (2d Cir. 1977) (28 U.S.C. 2255) (burden of persuasion); Bouchillon v. Collins, 907 F.2d 589, 593 n.6 (5th Cir. 1990) (notes that there is a division in the circuit courts over the burden of proof on habeas petitions). Where, the issue of competence is not raised until long after the trial has been concluded, substantial problems of proof may be presented, and the petitioner may find the burden difficult to sustain. *See, e.g.,* United States v. Williams, 819 F.2d 605 (5th Cir. 1987); Johnson v. Estelle, 704 F.2d 232, 238 (5th Cir. 1983). Indeed, it has been suggested: The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. The record of the trial proceedings may provide some indications of incompetence. Occasionally, there will have been contemporaneous psychiatric examinations prepared for another purpose, such as sentencing, *See* United States v. Renfroe, 825 F.2d 763, 767 (3d Cir. 1987), *affd after remand,* 935 F.2d 1283, *cert. denied,* 112 S. Ct. 419(1991); United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976), or treatment immediately preceding trial, *See* Lokos v. Capps, 625 F.2d 1258 (5th Cir. 1980)., or during incarceration, *See* United States v. Johns, 728 F.2d 953, 95758

(7th Cir. 1984); that may be used. More often the lay observations of other participants in the trial or person's familiar with the defendant, *See* Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990); may have to be relied upon. Frequently, counsel for the defendant may be called upon either to support or refute the claim of incompetence. Whether the report of a psychiatrist was sufficient to establish a bona fide doubt as to the defendants competence would also be a reviewable question. *See* United States *ex rel.* Lewis v. Lane, 822 F.2d 703, 705 (7th Cir. 1987). If the procedures are found to have been constitutionally inadequate to a meaningful inquiry into the defendants competence and there is reason to believe that the defendant was incompetent in fact, then the court must consider the possibility of a nunc pro tunc proceeding. *See, e.g.,* Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984). If the coram nobis petitioner meets the burden of persuasion, the court may conduct a hearing de novo into the defendant's competence at the time of the original proceedings. At such a hearing the burden should be upon the state to show that the defendant was in fact competent at the time of proceeding. *See* United States *ex rel.* Lewis v. Lane, 822 F.2d 703, 706 (7th Cir. 1987). The Supreme Court has emphasized the difficult and unsatisfactory nature of such nunc pro tunc determinations, *See* Pate v. Robinson, 383 U.S. at 387; Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); even as soon as one year after the time of trial. *See* Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The court must determine that sufficient contemporaneous information exists to make a meaningful retrospective determination of competence possible. The question of meaningfulness is answered by determining whether the quantity and quality of available evidence is adequate to arrive at an assessment that could be labeled as more than mere speculation. *See* Martin v. Estelle, 583 F.2d 1373, 1374 (5th Cir. 1978). The court must attempt to reconstruct the defendants past competence from any expert examination and data available

from the time of the trial, and may hear expert psychiatric testimony on the issue of defendants past competence. *See* Lokos v. Capps, 625 F.2d 1258, 1268 n.5 (5th Cir. 1980). A successful collateral attack may result in a new trial, rather than merely a retrospective hearing on competence in the event that no meaningful reconstruction is possible. Pello would assert that the court had before it a Bail Review Pretrial Release Report, that according to the C.C.S., was filed with the trial court on 9-20-06 and then a Bond Reduction Hearing, held on 9-21-06, to which the defendant notes no corrections to said report. On page 2 of this report lists his criminal history which includes at age 18 in 1959, Pello was committed to a Residential Treatment Center Bennington County, VT; in 1963 Pello was committed to State Prison for an indefinite term as a Psychopathic Personality; and in1976 Pello was discharged from a Sexual Offender Program for the Criminal Deviant Offender at the Beatty Hospital in Westville, IN, after a rape conviction. All of these cases have key words that should raise red flags about someone's mental health.

Next, Pello would show that a Pre-Sentence Investigation Report, was filed 1-10-08 with the trial court. According to the C.C.S., on 1-17-08 at Sentencing, Defendant notes corrections to P.S.I... On page 2 of the P.S.I. under *Mental Health Referrals* is typed ***Yes***. On page 3 section 'II Prior Legal History' which lists all of the same cases as the last report, plus some new stuff such as 1970 Attempt to rape a Male and Female, Sentenced to Federal Penitentiary and 1974 deemed a Sexual Deviant, Sentenced to the Indiana Department of Mental Health. Again, many keywords that should have raised red flags about someone's mental health. On page 4 section D Summary: again lists "(Psychopathic Personality)". On page 6 section 'VI. Health: B. Mental:' "Mr. Pello reported being committed to the Vermont State Hospital from the ages of eighteen to nineteen and a "couple times" in his twenties. Mr. Pello also reported he received mental health treatment at Bratelborro Retreat in Vermont at the age of nineteen. He stated he was hospitalized at

Norman Beatty Hospital in Indiana at the age of thirty-two. He reported he completed a criminal sexual deviate program." So, many keywords, that should have raised red flags.

It is not enough for the trial judge to find that the accused is oriented to time and place and has some recollection of events.

In Dusky, the Supreme Court said that although there was some evidence of the accused's ability to assist in his defense, such evidence could not properly have been deemed dispositive on facts presented, on the issue of the accused's competence. Concluding that, trial courts, failure to make an inquiry on this issue had deprived the accused of constitutional right to a fair trial. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

In the instant case Pello asserts that the Court failed to protect his Due Process Rights, failed in the best interest of Pello to have evaluations done.

The Court should have appointed where they will have the evaluations done with no cost to the defendant. *18 U.S.C. § 3006 (e) (1)*—states that an indigent Defendant is entitled to "investigate, expert, or other services necessary for adequate representation".

Prejudice in this case is clear that Pello did not receive a fair trial. The Sixth Amendment to the Constitution requires that criminal defendants be provided with a fair trial, not merely a "good faith" try at a fair trial. Pello, by what may have been nothing more than lawyer ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived the defendant of his guaranteed right to due process of law. The Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." Court cases have frequently recognized that protected liberty interests may arise "from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies." Pello contends he was denied due

process by the trial court's failure to *sua sponte* order a hearing regarding his competency, after it had heard testimony from the P.S.I. indicating Pello's questionable mental health. In addition, Pello contends trial counsel was deficient for failing to request such a hearing. While it is true that due process requires that the trial court inquire *sua sponte* into the defendant's competence if there is reason to doubt it. Pate v. Robinson 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). See also United States v. DiGilio, 538 F.2d 972, 987 (3d Cir. 1976).

Pello would ask this Court to note that Indiana has long held that a finding of incompetency years before the criminal trial and discovered after the criminal trial was sufficient to put defendant's competence to stand trial in question. Tinsely v. State, 298 N.E.2d 429 (Ind. 1973). Also, in a New York case it was noted that "the commonsense conclusion that if a person was legally found to be incompetent in New York County the same Person would necessarily be incompetent in Queens County." People v. Santana, 80 N.Y.2d 92, 103, 600 N.E.2d 201, 208 (N.Y. Ct. App. 1992).

Pello would ask this court to find that his Due Process Rights were violated, and for all just and proper relief.

CONCLUSION

Petitioner would ask this court to find that his Constitutional and Due Process Rights were violated. That there were many red flags that the court should have been taken into consideration, along with the fact that there was no way to assure the jury was unanimous as to what charge Pello was guilty of.

The petition for a writ of certiorari should be granted for the afore mentioned reasons, Petitioner asks this Court to issue the Writ, vacating the convictions and sentences, and order that Petitioner be afforded a new trial/resentenced; or resentenced to minimum concurrent sentence, within one-hundred and twenty (120) days, and for any and all just and proper relief, this Court deems necessary in the furtherance of justice.

Executed on: August 2, 2018,

Respectfully submitted,

JAMES PELLO
Petitioner / *pro se*