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NOTE

THE IDENTIFICATION OF INCOMPETENT DEFENDANTS: SEPARATING THOSE UNFIT FOR ADVERSARY COMBAT FROM THOSE WHO ARE FIT

INTRODUCTION

We try a lot of things in law, but one thing we must not do is try an insane person.¹

Hadfield's attempted assassination of George the Third,² Berkowitz's shooting of young lovers,³ and other spectacular crimes expose an ancient doctrine that appears to "save" even confessed guilty persons from trial. Actually, the rule prohibiting the trial of an incompetent criminal defendant merely postpones rather than avoids trial altogether.⁴ Recently, concern for

² Even though the Crown had established its case in the attempted murder of the King, the trial was discontinued once the defense made it known that ever since his brain had been pierced by a sword in battle the defendant, James Hadfield, had suffered from the delusion that he must sacrifice himself and others to keep the world from coming to an end. See Hadfield's Case, 27 How. State Trials 1282 (1800).
⁴ The rule is so frequently resorted to that there are more people in mental hospitals for the criminally insane as a result of having been found unfit to stand trial than people there as a result of having been found not guilty by reason of insanity. For statistics on the frequency with which incompetency bars trial, see, e.g., Brakel, *Presumption, Bias, and Incompetency in the Criminal Process*, 1974 Wis. L. Rev. 1105 n.3 (52% of all inmates in mental institutions were committed because incompetent to stand trial compared to 4% who were committed due to a verdict of not guilty by reason of insanity).

In interpreting these statistics it is important to remember the interdependency of the doctrines for competency to stand trial and criminal non-responsibility: though the tests are different, the incompetency-to-stand-trial doctrine often sorts out the more seriously impaired who might have been found not guilty by reason of insanity had they reached trial. Freiberg, "Out of Mind, Out of Sight": The Disposition of Mentally Disordered Persons Involved in Criminal Proceedings, 3 Monash U. L. Rev. 134, 145 (1976)[hereinafter cited as Freiberg](15% of those charged with murder in England from 1900 to 1949 were found incompetent to stand trial, compared to 21% in Canada between 1961 and 1970. McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 Am. J. Psych. 623, 624 n.1 (1965)[hereinafter cited as McGarry](.08% of those prosecuted in Massachusetts in 1961 were found incompetent to stand trial); Rosenberg, *Competency for Trial—Who Knows Best?*, 6 Carn. L. Bull.
the constitutional dimensions of the competency-to-stand-trial requirement has grown. For instance, the failure to grant a defendant a hearing on his competency, once substantial evidence\(^5\) of incompetency is manifest, has been held a violation of due process.\(^6\) Even after a hearing is held\(^7\) and a determination of competency is made, if later developments throw doubt on the decision, the trial judge has a duty to make further inquiry.\(^8\) While the hearing need not be lengthy or involved, at a minimum it must be of record, with both parties having an opportunity to examine the witnesses.\(^9\) Should the defendant be found incompetent, he is usually confined, so that through treatment the delay in bringing him to trial can be lessened; but once it becomes obvious that he is not going to regain his capacity to stand trial in the foreseeable future, the defendant must be released or civilly committed.\(^10\)

Despite this influx of cases on competency, including a restatement of the test for competency to stand trial,\(^11\) the Supreme Court has left unanswered questions regarding the application of the test for competency: What must a defendant be able to do to "have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"?\(^12\) How much must he understand to have "a rational as well as a factual understanding of the proceedings against him"?\(^13\) Which factors, in addition to the nature and extent of his disability, are likely to affect the defendant's ability to

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577, 578 (1970) (74% of the inmates at Matteawan State Hospital in New York in 1968 were committed because incompetent to stand trial); Note, Incompetency To Stand Trial, 81 Harv. L. Rev. 454 n.2 (1967-1968) [hereinafter cited as Incompetency] (65% of the inmates at Matteawan State Hospital in New York in 1962 were committed because incompetent to stand trial).

\(^5\) Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972).

\(^6\) Pate v. Robinson, 383 U.S. 375, 378 (1966). Even as early as 1899, one court stated, "It is not 'due process of law' to subject an insane person to trial upon an indictment involving liberty or life." Youtsey v. United States, 97 F. 937, 941 (6th Cir. 1899).

\(^7\) It may be constitutionally permissible to defer a defendant's competency hearing until the criminal proceeding is complete, as long as the inquiry is made with dispatch. Drope v. Missouri, 420 U.S. 162, 182 (1975).

\(^8\) Pouncey v. United States, 349 F.2d 699 (D.C. Cir. 1965).

\(^9\) Hansford v. United States, 365 F.2d 920, 923 n.8 (D.C. Cir. 1966).


\(^12\) Id.

\(^13\) Id.
satisfy the test? This Note focuses on these and other questions that need to be answered if the competency test itself is to be applied "with a reasonable degree of rational understanding."

I. THE HISTORY OF THE INCOMPETENCY DOCTRINE

A. The Rationale for the Doctrine

"The trial and conviction of a person mentally and physically incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of a free government." The primary purpose of the incompetency rule is to safeguard the accuracy of adjudication. The prohibition against trying an incompetent is justified on the ground that the defendant alone may know something that would prove his innocence.

It would be inhumane, and to a certain extent a denial of the right of trial upon the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or be tried for his life or liberty. There may be circumstances in all cases of which the defendant alone has knowledge, which would prove his innocence, the advantage of which, if insane to such an extent that he did not appreciate the value of such facts, or the propriety of communicating them to his counsel, he would be deprived.

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14 Sanders v. Allen, 100 F.2d 717, 720 (D.C. Cir. 1938).
15 Jordan v. State, 135 S.W. 327, 328 (Tenn. 1911). In United States v. Chisolm, 149 F. 284, 287 (C.C.S.D. Ala. 1906) the court stated:

The reason why an insane person, or one who though not insane, is laboring under such mental infirmity as to prevent his rationally aiding in his defense, should not be put to trial, is, in the language of the old books, 'because he is disabled by the act of God' from making a just defense if he has one, and 'because there may be circumstances lying in his private knowledge which would prove him innocent of his legal irresponsibility, of which he can have no advantage, because they are not known to persons who undertake his defense.'

Compare that with Youtsey v. United States, 97 F. 937, 940 (6th Cir. 1899), citing among other common law authorities, 1 Hale, Pleas of the Crown 34, 35, which states:

If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he might not by law be arraigned during such frenzy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment . . . . for were he of sound memory, he might allege somewhat in stay of judgment or execution.

The word "memory" as used by Hale had a meaning closer to "mind" than simply the capacity to remember clearly. This reference suggests that initially the bar to trial
If the defendant is not able to provide his counsel with the information necessary for the construction of a defense, he cannot meaningfully exercise rights designed to safeguard the accuracy of the trial, such as his right to confer with counsel, his right to testify, and his right to confront witnesses. However, the unlikelihood that the defendant will be able to tell his lawyer anything not available from other sources leads to a suspicion that societal values other than accuracy are being protected.

Another reason often given for the incompetency rule is that it is unfair to have an adversary contest in which the defendant, like a small boy being beaten by a bully, is unable to dodge or return the blows.

The humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defense at a time when his mind is in that situation as not to appear capable of so doing for, however guilty he may be, the inquiring into his guilt must be postponed to that season, when by collecting together his intellects, and having them entire, he shall be able so to model his defense as to ward off the punishment of the law . . . .

A defendant can protect himself only if he is able to compare his version of the events with the testimony given by others. He may prejudice his cause if he insists on actions that are harmful to his position which he would have avoided if he were in contact with reality. For instance, he can alienate the jury if he displays such inappropriate demeanor as grinning when gruesome details are discussed, losing his temper when witnesses

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1 United States v. Chisolm, 149 F. 284, 287 (5th Cir. 1906) where it is said: [A] person, though not entirely sane, may be put upon trial in a criminal case if he rightly comprehends his own condition with reference to the proceedings, and has such possession and control of his mental powers, including the faculty of memory, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him and material to repel the incriminating evidence, and has such poise of his faculties as will enable him to rationally and properly exercise all the rights which the law gives him in contesting a conviction.

maintain he is a violent man, or acting indifferent to the pro-
ceedings.

A more subtle justification for the prohibition is that the
trying of an incompetent transmutes the adjudication from "a
reasoned interaction between an individual and his com-
munity" into "an invective against an insensible object." To
maintain the dignity necessary for the administration of jus-
tice, the defendant should be able to make basic decisions, in
response to well explained alternatives, regarding the conduct
of his trial, such as deciding how to plead or whether to take
the stand. Without a minimum amount of personal, intelligent
participation by the defendant, the result is less a feeling of
justice triumphant than of pathos. The incompetency doctrine
originated as an extension of the ban against trials in absentia;
validation of the proceedings seems to require the mental
as well as the physical presence of the defendant in the court-
room.

A seldom mentioned but powerful psychological reason for
the requirement that the defendant be competent is that in
order to satisfy the urge of the community to punish, the
defendant must understand what he is being punished for. To
justify the action the state takes against him, the accused must
realize that in the eyes of the community his actions are mor-
ally reprehensible. To bring the force of the state to bear
against one of its members who does not understand why he is
being attacked has long been viewed as "a miserable spectacle,
both against law, and of extreme inhumanity and cruelty, and
can be no example to others."

The competency doctrine has been justified as a means of

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18 Incompetency, supra note 4, at 458.
19 See, e.g., Kinloch's Case, 18 How. State Trials 395, 411 (1746) where the court said:
[T]he common sense and feeling of mankind, the voice of nature, reason
and revelation, all concur in this plain rule, that no man is to be condemned
unheard, and consequently no trial ought to proceed to the condemnation of
a man, who by the providence of God is rendered totally incapable of speak-
ning for himself, or of instructing another to speak for him.
21 Szasz, Some Observations on the Relationship Between Psychiatry and the
Law, 75 A.M.A. Archives of Neurology & Psych. 297 (1956).
22 Incompetency, supra note 4, at 458-59.
23 3 Coke, Institutes 6 (1644); see also Nobles v. Georgia, 168 U.S. 398 (1897).
insuring the integrity of the adversary method of criminal adjudication by promoting the accuracy, fairness and dignity of the process. Moreover, the imposition of criminal sanctions to achieve the traditional goals of deterrence and retribution is less effective when the defendant is unable to comprehend the reason for his punishment or possibly even the fact that he is being punished.

B. The Test for Incompetency

The real question is: Does the mental impairment of the prisoner's mind, if such there be, whatever it is, disable him . . . from fairly presenting his defense, whatever it may be, and make it unjust to go on with his trial at this time, or is he feigning to be in that condition . . .? 24

American courts early acknowledged the common law test for competency. 25

The general rule at common law is that the test of a defendant's present sanity during the trial and at the time of sentence is not the right and wrong test, but the test is whether one is capable of properly appreciating his peril and of rationally assisting in his own defense. If he is not, then the defendant is of such unsound mind that he may not be tried, sentenced, or punished. 26

With only slight variations, the understand-and-assist test is

21 United States v. Chisolm, 149 F. 284, 298 (5th Cir. 1906).
22 United States v. Lawrence, 26 F. Cas. 887, 891 (D.C. Cir. 1835)(No. 15,577)(assault on President Jackson) where the court states:
But in case a man, in a frenzy, happen, by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial; and it appears to the court, upon his trial, that he is mad, the judge, in his discretion, may discharge the jury of him, and remit him to gaol, to be tried after the recovery of his understanding, especially if any doubt appear upon the evidence touching the guilt of the fact [sic], and this is a favorem vitae. And if there be no color of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact [sic] committed, then, upon the same favor of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement.

In United States v. Chisolm, 149 F. 284, 287 (C.C.S.D. Ala. 1906) the court said the prisoner should be in "such possession of his mental faculties as enables him to rightly comprehend his condition with reference to the proceedings against him and to rationally aid in the conduct of his defense."
accepted today in almost every jurisdiction either by statute or by case law.

The scope of the test has been greatly expanded during the last decades as less obvious mental disabilities have been recognized as incapacitating, but the test itself remained relatively unchanged until *Dusky v. United States.* The Supreme Court, in this per curiam opinion, may have subtly altered the test to incorporate twentieth-century ideas regarding behavior. In *Dusky* the test is "whether he [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him." By emphasizing the need for rationality, the *Dusky* case expands the meaning of the charge that the defendant must be able to understand the proceedings: not only must the defendant be oriented to time, space, and things and have some recollection of events, but he must also be able to appraise and assess the proceedings. The *Dusky* test also

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29 Compare Fla. R. Crim. P. 3.210(a) merely stating the prohibition against the trial of an incompetent, with Southworth v. State, 125 So. 345, 348-49 (Fla. 1929) expressing the test for determining competency. See also KY. R. CRIM. P. 8.06 and Strickland v. Commonwealth, 375 S.W.2d 701 (Ky. 1964).


32 Id.

33 The *Dusky* expansion of the test for incompetency is similar to the development of the test for insanity at the time of the act. Whether following the M'Naghten or the Model Penal Code versions of the test for non-responsibility, most jurisdictions today interpret "knowing" the wrongness of one's act as appreciating the ethical significance of the act, not just recognizing its legal wrongness. See, e.g., United States v. Freeman,
makes clear that a competent defendant need only be able to assist counsel in preparing his defense; he does not have to be able to represent himself. While Dusky establishes the test for competency only in federal cases, several circuit courts see Dusky as setting forth the minimum standard for competency to stand trial under the Constitution.

II. COMPETENCY DETERMINATION

A. Procedures

By looking closely at the procedures for determining competency to stand trial, it is possible to identify the points in the process where decisions are made and the factors considered in making these decisions. The issue of a defendant’s competency may be raised by the defense, the prosecution, the court sua sponte, or even the defendant at any time prior to, during, or subsequent to trial. Once the issue is raised, neither the defendant nor his lawyer can waive the issue and demand


33 Mackey v. Craven, 537 F.2d 322 (9th Cir. 1976); Curtis v. Zelker, 466 F.2d 1092, 1095 (2d Cir. 1972). Therefore, when federal courts consider habeas corpus petitions from state prisoners, the federal standard will prevail. See Novle v. Sigler, 361 F.2d 673, 677 (8th Cir. 1965), cert. denied, 385 U.S. 893 (1966).

36 For several of the articles describing and proposing procedural alternatives at different points in the decisional process, see Parker, California’s New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial, 6 PAC. L.J. 484 (1957); Note, Criminal Insanity Procedures in Kentucky, 57 Ky. L.J. 525 (1969); Note, Competency to Stand Trial—Pre-trial Procedures, 22 Sw. L.J. 857 (1968); Note, Mental Condition of an Accused: Pre-Trial, Trial and Post-Trial, 13 SYRACUSE L. REV. 287 (1961); Note, Procedural Protections for the Incompetent Criminal Defendant in Texas, 2 TEX. TECH. L. REV. 89 (1970); Note, Florida’s Incompetency to Stand Trial Rule: Justice in a Straight Jacket, 27 U. FLA. L. REV. 248 (1974); Comment, Competency to Stand Trial and the Insanity Defense in Wyoming—Some Problems, 10 LAND & WATER L. REV. 229 (1975).

37 If subsequent to trial the convicted person alleges he was incompetent to stand trial, a hearing on the issue is appropriate. Papalia v. United States, 333 F.2d 620 (2d Cir. 1964), cert. denied, 379 U.S. 838 (1964). In People v. Laudermilk, 431 P.2d 288, 235, 61 Cal. Rptr. 644, 651, cert. denied, 393 U.S. 861 (1968), the court said an appeal can be taken even upon a plea of guilty, since “the error goes to the question of jurisdiction in the sense that the trial court has no power to pronounce judgment in such a case.” But see Comment, Competency to Stand Trial and the Insanity Defense in Wyoming—Some Problems, 10 LAND & WATER L. REV. 229 (1975) where the Wyoming statute is interpreted to mean that the only person who can raise the issue is the defendant when he pleads.
The court must investigate and determine whether there is sufficient evidence of incompetency to require a competency-to-stand-trial hearing. Even if there is insufficient evidence to require a competency hearing, the court may still choose to hold a hearing to reduce the likelihood of a successful collateral attack on the judgment resulting in an expensive retrial or a nunc pro tunc hearing to determine retrospectively whether the defendant was competent to stand trial. Prior hospitalizations, suicidal or aberrational acts, or an unsupported claim of incompetency are usually insufficient to require a full-blown competency hearing. On the other hand, a medical opinion that the defendant is incompetent to stand trial is usually

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38 Logically, "it is contradictory to argue that the defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have a court determine his capacity to stand trial." Pate v. Robinson, 383 U.S. 375, 384 (1966).

39 Pate v. Robinson, 383 U.S. 375 (1966) (interpretation of statutory bona fide doubt standard); People v. Laudermilk, 431 P.2d 228, 61 Cal. Rptr. 644, cert. denied, 393 U.S. 861 (1968) (substantial evidence to raise a bona fide doubt); Via v. Commonwealth, 522 S.W.2d 848 (Ky. 1975)(reasonable grounds to believe insane).

40 Hansford v. United States, 365 F.2d 920 (D.C. Cir. 1966) where Judge Bazelon ordered retrial rather than a nunc pro tunc hearing to determine retrospectively whether the defendant had been competent during trial, since it was impossible without contemporaneous testimony to determine whether the defendant had been suffering withdrawal during trial; Pouncey v. United States, 349 F.2d 699, 700 (D.C. Cir. 1965) where the court remanded for a nunc pro tunc hearing to determine whether the behavior of the accused during trial was such as to throw doubt on the hospital's earlier prediction of competency.

41 Plumb v. Commonwealth, 490 S.W.2d 729 (Ky. 1973) where hospitalization in Arizona two years before the armed robbery did not constitute reasonable grounds to require a hearing on the defendant's competency, especially in light of his demonstrated ability in the drafting of his pro se motion for a psychiatric examination and hearing; Hicks v. Commonwealth, 488 S.W.2d 702 (Ky. 1972) where a detailed affidavit concerning the defendant's competency did not supply reasonable grounds to make further inquiry necessary when two doctors who examined the defendant certified that he was not mentally ill; Dye v. Commonwealth, 477 S.W.2d 805 (Ky. 1972) where evidence, consisting principally of Dye's claimed lapses of memory and the testimony of his attorney, was not sufficient to warrant a full scale hearing, in light of the fact that the defendant recalled events other than those surrounding the shooting and answered numerous questions relevant to the case; Matthews v. Commonwealth, 468 S.W.2d 313 (Ky.), cert. denied, 404 U.S. 966 (1971), where hospitalization 15 years before the armed robbery was not of itself sufficient evidence of mental incapacity to render clearly erroneous the trial court's failure to grant a competency hearing; Osborne v. Commonwealth, 407 S.W.2d 406 (Ky. 1966) where commitment to Eastern State Hospital for examination was not sufficient reason for further investigation when the defendant, charged with sodomy and grand larceny, escaped before examination, in light of the fact his counsel said he understood the significance of changing his plea from not guilty to guilty.
At common law the method for determining competency to stand trial was discretionary with the court. Today some jurisdictions specify by statute a particular procedure the court must follow in gathering information on the legal question of whether the defendant should stand trial. The court usually conducts the inquiry: it decides which sources could best supply information on the defendant's capacity to perform his designated functions.

With the data supplied in answer to its requests, the court determines whether the defendant's functional impairment is cumulatively so great that he fails to meet the minimum performance level necessary for the satisfaction of due process and the preservation of the integrity of the criminal adversary system. While courts pay lip service to the distinction between the medical fact of mental illness and the legal conclusion of competency to stand trial, in practice once mental illness is found, the court rarely asks the next question, whether this particular disabling condition prevents the defendant from satisfying the

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4 Via v. Commonwealth, 522 S.W.2d 848, 850 (Ky. 1975) where a hearing was required when Via had been committed on four prior occasions and the psychiatrist classified her as schizophrenic, even though Eastern State Hospital had released her as competent before trial: "The fact they might warrant a finding of mental capacity would not eliminate the necessity of a hearing." Commonwealth v. Strickland, 375 S.W.2d 701 (Ky. 1964) where a current diagnosis of a paranoid condition and unfeigned hallucinations compelled the court to order a hearing; in Pate v. Robinson, 383 U.S. 375 (1966), interpreting the bona fide doubt standard for a hearing, a composite of details should have put the court on notice that a hearing was required: a medical incident that might have caused the disturbance—the dropping of a brick on Pate's head at age seven; a history of disturbed behavior; prior hospitalization eight years before the murder of his common law wife; and his attempted suicide and murder of his 18-month-old son some years before. In Cooke, The Course Study Unit: Patient Characteristics and Differences between Patients Judged Competent and Incompetent, 25 J. CLIN. PSYCH. 141, 142 (1969), analysis revealed that those found incompetent tended to be more depressed, anxious, hysterical, paranoiac, psychastheniac, and schizophrenic than those found competent.

4 For determination of the issue of competency to stand trial by jury, commission, judge, or any designated group of experts, see, e.g., United States v. Maret, 433 F.2d 1064 (8th Cir. 1970), cert. denied, 402 U.S. 989 (1971); United States v. Schaffer, 433 F.2d 928 (5th Cir. 1970). While there is no absolute right to trial by jury on the issue, the judge in his discretion can direct that the question be answered by a jury along with the principal issue or by a separate jury impaneled to decide the question. See, e.g., Myers v. Blalock, 214 F. Supp. 853 (W.D. Va. 1963); United States v. Higgins, 103 F. Supp. 481, 483 (S.D. Cal. 1952).
test for competency.\textsuperscript{44}

Even though the probability of incompetency to stand trial is greater with some types of mental illnesses and psychopathic symptoms,\textsuperscript{45} no diagnosis or label should predetermine the answer to the legal question of whether the accused is competent to stand trial.\textsuperscript{46} For instance, if an area peripheral to the subject of the trial is distorted by delusions, or if the effect of the delusion is easily discernible, there may not be enough distortion in the defendant's perception and rationality to justify halting the trial. In contrast, if the defendant is hallucinating and unable to understand the proceeding, as might occur if he thought the victim was still alive and talking to him, or if he has such paranoid distrust that he is convinced everyone, including his attorney, is out to get him, his mental illness is

\textsuperscript{44} For information on the tendency of courts and examiners to act as if mental illness were the exclusive criterion for competency, see generally Bennett & Matthews, The Dilemma of Mental Disability and the Criminal Law, 54 A.B.A.J. 467 (1968); Hess & Thomas, Incompetency to Stand Trial: Procedures, Results and Problems, 119 Am. J. Psych. 713, 714-15 (1963) (hereinafter cited as Hess & Thomas); McGarry, supra note 4, at 623, 624-25 (out of 106 examined at Massachusetts State Hospital in 1960 only those diagnosed as psychotic were found incompetent); Pfeiffer, Eisenstein, & Dabbs, Mental Competency Evaluation for the Federal Courts: I. Methods and Results, 144 J. Nervous and Mental Disease 320, 325 (1967) (100% with chronic brain syndrome, 77% with psychosis, and 62% with mental deficiency were found unfit, while 100% of those with neurosis or character disorders were found fit); Robey, Criteria for Competency to Stand Trial: A Checklist for Psychiatrists, 122 Am. J. Psych. 616, 621 (1965) (hereinafter cited as Robey); Slovenko, The Psychiatric Patient, Liberty, and the Law, 13 Kan. L. Rev. 59, 70 (1964). For cases paying lip service to the distinction between mental illness and competency to stand trial, see, e.g., Whalem v. United States, 346 F.2d 812 (D.C. Cir.), cert. denied, 382 U.S. 862 (1965). In the final analysis the decision is a judicial, not a medical, determination. See, e.g., United States v. Davis, 365 F.2d 251, 256 (6th Cir. 1966); United States v. Sermon, 228 F. Supp. 972, 974 (W.D. Mo. 1964).

\textsuperscript{45} The diagnosis of a psychosis is irrelevant except insofar that it renders a patient incapable of participating in his trial in a sufficiently self-protective fashion or insofar as it invades his ability to understand the reality of the trial situation per se exclusive of other areas of disturbed reality testing. McGarry, supra note 4, at 625.

\textsuperscript{46} For more on courts and medical examiners mistakenly basing their opinion of incompetency on the test for commitability or making the diagnosis of psychosis or particular descriptive symptoms determinative of whether the person is competent, see generally Pfeiffer, Eisenstein, & Dabbs, Mental Competency Evaluation for the Federal Courts: II. Appraisal and Implications, 145 J. Nervous & Mental Disease 18 (1967) (judges admitted considering diagnosis as the primary factor); Vann & Morganroth, Psychiatrists and the Competency to Stand Trial, 42 U. Det. L.J. 75, 84 (1964) (four out of seven psychiatrists felt psychosis was a criterion).
severe enough to warrant discontinuing trial.\textsuperscript{47}

Although at common law the process stopped when the defendant was found incompetent to stand trial, today some states by statute allow a limited continuation of the proceedings to determine whether the prosecution has sufficient admissible evidence to bring the defendant to trial for the crime.\textsuperscript{48}

At common law the problem of what to do with an incompetent defendant until he regained his competency was solved by returning him to the jail until he regained his competency. With the emergence of mental hospitals the defendant was usually committed to a hospital for the criminally insane until he regained his competency. Today due process limits the duration

\textsuperscript{47} For cases holding that an insane person may be competent to stand trial, see, \textit{e.g.}, Hall v. United States, 410 F.2d 653 (4th Cir. 1969), \textit{cert. denied}, 396 U.S. 970 (1969) (not incompetent merely because mentally ill to some degree); Lyles v. United States, 254 F.2d 725, 729 (D.C. Cir. 1957), \textit{overruled}, 471 F.2d 969, 997 (1972) (on unrelated grounds) where the court said, "a paranoiac or pyromaniac may well understand the charges against him and be able to assist in his defense . . . ."; Crawn v. United States, 254 F. Supp. 669 (M.D. Pa. 1966) (not incompetent merely because emotionally unstable); Higgins v. McGrath, 98 F. Supp. 670 (W.D. Mo. 1951); United States v. Gundelfinger, 98 F. Supp. 630 (W.D. Pa. 1951); People v. Bassett, 323 N.E.2d 607 (Ill. App. 1975) (competent even though suffering from mental and emotional disturbances); State v. Severns, 336 P.2d 447, 452 (Kan. 1959); Jordan v. State, 135 S.W. 327 (Tenn. 1911) (sane enough for trial though deranged on some subjects); People v. Bryant, 71 Cal. Rptr. 117 (Ct. App. 1968) (more required than immaturity, dangerousness, psychopathic, or homicidal diagnosis).

\textsuperscript{48} \textit{See, e.g.}, \textbf{CAL. PENAL CODE} § 1368 (West Cum. Supp. 1977) stating that a mentally incompetent person cannot be bound over for a felony until a prima facie case is proven to the satisfaction of a magistrate during the preliminary hearing or to a grand jury and \textbf{CAL. PENAL CODE} § 977.1 which permits the court to hear any matter capable of determination without the personal consent of the defendant; \textbf{Md. Ann. Code} art. 59, § 24(a)(1972); \textbf{Mont. Rev. Codes Ann.} § 95-506(4)(Cum. Supp. 1977); \textbf{N.Y. Crim. Proc. Law} art. 730.60(5)(McKinney Cum. Supp. 1977). In \textit{Jackson v. Indiana}, 406 U.S. 715, 740-41 (1972) the Supreme Court said that states are not precluded "from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment or to make pre-trial motions through counsel." \textit{See, e.g.}, United States v. Jorgenson, 415 F.2d 516 (10th Cir. 1971); United States v. Gradshteyn, 434 F.2d 888 (5th Cir. 1970); United States v. Shotwell Mfg. Co., 287 F.2d 667, 670 (7th Cir. 1961); United States v. Lockwood, 382 F. Supp. 1111 (E.D.N.Y. 1974) (motion regarding sufficiency of indictment). In \textit{Comment on Pre-trial Commitment of Criminal Defendants}, 108 U. Pa. L. Rev. 832, 841 (1960), Foote suggests three situations when the proceedings against a defendant who may be incompetent should be allowed to proceed: he should be able 1) to show if the prosecution is barred as a matter of law, due to the running of statute of limitations, 2) to point out defects in the prosecution's factual case that would prevent conviction, such as the inadmissibility of evidence unlawfully obtained, or 3) to assert any affirmative defense that could be established without his participation, such as an alibi defense or insanity.
of any commitment to a period that is reasonable in relation to the purpose for the commitment—the facilitation of the defendant's recovery so that he may be tried with a minimum of delay. In other words, the defendant can only be committed long enough to determine if there is a probability that he will regain competency. If recovery is not foreseeable, as may be the case, for instance, with severe retardation, he must either be released or civilly committed.

While most jurisdictions require that the defendant be hospitalized for some period of time, a few offer less restrictive alternatives after a brief period of hospitalization. If the purpose of mandatory hospitalization is to protect society from those suspected of criminal activity who cannot stand trial, then the court, in addition to finding the defendant incompetent, should also determine whether he is dangerous before dismissing the alternative of bail with out-patient care whenever this option is feasible.

While review of the defendant's progress formerly depended on the initiative of the superintendent of the institution where the defendant was confined, many jurisdictions now require that periodic progress reports be submitted to the committing court. Once the defendant is released as a result of either habeas corpus or a recommendation from the institution to the court that the defendant is now competent, he is returned to the committing court to stand trial. Frequently the charges are dropped for minor offenses, or if the defendant does stand trial, he is often given credit for the time he was confined

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49 Jackson v. Indiana, 406 U.S. 715, 730 (1972). Some jurisdictions now limit the duration of a competency commitment to the maximum sentence for the crime the defendant is charged with, the maximum sentence reduced by a fraction for parole, or an arbitrary maximum for all crimes.


51 Compare the mandatory commitment of FLA. R. CRIM. P. 3.210(a) with WIS. STAT. ANN. § 51.21(6) (West 1957) where parole is possible before the charges are dismissed or competency is restored. In federal incompetency cases it is necessary to show dangerousness to continue to hold defendants after an initial observation period. United States v. Curry, 410 F.2d 1372, 1374 (4th Cir. 1969).

For various remedies available to the defendant who is wrongfully detained as incompetent or tried while incompetent, see, e.g., Smith v. Commonwealth, 112 S.W. 615 (Ky. 1908) (motion for a new trial); Ince v. State, 88 S.W. 818 (Ark. 1905) (coram nobis); Annot., 121 A.L.R. 267 (1939); Annot., 10 A.L.R. 213 (1921); Annot., 7 A.L.R. FED. 565, 575-97 (1971).
prior to trial by the granting of parole or a lighter sentence than might otherwise have been expected.

B. Effect of Misclassifications

The effect of a misclassification of a defendant is either that an incompetent defendant is forced to face trial or that a competent defendant is deprived of his right to a speedy trial and his right to a trial by jury before being incarcerated.\(^53\) When either error occurs, the goals promoted by the competency-to-stand-trial doctrine are subverted: The defendant is treated unfairly and the integrity of the adversary system is diminished. Misclassification threatens the integrity of the criminal system with decreased efficiency, a possible reduction in accuracy due to the erosion of evidence during the delay, and increased disrespect for a system that appears to make arbitrary decisions. Misclassifications also lessen the likelihood that the goals justifying the imposition of sanctions—punishment, deterrence, and rehabilitation—will be achieved.

Ironically, misapplication of the competency doctrine works to the disadvantage of the defendant it was designed to protect. For instance, if the defendant is competent, the delay of trial is likely to weaken his defense, since with the passage of time evidence disappears and witnesses forget. The prosecution is rarely equally disadvantaged, since by charging the defendant it has already gathered and preserved some evidence, while the defense of the incarcerated defendant provided with appointed counsel usually awaits preparation until the defendant is ready to stand trial. Delay of the trial of a defendant who is in fact competent is likely to induce mental disorder rather than encourage recovery, because the defendant nurses the idea that he is being treated unjustly and he is treated by others as if he were a disturbed person. If the defendant is mentally ill but not incompetent to stand trial, the effect of finding him incompetent is likely to be antitherapeutic rather than therapeutic: He is hampered in his recovery by the fact that he has no incentive to get well since the reward for recov-

ery is trial and perhaps imprisonment. His chances for rehabilita-
tion are also reduced, since, as an inmate in an institution
for the criminally insane rather than a patient in a mental
hospital, he is denied the opportunity to reintege himself
gradually into the community via off-ground privileges, and
the stigma of having been in an institution for the criminally
insane reduces his chances of being reaccepted into the com-

III. THE CONTENT OF THE COMPETENCY TEST

I believe every District Judge will and can avoid eventual
trouble and therefore administer justice more effectively if,
and only if, he approaches a Section 4244 competency hearing
on the general theory that neither the District Attorney, the
defense attorney, nor any of the witnesses, professional or
otherwise, have the vaguest idea about the purpose of the
hearing, the scope of the evidence, the specific issue for ulti-
mate decision; or, indeed, really why everyone gathered in
your courtroom.54

Applying the test for competency is easy when the defen-
dant is so disabled that he cannot communicate or he is so inert
or raving that the spectacle of him in the courtroom disturbs
even the most hardened skeptic's sense of decorum and fair
play.55 With the recognition that less obvious mental disturb-
ances can be equally crippling, distinguishing incompetent
from competent defendants has become more difficult, espe-
cially when the defendant lies close to the dividing line between
competency and incompetency.

A. Identification of Defendant Functions

The question in any case is whether mental illness has dis-
abled the specific functions of personality which sound policy
in the administration of criminal justice require before the

54 Judicial Hearings to Determine Mental Competency to Stand Trial, 39 F.R.D. 523, 545 (Judge Oliver, United States District Court Judge for the Western District of Missouri) (Ninth Circuit Sentencing Institute).
55 See United States v. Lawrence, 26 F. Cas. 887, 891 (D.C. Cir. 1835) (No. 15, 577)(frenzy); Hess & Thomas, supra note 44, at 720.
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accused may be subjected to adversary proceedings on the charge against him.54

The fact that most cases simply state the test for competency rather than specify how the defendant failed to satisfy the test suggests that few courts use a qualitative standard, either to direct the gathering of information on the nature and magnitude of the defendant's disability or to measure the performance of the defendant. The importance of an operational definition of the functions a defendant might be expected to perform has been pointed out.57 However, there have been few attempts to develop comprehensive guidelines describing the kind and level of defendant participation necessary to satisfy the test for competency to stand trial.58

One of the earliest specifications of the tasks a defendant might be required to perform was developed by Robey in 1965.11 In order for a defendant to stand trial, Robey felt he must understand his surroundings, his legal rights, the procedures, principles, charges, verdicts, and penalties relevant to his case, be able to provide facts, enter a plea, maintain a consistent defense, waive his rights, interpret witness testimony, testify, and be able to stand the stress of trial. In the 1970's one of the products of an extensive study by the Harvard Medical School on competency to stand trial60 was the identification of three more capabilities a defendant might need in order to be competent to stand trial: The defendant should be able to concentrate

54 Whalem v. United States, 346 F.2d 812, 820 n.6 (D.C. Cir.) (dissent), cert. denied, 382 U.S. 862 (1965).
57 Pouncey v. United States, 349 F.2d 699, 701 (D.C. Cir. 1965) where the court recognized that competency "denotes the intellectual and emotional capacity of the accused to perform the functions which are essential to the fairness and accuracy of a criminal proceeding." In Incompetency, supra note 4, at 457 the observation is made that "[t]o identify the content of that test, however, it is necessary to examine the functions it is thought to serve."
58 For articles mentioning tasks a defendant might be called on to perform, see, e.g., Bennett, Competency to Stand Trial: A Call for Reform, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI., 569, 574 (1968) which identifies four qualities of mind a defendant should possess: contact with reality; intelligence sufficient to grasp the significance of what is going on; rationality sufficient to consult with counsel; memory sufficient to reconstruct the facts surrounding the crime that could prove his innocence. See also Figari, Competency to Stand Trial in Texas, 25 S.W. L.J. 279, 283-84 (1971).
59 Robey, supra note 44, at 617.
60 CENTER FOR STUDIES OF CRIME AND DELINQUENCY, NATIONAL INSTITUTE OF MENTAL HEALTH, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS (Final Report 1973).
on what is going on, to appraise the probability of the eventual outcome of the trial, and to want justice rather than undeserved punishment.

In order to assess whether, in light of current legal practices and philosophies, the defendant must be able to perform these and other tasks, it is necessary to analyze what happens at various stages in the criminal process. By focusing on the events in the judicial drama in which the defendant plays a part, it should eventually be possible to reduce the activities a defendant must participate in down to a minimum set of functions he must be able to perform in order to satisfy due process.

*The defendant should appreciate what an arrest is.* Unless he understands the social dynamics of the arrest, he cannot respond appropriately. If he does not understand the role of each party or if he fails to recognize the situation as an arrest, rather than a personal attack by his enemies, he may flee or use force to free himself. Failure to understand the proper response at this point is, however, not per se unfair to the defendant, unless flight is considered probative of guilt.

*The defendant should have the ability to remember and to report his treatment by law enforcement officers.* From the time he is arrested until he is brought before a magistrate, the accused is alone with law enforcement officers. Only the defendant and the officers know whether he was instructed on his rights, what promises were made to encourage him to talk, how he was treated, where the arresting officers searched, how long he was questioned, and a host of other details surrounding the arrest. Even if there is little probability that the officers will wilfully distort what happened, the fact remains that because they make countless arrests, they are less likely than the defendant to remember the circumstances of his particular arrest. If the defendant is so uninterested in his own welfare that he does not notice what happens or if he cannot accurately perceive, remember, or communicate events from the time he was taken into custody until the conduct of the police falls under the watchful eye of counsel, he is denied the protections the law gives defendants whose rights are violated by the police.

*The defendant must have the ability to exercise his privilege against self-incrimination.* Immediately after his arrest,
the accused should be informed of his right to remain silent.\textsuperscript{61} In order to receive the benefit of this warning,\textsuperscript{62} he must understand that he does not have to say anything and be able to exercise his right to remain silent if that would be in his best interest. On the other hand, a decision to confess must be the result of a free and knowing act in order for the confession to be valid.\textsuperscript{63} Therefore, if the defendant's ability to weigh the possibility of conviction against the advantages of confession is substantially impaired or if he cannot withstand ordinary pressures of interrogation without being overborne, he can neither intelligently nor voluntarily assert or waive his right to remain silent.\textsuperscript{64}

*The defendant should have the ability to exercise his right to counsel.* After arrest, the accused must be informed of his right to hire a lawyer and his right to have one appointed to represent him if he is indigent.\textsuperscript{65} In order to exercise this right,

\textsuperscript{61} The purpose of the privilege against self-incrimination, guaranteed by the fifth amendment and applied to the states via the fourteenth amendment, is to preserve the integrity of the judicial system by refusing to allow the state to use its superior force to coerce suspected law breakers into convicting themselves. See, e.g., Mills v. Louisiana, 360 U.S. 230, 238 (1959); United States v. Interborough Delicatessan Dealers Ass'n, 235 F. Supp. 230 (S.D.N.Y. 1964). The reason for excluding evidence so obtained is not only that it may be untrustworthy but also that the method used to abstract the information offends constitutional principles of due process. See, e.g., Lyons v. Oklahoma, 332 U.S. 596, 602 (1944); Rivera-Vargas v. United States, 307 F. Supp. 1075 (D. Puerto Rico 1969).

\textsuperscript{62} See People v. Randolph, 294 N.Y.S.2d 933 (1968) where a mental defective was found unable to waive *Miranda* warnings.

\textsuperscript{63} If the defendant can show he did not voluntarily waive his privilege against self-incrimination, but was coerced into making admissions by threats, promises, or the exertion of improper influence by law enforcement authorities, the incriminating statements are inadmissible. Brady v. United States, 397 U.S. 742, 748 (1970). Many factors bear on the issue of the voluntariness of a statement—the person's age, education, intelligence level, the period of detention, length of the interrogation, techniques of interrogation, absence of counsel, and the failure to advise the defendant of his right to counsel and to remain silent. United States ex rel. Monks v. Warden, 339 F. Supp. 30 (D.N.J. 1972).

\textsuperscript{64} The probability that the defendant was not sane when he made a confession is a factor in determining whether a confession was illegally obtained. E.g., Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 199, 207 (1960); United States v. Robinson, 439 F.2d 553 (D.C. Cir. 1970).

\textsuperscript{65} The right to counsel requires that indigent defendants be afforded the assistance of counsel at critical stages in the criminal proceedings. United States v. Wade, 388 U.S. 218 (1967). The right to counsel applies to all serious offenses, whether felonies or misdemeanors. United States ex rel. Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971). The guiding hand of counsel is essential at the preliminary hearing to guard
the defendant must understand the nature of the charge, the allowable range of punishments, his right to request a lawyer, and the probability of conviction. If the defendant decides to waive counsel, his choice must be knowingly and voluntarily made, and, therefore, the waiver of counsel by a defendant who is unable to assess the value of counsel is not binding.

The defendant must understand the nature of the crime and the range of possible penalties. Soon after arrest the prisoner is brought before a judicial officer who informs him of the nature of the charge and advises him of his rights. Unless he understands what acts constitute the crime with which he is charged, he cannot intelligently exercise his rights, since he cannot know whether he is saying something incriminating, whether he in fact did or did not commit the acts, why it might appear that he committed the crime, whether there is a simple way to extricate himself, or whether the severity of the charge or the likelihood of conviction warrants his having a lawyer.

The defendant must appreciate the consequences of any waiver. During the appearance before the magistrate the defendant may be asked whether he consents to the removal of his case to another jurisdiction, whether he wants counsel, whether he consents to a waiver of his right to a preliminary hearing to determine probable cause or his right to an indictment. If he


The fundamental purpose of bringing the accused before a commissioner "is to make certain that a person arrested is advised by a judicial officer of his constitutional right to counsel and of his privilege against self-incrimination 'without unnecessary delay,'" Greenwell v. United States, 336 F.2d 962, 966 (D.C. Cir. 1964), cert. denied, 390 U.S. 923 (1965).

A defendant has a right to a preliminary hearing to determine whether the state has sufficient evidence to justify binding the accused over for trial and/or a right to a grand jury indictment whenever the offense is punishable by more than one year. Cammer v. United States, 350 U.S. 399, 407 (1956). The defendant must be prosecuted by indictment for all felonies, unless he waives his right in open court, but he cannot waive his right to indictment if he is charged with a capital offense. United States v. East, 5 F.R.D. 389 (N.D. Ind. 1946); Fed. R. CRIM. P. 7. Since misdemeanors may be
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does not waive the preliminary hearing or his right to counsel, the magistrate sets a date for the hearing and assigns him counsel if he is indigent. Before he can intelligently waive any of these rights, however, he must have some understanding of what the benefits of asserting and the consequences of waiving the particular right are. For instance, he cannot waive his privilege against self-incrimination unless he is able to understand that what he says can later be used against him. The waiver of a right involves the ability to judge whether assertion or waiver of the right best furthers his interests, and making the best choice requires that the defendant know and be able to evaluate the advantages and disadvantages of each option. Since an incompetent person may be abnormally susceptible to pressures to waive his rights, waivers must be carefully scrutinized whenever there is any suspicion that the defendant may be incompetent.

Before having to suffer the expense, inconvenience, and embarrassment of trial, the defendant is entitled to a judicial determination of whether the state has sufficient evidence to bring him to trial, unless he has waived his right to a preliminary hearing or a grand jury indictment. If the evidence is insufficient to establish the necessary elements of the crime, the charge is dismissed. But, usually, the defendant will have to demonstrate that some of the "facts" necessary for a *prima facie* case have not been proven to the extent a reasonable man could find the defendant guilty of the crime. In order to prove that the state is mistaken about some of the essential facts, the

prosecuted by information, there is no need for the defendant to waive his right to an indictment if the offense is only a misdemeanor. United States v. Solomon, 216 F. Supp. 835 (S.D. N.Y. 1963).

As with any other waiver, the waiver of an indictment must be knowingly and voluntarily made. E.g., United States v. Culbert, 215 F. Supp. 333 (D. Mo. 1963).


E.g., United States v. Carignan, 342 U.S. 36, 44 (1951) stating that there must be adequate grounds to justify prosecution; Benson v. McMahon, 127 U.S. 457, 463 (1888) in which the question focused on during the preliminary hearing is "whether a case is made out which will justify holding the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him."

There is no need for a preliminary hearing if a grand jury indicts. Boone v. United States, 280 F.2d 911 (6th Cir. 1960).
defendant must either testify himself or call witnesses in his behalf.

The defendant should be able to relate what happened at the time of the crime. Unless the defendant recalls what happened, he cannot tell his story himself, identify other witnesses to verify his story, or point out to his attorney inaccuracies in the testimony of other witnesses. If the defendant's perception at the time of the crime or his memory of the events is distorted, he is ill-equipped to assist counsel in rebutting the prosecution's version of the alleged crime. Since many crimes depend on the state of mind of the accused at the time of the criminal act—his intent, knowledge, premeditation—the defendant must be able to recount his feelings at the time of the crime. While it may sometimes be possible to reconstruct what happened without the defendant's help, under most circumstances the defendant is disadvantaged by his inability to remember.

The defendant must understand the legal defenses available to him. Unless the defendant appreciates the meaning of a legal defense, he cannot select the facts which might be relevant. For instance, when the defense is self defense, its success may depend upon the defendant's recollection of any motive the person had for attacking him; but if he cannot understand his lawyer's explanation of the defense, he is unable to select from his past crucial facts he may know.

The defendant must be able to testify intelligently if he is to take the stand. During the preliminary hearing and later at trial, the defendant has the right to testify in his own behalf.\textsuperscript{46}

\textsuperscript{46} The rationale for the fifth amendment prohibition against compelling a defendant in a criminal proceeding to be a witness against himself is that it is unfair to force him to choose between possible conviction for a crime and contempt or perjury proceedings: "Answer truthfully and you have given evidence leading to conviction for violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt . . . ." Aiuppa v. United States, 201 F.2d 287, 300 (6th Cir. 1952). The defendant asserts the privilege by refusing to answer questions that would connect him with a crime. United States v. Cefalu, 338 F.2d 582 (7th Cir. 1964). The defendant waives the privilege as far as the circumstances connecting him to the crime now being prosecuted by voluntarily taking the stand or entering a guilty plea. E.g., Johnson v. United States, 318 U.S. 189, 196 (1943); Day v. Peyton, 303 F. Supp. 221 (W.D. Va. 1969). Any waiver of the privilege must be voluntarily and intelligently made. E.g., United States v. Michael, 425 F.2d 1067 (7th Cir. 1970); United States v. Doremus, 414 F.2d 252 (6th Cir. 1969).
With the aid of counsel, he must determine whether taking the stand would help or hinder his defense. In order to testify he should accurately remember what happened, be able to understand the questions, and be able to formulate answers describing what he experienced. Moreover, in order to testify, he, like any other witness, must appreciate the necessity for telling the truth on the stand and be able to do so. If he is to be effective, his demeanor and testimony must convince the jury that he is in fact telling the truth. Like other witnesses he is also subject to cross examination to test his credibility. Unlike the fairly supportive relationship existing between defense counsel and the defendant, the hostile atmosphere during cross examination demands that the defendant be able to withstand interrogation without collapsing or being led into damaging, even untrue admissions—a real possibility for a defendant of abnormal suggestibility or subnormal rationality. Once on the stand he still has the right to refuse to answer questions that would connect him with crimes other than the one for which he is being tried. For this reason, the defendant must be able to judge when he must answer in order to avoid contempt and when he does not have to answer because the answer would link him with another crime.

The defendant must be able to decide how to plead. Once the court is satisfied that the state has introduced sufficient evidence to convince a reasonable man of the defendant's guilt, the court may halt the preliminary hearing and demand that the defendant answer the charge by pleading guilty, not guilty, or, for some minor offenses, nolo contendere. Without auto-

77 The government can point out that the evidence is uncontradicted or unexplained, but not that the defendant did not take the stand. Robilio v. United States, 291 F. 975, 985 (6th Cir. 1923). However, the failure to take the stand is open, practically if not legally, to inferences against the defendant. Once on the stand the defendant is subject to cross examination to test his veracity and credibility and must answer questions relating to the crime under consideration. Martin v. United States, 404 F.2d 640 (10th Cir. 1968).

78 United States v. Looper, 419 F.2d 1405 (4th Cir. 1969).

79 If a defendant refuses to answer a proper question on cross examination, he can be punished for contempt of court. Carpenter v. United States, 264 F.2d 565, 570 (4th Cir. 1959). If it were subsequently found that he was insane at the time he committed contempt, the primary case might have to be reversed. Rollerson v. United States, 343 F.2d 269, 270 (1964).

matically rejecting or accepting the advice of his lawyer, the defendant must be able to decide which plea option he prefers after the advantages of each alternative are explained. After the entry of a plea of not guilty, the court sets a date for trial, and the defendant is either returned to jail or released on bail to await trial. With the assistance of counsel, the defendant must convince the judge that he is not dangerous and that he can be trusted to appear for trial in order for the judge to grant bail.

A defendant should appreciate the consequences of entering a plea of guilty. Since the results of a guilty plea are so drastic, the court must carefully ascertain whether the defendant appreciates the consequences of entering the plea and whether there is a basis in fact for the guilty plea. A defendant cannot appreciate the effect of entering a guilty plea if he does not understand the charges against him, the penalties for the crime, possible defenses available to him, and the circumstances under which evidence is generally inadmissible. If the defendant is incompetent, he cannot enter a guilty plea any more than he can be tried for the crime.

The defendant should be able to persuade the court that he can perform his part in the process. Since the issue at the

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81 A plea of guilty is not only an indirect waiver of such rights as the right to a jury trial, to confront one's accusers, and to testify in one's own behalf, but also is a waiver of all non-jurisdictional defects, such as the inadmissibility of evidence. Weir v. United States, 92 F.2d 634, 635 (7th Cir. 1937).

82 The court must be convinced that the plea is voluntarily made with a full knowledge of the effects of the waiver and full understanding of the facts on which the decision to waive is based. E.g., Machibroda v. United States, 368 U.S. 487 (1962); Shelton v. United States, 292 F.2d 346 (7th Cir. 1961); Fokus v. United States, 34 F.2d 197, 198 (4th Cir. 1929); FED. R. CRIM. P. 11 requires an inquiry in open court as to whether the defendant realizes all the consequences of entering a guilty plea and whether there is a basis in fact for the guilty plea. A plea is not voluntary if induced by promises or threats of law enforcement agents. E.g., Monroe v. United States, 463 F.2d 1032 (5th Cir. 1972).

83 If a plea is made under the pressure of false information, it may not be voluntary. E.g., McMann v. Richardson, 397 U.S. 759 (1970)(incorrect information on the admissibility of evidence); United States v. Martin, 389 F.2d 383 (4th Cir. 1968)(defenses); Fultz v. United States, 365 F.2d 404 (6th Cir. 1966); Munich v. United States, 337 F.2d 356 (9th Cir. 1964)(penalties).

84 If the defendant later proves that he was incompetent when he entered the guilty plea, it is invalid. E.g., Tweedy v. United States, 435 F.2d 702 (8th Cir. 1970)(valid guilty plea by alcoholic); Sturrup v. United States, 218 F. Supp. 279 (E.D. N.C. 1963)(psychotic unable to enter guilty plea); Johnson v. Settle, 209 F. Supp. 279 (D. Mo. 1962).
preliminary hearing is whether the defendant ought to stand trial at all rather than whether he is guilty, the question of competency to stand trial is often raised at this point. Even the defendant may put the court on notice that a competency hearing may be required by reporting previous hospitalizations for mental illness or other facts probative of incompetency. However, since an incompetent defendant usually does not recognize or want to admit that he is incompetent, the question of whether a psychiatric examination is necessary is usually raised by the defense attorney, the prosecution, or even the court itself after observation of the defendant's behavior. Once the defendant is suspected of being incompetent, by definition he is no longer required to do anything to help himself.

The defendant must be able to appreciate the drama unfolding in the courtroom. To do this, he must understand something about the interacting roles of the prosecutor, the defense counsel, the judge, the jury, the witnesses, and the defendant. The defendant must understand enough about the plot of the unfolding drama to know what the possible endings might be and the effect of each outcome on him. In order to decide whether he needs counsel or should plea bargain or plead guilty, he must have a fairly realistic idea of what the outcome is likely to be.

The defendant must be able to decide whether to waive his right to a jury trial. While the defendant has a right to a jury trial in most criminal cases, he may waive this right by requesting that the court act as fact finder or by entering a plea of guilty. In order to select the alternative which best serves his interests, he must appreciate the advantages and disadvantages of the judge serving as fact finder or the advantages of entering a guilty plea after plea bargaining.

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86 The defendant may waive his right to a jury trial by requesting that the court act as the fact finder or by pleading guilty. Ferracane v. United States, 47 F.2d 677, 679 (7th Cir. 1931). In federal court, he must have court approval. Fed. R. Crim. P. 23. Even then, he must have the requisite mentality to make a knowing and voluntary waiver of his right to a jury trial. Dranow v. United States, 325 F.2d 481 (8th Cir. 1963).
The defendant must be able to approve, participate in, and adhere to a defense strategy. Once the facts are supplied by the defendant, defense counsel can map out an over-all strategy for the defendant's approval. Once the defendant accepts a basic defense plan, he must be able to follow his part in the plan, maintain a consistent stance throughout the trial without vacillating from one position to another for inadequate reasons, and be able to concentrate and care enough about what is going on to monitor what happens during trial. If the defendant is unrepresented he has the more difficult task of selecting and implementing a plan.

Though the burden of proof on the state is greater at trial than at the preliminary hearing, the similarity between the purposes of the preliminary hearing and the full-blown trial—establishing whether the state has made a case against the accused—explains why many of the functions the defendant is asked to perform during the trial may already have performed during the preliminary hearing. For instance, the defendant must decide on a plea. Unless he wants to risk the chance of the state failing to prove a prima facie case, the defendant must introduce enough evidence to persuade a juror that he did not commit the crime, lacked the requisite state of mind, was not criminally accountable for his act, or was guilty of a lesser offense. To exercise his right to confront the witnesses against him effectively, he must know what happened at the time of the crime and appreciate the nature of the crime and possible defenses open to him. If necessary, he must be able to testify in his own behalf.

The defendant should be able to recognize circumstances that may warrant his receiving a lighter sentence. After the jury enters a verdict of guilty, the court addresses the defendant personally before imposing sentence and asks him if he has any information to present that might provide a reason for mitigating his punishment. The defendant must understand as a result of counsel's explanation what extenuating circumstances are. If he is unrepresented by counsel, he must know when asked which factors may lessen the reprehensibility of his act. Since an independent pre-sentence investigation can uncover more mitigating circumstances in the defendant’s background and environment than even a competent defendant would be likely to recognize, the ability to perform this function may not be crucial for competency.
The defendant should appreciate that he has the right to appeal. After imposing sentence, the court advises the defendant that he has the right to appeal. At this time the value of his participation lies in his vested interest in continuing the fight until he has exhausted all avenues of recourse, especially if he knows he has undeservedly been found guilty. To exercise this right, the defendant must understand his right to appeal and must know how to appeal. Ironically, if the defendant was an undetected incompetent during trial and remains or becomes incompetent subsequent to trial, it is unlikely that he will know how to exercise his right to appeal anymore than he knew how to defend himself during trial.

The defendant should be able to dismiss his lawyer when the representation is inadequate. The defendant should be able to judge whether his lawyer is providing him with adequate guidance by observing whether the lawyer takes advantage of weaknesses exposed and whether he vigorously implements the basic defense plan agreed upon. To determine whether his lawyer is representing him as well as can reasonably be expected, the defendant must have some idea of what kind of representation he realistically should expect. The accuracy of this assessment of his lawyer's conduct may depend on whether the defendant's perception is distorted by paranoia or other fantasies. Once he is confident that the representation is inadequate, the defendant must have the initiative to dismiss his lawyer or the competence to raise the question of inadequate representation in order to justify a replacement of appointed counsel.

A defendant unable to perform one function will probably be unable, in varying degrees, to perform other functions. A person who cannot appreciate the significance of the courtroom drama certainly cannot adhere to a general defense strategy. At some point the defendant's power to perform his functions becomes so disproportionately weak in relation to the power of the state prosecuting that it is no longer fair to continue the contest.

B. An Unconditional Function-Based Test

A defendant may be unfit to stand trial if his performance
is impaired because he is mentally ill,\textsuperscript{7} retarded,\textsuperscript{8} suffering from amnesia,\textsuperscript{8} suffering from drug use or its abrupt discontinuance,\textsuperscript{9} alcoholic,\textsuperscript{10} diabetic\textsuperscript{11} or epileptic,\textsuperscript{12} or suffering from physical injuries or diseases.\textsuperscript{13} The issue is whether the disabling condition so impairs the defendant’s ability to perform

\textsuperscript{7} E.g., Pate v. Robinson, 383 U.S. 375 (1966)(mental disorder caused by physical disease or trauma); People v. Swallow, 301 N.Y.S. 2d 798 (Sup. Ct. 1969).


\textsuperscript{9} See, e.g., Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968)(impaired memory due to permanent retrograde amnesia); United States v. Sermon, 228 F. Supp. 792 (W.D. Mo. 1964)(defense sufficient if amnesiac’s assistance not needed); United States v. Olvera, 4 C.M.A. 134, 15 C.M.R. 134 (1954)(amnesiacs consistently found competent to stand trial in military courts); State v. Severns, 336 P.2d 447 (Kan. 1959)(amnesiac competent since a record from the first trial was available); State v. Swails, 66 So. 2d 796 (La. 1953), cert. denied, 348 U.S. 983 (1955)(amnesiac competent since pleading not guilty by reason of insanity rather than arguing he did not commit the act); Carter v. State, 21 So. 2d 404 (Miss. 1945) where the court said,

[No one shall be tried for the commission of a crime when he is mentally incapable of making a rational defense, i.e., incapable of remembering and intelligently stating the facts on which his defense rests. This mental condition may be casual, temporary or permanent and it may result from any cause.

See also Regina v. Podola, [1960] 1 Q.B. 325 (amnesia alone is never enough since insanity is necessary for incompetency). See Comment, Criminal Law—Ability to Stand Trial—Amnesia, 52 Iowa L. Rev. 339 (1966) where the rationale for holding amnesiacs competent is criticized.

\textsuperscript{10} See, e.g., Sanders v. United States, 373 U.S. 1, 19-20 (1962); Harris v. United States, 426 F.2d 99 (6th Cir. 1970)(a person under the influence of drugs at the time of pleading was found incompetent); Hansford v. United States, 365 F.2d 920, 922 (D.C. Cir. 1966)(the use or discontinuance of narcotics might per se be sufficient to require an examination and a competency hearing). See generally Buschman & Reed, Tranquilizers and Competency to Stand Trial, 54 A.B.A.J. 284 (1968); Scrignar, Tranquilizers and the Psychotic Defendant, 53 A.B.A.J. 43 (1967); Case note, 45 Tex. L. Rev. 565 (1967).

\textsuperscript{11} See In re Buchanan, 61 P. 1120 (Cal. 1900) in which alcoholism did not preclude trial when the defendant could meet the test for competency even though his character had been altered and he was permanently insane.

\textsuperscript{12} See Featherston v. Mitchell, 418 F.2d 582 (5th Cir. 1970), cert. denied, 397 U.S. 937 (1970), where a mistrial in a tax evasion case was granted due to a diabetic blackout during trial.

\textsuperscript{13} See, e.g., Gann v. Gough, 79 F. Supp. 912, 914 (N.D. Ga. 1948), rev’d on other grounds, 170 F.2d 473 (1948) (a person who had an epileptic seizure on the day that a plea was entered might be competent).

\textsuperscript{14} See, e.g., Felts v. Murphy, 201 U.S. 123, 129 (1906); United States v. Sermon, 228 F. Supp. 972, 980 (W.D. Mo. 1964) (loss of memory due to cerebral arteriosclerosis).
his functions that he cannot satisfy the competency test. While it may seem obvious that the source of the disablement should not affect the competency decision, courts are sometimes misled by limiting words in the preface to statutory tests[9] that suggest that the dysfunction must be a result of designated causes, regardless of the defendant’s actual degree of impairment. Just as none of the conditions referred to above can automatically be rejected as a possible reason for incompetency, none can be accepted as equivalent to a finding of incompetency, since the effect of the disablement may not be great enough to warrant halting the criminal process.[96]

One reason given for the restriction of the competency-to-stand-trial doctrine to the mentally ill or retarded is a desire to protect society. When a dangerous but not insane amnesiac is in fact incompetent to stand trial, the court is sometimes reluctant to find him incompetent due to fear that he will be released once it becomes obvious that his condition cannot be alleviated. It is probably constitutionally impermissible under the due process clause to declare a person competent to stand trial if he is in fact incompetent, though not civilly commitable, in order to fill in a gap in the law.

IV. APPLICATION OF THE COMPETENCY TEST

A. An Organizational Tool

In addition to the development of a normative standard to describe the functions a defendant might have to perform in order to satisfy the test for competency to stand trial, there is a need for the formulation of an easily useable method for the organization and presentation of data on the effect of the defendant’s disability on his capacity to perform the required functions. One vehicle a court could use to structure the analysis

19 U.S.C. § 4244 (1977) recognizing that the disabling condition can be caused by factors other than insanity, in that a person who is "presently insane or otherwise so mentally incompetent as to be unable to understand the nature of the proceedings against him or properly to assist in his own defense" is incompetent.

96 See, e.g., Hansford v. United States, 365 F.2d 920, 923 (D.C. Cir. 1966) in which the court recognizes that, since the effect of narcotics varies with the amount of drug taken, the degree of tolerance, and the idiosyncratic reaction of the person, it is only by a hearing that it can be determined whether any particular defendant is incompetent because of his use of drugs.
of each function is a simple four-parameter paradigm. Each parameter focuses on one of the factors necessary for the achievement of a voluntary action: 1) the defendant must want to perform the function; 2) the defendant must know the concepts and facts necessary for the performance of the function; 3) the defendant must know how to perform the function; and 4) the defendant must have the physical and emotional capacity to actualize in conduct the desired behavior. With such a simple paradigm for the analysis of behavior, the medical examiner or, for that matter, counsel, the court, or any witness can graphically depict the manner in which the defendant's impairment is likely to disable him in his performance of any function.

Using the four-parameter paradigm to describe the effect of a defendant's disability on his ability to perform one of the functions described in the preceding section of this Note demonstrates how the paradigm works. It should be pointed out that the thumbnail sketch which follows is not meant to be exhaustive, but merely suggestive, of the sub-functions that impinge on each of the parameters and affect the individual's ability to perform the function.

To be able to relate what happened at the time of the crime is one of the basic functions the defendant should be able to perform. To particularize the "want" parameter it is necessary to identify which wants, desires, motivations, or drives are required for the successful performance of this function. The defendant must trust his attorney in order to feel free enough to divulge what he perceives to be the true facts. An inability to trust involves more than a general distrust of lawyers or a deliberate decision to lie. A paranoid defendant who believes that his lawyer and the rest of the world are out to get him would be deficient in his capacity to trust, but some kinds of

87 Pouncey v. United States, 349 F.2d 699, 701 (D.C. Cir. 1965) (the court recognized the need for the defendant to trust counsel enough to communicate to him the truth).
88 See, e.g., Henderson v. United States, 360 F.2d 514 (D.C. Cir. 1966) where Judge Bazelon said he doubted that a schizophrenic should be allowed to withdraw his appeal when he conceivably was motivated by self-defeating aims, such as the characteristic of a schizophrenic in remission to deny at all costs that he was ever ill; Hansford v. United States, 365 F.2d 920, 923 n.6 (D.C. Cir. 1966) where the court pointed out that the use of heroin might lower "tensions that are actually healthy and perhaps essential for proper participation in an adversary court proceeding . . . .";
paranoia would not affect the defendant’s ability to trust his lawyer, as, for instance, the defendant’s murdering his wife in the belief that she was trying to poison him.

In order to perform almost any function, the defendant must have a desire for self-preservation. The defendant may not possess this self-preservation drive if he is experiencing suicidal depression, longs for punishment for reasons unrelated to the crime, desires martyrdom, or feels no concern for himself due to his immersion in the euphoria created by drugs or his withdrawal from reality.

To particularize the “know” parameter it is necessary to identify which facts and concepts are required for the successful performance of this function. Basically the defendant must know what he did and felt at the time of the alleged crime in order to furnish counsel with an accurate account of the facts and the names of possible witnesses. Forgetting irrelevant or undisputed facts is not enough to prevent the defendant from advising counsel concerning the broad facts of his case. If the defendant imperfectly perceived or does not remember what happened at the time of the criminal act, he is deprived of whatever value his eye-witness version of the events might have. A defendant who is unable to remember what happened due to hallucinations, epilepsy, amnesia or dotage is deficient in the factual knowledge necessary to perform this function. If after careful explanation the defendant cannot understand which facts are relevant to his defense, the defendant may be

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Commonwealth v. Harrison, 173 N.E.2d 87 (Mass. 1961) where the defendant unsuccessfully argued that his self-inflicted brain injury after shooting his wife blunted his emotional awareness of his peril to such an extent that he was incompetent.

E.g., Lyles v. United States, 254 F.2d 725, 729-30 (D.C. Cir. 1957), overruled on other grounds, 471 F.2d 969, 977 (1972) (where the defendant was required to furnish counsel with an accurate account of the facts and the names of possible witnesses); United States v. Chisolm, 149 F. 284, 287 (5th Cir. 1906) stating that the defendant, although not entirely sane, is competent if he “has such possession and control of his mental power, including the facts of memory, as will enable him to testify intelligently and give his counsel all of the material facts bearing upon the criminal act charged against him and material to repel the incriminating evidence.” See also Commonwealth v. Zelenski, 191 N.E. 355, 357 (Mass. 1934) in which the medical evidence fell short of “proving that the mental infirmities of the defendant deprived him of the faculties of the consciousness of the physical acts performed by him, of the power to retain them in his memory, and of the capacity to make a statement of these acts with reasonable accuracy.”

deficient in his ability to grasp the concepts necessary for the performance of this function.

To particularize the "know how" parameter, it is necessary to identify which skills are necessary for the successful performance of this function. The defendant probably has the requisite skill to satisfy this parameter if he can provide relevant details in answer to his attorney's questions. In addition to understanding questions and being able to assess his experiences to answer the questions, he must be able to articulate the answer in an intelligible, even if idiosyncratic, manner. A defendant who is irrational due to prolonged drug or alcohol addiction or severe retardation would probably drop below acceptable standards for the "know how" parameter of this function.

Even if a defendant has the needed motivation, knowledge, and skill to perform a particular function, he still may lack the capacity to perform the function. For instance, a person may know what happened and want to relate it, but be unable to because he is paralyzed, lacks the initiative to relate details unless specifically asked for them, or is unable to concentrate long enough to reconstruct what happened.

Everyone laments the lack of communication between law and psychology. By using the four-parameter paradigm, better communication between the court and experts may be achieved. If the court fails to request specific information from the expert, the unguided expert has to base his opinion on whatever factors he considers relevant. If he speaks in conclusory terms, the court, not supplied with the specific information necessary to form an independent opinion, must rubber-stamp the expert's pronouncement. In order to use the expertise of the expert and yet assert its role as decision-maker, the

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101 E.g., United States v. Horowitz, 360 F. Supp. 772, 777 (E.D. Pa. 1973) in which the revelation of facts to counsel, including remembering the events in general and being able to understand questions concerning the events, was recognized as "the primary assistance" the defendant gives counsel; Wieter v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961) holding that a requirement for the release of a person judged incompetent on habeas corpus is that he be able "to tell his lawyer the circumstances to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed . . . ."; State v. Swails, 66 So. 2d 796, 800 (La. 1953), cert. denied, 348 U.S. 983 (1956) recognizing that retardates have special trouble remembering and relating facts clearly and convincingly.
court must specifically identify for the expert the information that is needed. With specific information the court can indicate which tasks the defendant cannot perform that cumulatively render him incompetent.

This Note identifies and describes the functions a defendant might be expected to perform during criminal prosecution. If the prosecution and defense sketch out their anticipated strategies for the court, the court can select from its list of potential functions those the defendant in this particular trial will actually be called upon to perform. Should the court need medical information on the manner in which the defendant’s disorder impairs his ability to perform any function, the court can request such specific information from the expert. Such requests for information enable the expert to answer questions that are properly the subject of his expertise rather than legal questions.

B. Factors Influencing Judgment

By implementing the function-paradigm scheme presented in this Note, the court should receive relevant, probative information on which to base its decision. The court, not the medical expert, should apply the test for competency to stand trial to the data collected and determine whether the defendant can perform the functions required to the extent necessary to satisfy the due process requirement for a fair trial. Deciding whether a defendant is competent is ultimately a value judgment resulting from a balancing of the competing goals of fair treatment for those impaired and unhindered execution of justice. The scales should be weighed in favor of the defendant’s standing trial, and therefore the doctrine should be invoked only when the accuracy, fairness, dignity, in short, the vitality of the system for the administration of criminal justice is threatened.

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103 Judges differ in the level of awareness they require and the amount of emotional instability they will tolerate, and lawyers differ in the degree of collaboration they find necessary. This has caused some to question whether the criteria for determining competency to stand trial can ever transcend these subjective differences. Freiberg, supra note 4, at 147; Robey, supra note 44, at 620.

104 To err and send an incompetent to trial may be less disastrous than halting
Between the data collection and the decision stage lies the evaluative process. While it is impossible to know the weight assigned to various factors in reaching the judgment, it is possible to identify the factors that the court is likely to consider. The nature of the crime and the extent to which the defendant’s participation at trial is necessary interact with the defendant’s disability so that the court must decide on a case-by-case basis whether the defendant is competent to participate in the manner and to the extent the circumstances of his particular case demand.

While the success of a play rarely depends on the adroitness with which a bit actor plays his part, the performance of the defendant must meet minimal competency standards regardless of how small his part is, since he is the person around whom the drama revolves. Just as some roles are easier to perform than others, a defendant may be able to play one part but not another. The pivotal question is always whether the defendant can perform the personal functions required in the particular proceedings.

For instance, if the defendant takes the witness stand, he must be able to function at a higher level than if he remains passively in his seat. On the witness stand he must endure the strain of cross examination: He must be able to withstand

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105 Just as a fact is either relevant or irrelevant, a defendant is either competent or incompetent to perform his functions. However, just as some facts are more probative than others, so too the performance of some functions require more complex thought processes and skills. In Thomas v. Morrow, 361 S.W.2d 105, 106 (Ky. 1962), the court denied that there are multiple levels of competency:

[T]he same lack of mental capacity which denied to petitioner the faculty to plead properly to the indictment also made him incapable of recognizing error, feeling aggrieved and prosecuting an appeal to correct it. If he did not have the capacity to plead to the indictment he also lacked the capacity to protect himself by appealing to this Court.

106 In People v. Andrews, Crim. No. 39181 (Wayne County Cir. Ct., Mich., June, 1966) the judge focused on how the existence of mental illness would interfere with the defendant’s actual participation in the trial and decided that since his sole defense was insanity and no personal participation in the trial was proposed, his psychosis was not reason enough to delay trial.

107 See Robey, supra note 44, at 619.
stress without collapsing and his demeanor must convince the jury that he is telling the truth. Sometimes external circumstances, such as the existence of corroborating witnesses, may reduce the necessity that his testimony be clear and persuasive since with this backup his confused comments may make sense.

The waiver rather than assertion of a right may require a higher functional level, since an unwaived right protects the interests of the defendant even though he is unaware of the interests that are protected. On the other hand, waiver of a right requires that the defendant appreciate the consequences of his waiver.\textsuperscript{108} It has been argued that the simultaneous waiver of many rights—the right to a jury trial, the right to confront witnesses, and so forth—by pleading guilty may require greater functional capacity\textsuperscript{109} than the sequential waivers of the same rights, but the prevailing view is that there is no difference.\textsuperscript{110}

The type of crime, the complexity of the issues, arguments, and procedures, and the anticipated duration of the trial all may affect the functional level required for competency.\textsuperscript{111} A defendant who would deteriorate under the prolonged stress of a lengthy murder or conspiracy trial may be able to stand trial for assault. A defendant with a low intelligence quotient may be able to understand the charge for indecent exposure but not for tax evasion.

While the penalty for the crime may affect the maximum period of confinement for treatment, this should not per se be a factor in determining competency to stand trial. It is true that less participation may be required of a defendant when the


\textsuperscript{109} E.g., Sieling v. Eyman, 476 F.2d 211 (9th Cir. 1973); In re Williams, 165 F. Supp. 879 (D.D.C. 1958) holding that a greater degree of awareness is required for a guilty plea than for competency to stand trial; Comment, Competence to Plead Guilty: A New Standard, 1974 DUKE L.J. 149, 151.

\textsuperscript{10} E.g., Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States v. Harlan, 480 F.2d 515 (6th Cir. 1973), cert. denied, 414 U.S. 1006 (1973); State v. Contreras, 542 P.2d 17 (Ariz. 1975) in which the Arizona Supreme Court recently rejected the idea that a finding of competency to stand trial was insufficient to support a finding of competency to plead guilty.

\textsuperscript{11} See Person, The Accused, Retardate, 4 COLUM. HUMAN RIGHTS L. REV. 239, 245 (1972).
crime is a malum prohibitum offense that does not require proof of the accused's state of mind, but the level of participation is less, not because the crime is a minor crime, but because the denial of specific intent is not a possible defense. The extent of the defendant's participation necessarily increases where an element of the offense is specific intent, knowledge, willfulness, or other mental attitudes that the defendant alone may have knowledge of.

While the general rule is that the prosecution must prove every element of the crime beyond a reasonable doubt, with some defenses the burden of going forward may lie on the defendant, or presumptions may shift the burden to the defendant. When this occurs, greater participation is required from the defendant since he is often the primary source for information establishing negative facts, lack of knowledge, entrap-

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112 Intent does not always have to be specifically proven, but can be inferred from the doing of the act, since a person is presumed to intend the natural and probable consequences of his act. Reynolds v. United States, 98 U.S. 145, 167 (1878). The act is sufficient in itself for establishing intent if there is a rational connection between the fact known and the ultimate fact presumed. See, e.g., McClain v. United States, 417 F.2d 489 (9th Cir. 1969) (concealing marijuana). The defendant can overcome this presumption by his own uncorroborated testimony if the jury believes him. See, e.g., Morissette v. United States, 342 U.S. 246 (1952).

113 If intent is an element of the offense charged, it must be specifically proven. United States v. Jones, 328 F. Supp. 556 (E.D. Tenn. 1971). The defendant can testify that he did not have the requisite knowledge or bad motive. Haigler v. United States, 172 F.2d 986, 987 (10th Cir. 1949). Generally, knowledge and intent are necessary elements in theft and fraud crimes. E.g., United States v. Jones, 328 F. Supp. 556 (E.D. Tenn. 1971) (counterfeiting); Lindgren v. United States, 260 F. 772, 775 (9th Cir. 1919) (embezzlement).

114 In tax evasion cases the burden of going forward is on the defendant after the prosecution establishes a prima facie case. Davis v. United States, 226 F.2d 331, 335 (6th Cir. 1955). The burden of proving guilt beyond a reasonable doubt rests upon the prosecution from the beginning to the end of the trial. McKnight v. United States, 115 F. 972, 976 (6th Cir. 1902). Whether the presumption is created for procedural convenience, such as the presumption that the defendant is sane, or whether it is created because there is a probability that where the basic fact is found the presumed fact also exists, information from the defendant may still be helpful in rebutting the presumption. See Greer v. United States, 245 U.S. 559, 561 (1918).

115 See, e.g., United States v. Fleischman, 339 U.S. 349, 360-61 (1950) stating that the government does not have to prove negative averments which are fairly well established by circumstances and which if untrue could be readily disproven by the production of evidence within the defendant's control; McCurry v. United States, 281 F. 532 (9th Cir. 1922) (nonpayment of tax due on retail liquor business and non-registration of a still).

116 See, e.g., Edwards v. United States, 334 F.2d 360, 366 (5th Cir. 1964), cert. denied, 379 U.S. 1000 (1965) stating that the defendant has the burden of rebutting
ment,\textsuperscript{117} qualification for an exception to the statute,\textsuperscript{118} alibi defenses, self defense,\textsuperscript{119} and sometimes even insanity.\textsuperscript{120}

C. Quantitative Measurement of the Defendant's Qualities

The final question is when does the performance level of the defendant become so reduced that delaying trial is necessary to guarantee due process. While precedent defines the points past which a defendant is considered to be conclusively competent or incompetent,\textsuperscript{121} in the vast majority of cases the court, guided by the competency-to-stand-trial test identifying the areas that must not be substantially impaired if the defendant is to stand trial, has to decide whether the defendant is competent. While it should eventually be possible to devise a qualitative standard delineating tasks the defendant may be called on to perform, probably the goals the competency-to-stand-trial doctrine was designed to promote already provide the best quantitative standard possible. In other words, whether the defendant is so disabled that he cannot stand trial depends on the answer to questions such as: Is the defendant's disablement so great that it would no longer be fair to match him in an adversary contest with his antagonist, the state? Would his inept participation turn the administration of justice into an invective against an insensate person?

The competency-to-stand-trial doctrine does not attempt to compensate for the inevitable disparities among defendants. Therefore, it is not enough that the defendant's performance

\begin{itemize}
    \item \textsuperscript{117} See, e.g., Sagansky v. United States, 358 F.2d 195 (1st Cir. 1966), cert. denied 385 U.S. 816 (1966).
    \item \textsuperscript{118} See, e.g., Williams v. United States, 138 F.2d 81, 82 (D.C. Cir. 1943) (abortion exception).
    \item \textsuperscript{119} See, e.g., United States v. Marcus, 166 F.2d 497, 503 (3rd Cir. 1948); De Groot v. United States, 78 F.2d 244, 251 (9th Cir. 1935).
    \item \textsuperscript{120} If insanity is the defense, the burden of raising and sustaining the defense is on the defendant. Swisher v. United States, 237 F. Supp. 921 (W.D. Mo. 1965). Enough evidence has been introduced to meet the burden when a psychiatrist states that the defendant was insane or when the defendant has been adjudicated mentally incompetent at an earlier time. Durham v. United States, 214 F.2d 882, 886 (D.C. Cir. 1954), overruled, 471 F.2d 981 (1972) (restating insanity test only); Hurt v. United States, 327 F.2d 978 (8th Cir. 1964).
    \item \textsuperscript{121} If a defendant is found incapable of standing trial in federal court, it is conclusive he is incompetent in state court. Thomas v. Morrow, 361 S.W.2d 105 (Ky. 1962).
\end{itemize}
level is such that it is more laborious and difficult for him to perform his functions than it would be for an average person.122 His functioning level must be so low that to force him to stand trial would violate the due process requirement that a defendant receive a fair trial. If the level of performance expected were that of the reasonable man or even the average man, many defendants would, by definition, be incompetent.

D. Pro Se Competency

A defendant can be competent to stand trial but not be qualified to represent himself. If the accused represents himself,123 the functions he must perform are more complex than those he would perform if he were guided by an attorney.124 Therefore, once the court finds that the defendant is competent to stand trial, if the defendant then asks to represent himself, the court must decide the separate question of whether the defendant is able to do so. In order to represent himself, the defendant must be able to conceive, develop, and implement defense strategies rather than merely select from well-explained alternatives. Pro se representation requires that the

122 See United States v. Horowitz, 360 F. Supp. 772, 778 (E.D. Pa. 1973) holding that the fact that a defendant was so emotionally shaken that testifying was difficult was not enough to render him incapable of testifying and so incompetent.

123 See Faretta v. California, 422 U.S. 806 (1975) making the sixth amendment right of self-representation applicable to the states by the fourteenth amendment; United States v. Duty, 447 F.2d 449 (2d Cir. 1971) in which counsel was not forced on the defendant once the court determined he was cognizant of his legal rights and the consequences of his decision.

124 A defendant competent to stand trial is not automatically able to represent himself. E.g., State v. Westbrook, 406 P.2d 388 (Ariz. 1965), vacated and remanded, 384 U.S. 150 (1966) where the Court recognized that being able to stand trial with the aid of counsel is not the same as being able to represent oneself; Massey v. Moore, 348 U.S. 105 (1954), holding that a person may be found competent yet lack the capacity to represent himself; United States ex rel. Königsberg v. Vincent, 388 F. Supp. 221, 226 (S.D. N.Y. 1975), aff'd, 526 F.2d 131 (2d Cir. 1975), cert. denied, 425 U.S. 937 (1976), in which the court admitted the decision to represent oneself was "vaguely higher than the standard for competency to stand trial"; Gregori v. United States, 243 F.2d 48, 54 (5th Cir. 1957) where the dissent mentions that a lower standard for mental ability may be sufficient if the defendant is represented by counsel; Silten & Tullis, Mental Competency in Criminal Proceedings, 28 HAST. L.J. 1053, 1065-72 (1977) stating that a higher level of competency is necessary to represent oneself. But see People v. Reason, 334 N.E.2d 572, 37 N.Y.2d 351 (1975); Silving, The Criminal Law of Mental Incapacity, 53 J. COLUM. L. 129, 140-41 (1962) in which he suggests that the test for competency to stand trial might be whether the defendant can represent himself.
Incompetent Defendants

Defendant have greater initiative, imagination, and verbal ability than would be necessary if he were represented by counsel. It has been argued that waiver of the right to counsel requires a higher functional level than the waiver of other constitutional rights.\(^2\) Since the decisional process is similar in determining whether to waive any right, it is doubtful that the waiver of counsel itself requires more ability than the waiver of any other right. However, once the decision to waive counsel is made, the burden of conducting one's own defense does demand a higher functional level than merely assisting counsel in preparing a defense.

**Conclusion**

It would be a reproach to justice if a guilty man . . . postponed his trial upon a feigned condition of mind, as to his inability to aid in his defense. On the other hand . . . it would be likewise a reproach to justice in our institutions, if a human being 'made in God's own image,' while suffering as the old books put it 'under a visitation from God,' were compelled to go to trial at a time when he is not sufficiently in possession of his mental facilities to enable him to make a rational and proper defense. The latter would be a more grievous error than the former; since in the one case an individual would go unwrapped of justice, while in the other the great safeguards which the law adopts in the punishment of crime and the upholding of justice would be rudely invaded by the tribunal whose sacred duty it is to uphold the law in all its integrity.\(^6\)

Failure to use the proper test for competency to stand trial,\(^12^7\) lack of knowledge regarding how to apply the test, and

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\(^{12^5}\) Comment, *Criminal Procedure—Competence and Waiver of the Right to a Jury Trial—State v. Decello, 1975 Ariz. Sr. L.J. 227*, focusing on this state court case interpreting Westbrook v. Arizona, 384 U.S. 150 (1966) in which the defendant was charged with the murder of his attorney during an argument over the adequacy of his representation in an earlier civil case.

\(^{14^9}\) United States v. Chisolm, 149 F. 284, 288 (5th Cir. 1906).

\(^{17}\) See, e.g., United States v. MacLeod, 83 F. Supp. 373 (E.D. Pa. 1949) where the court announced that "the law will not try an individual whose mental condition is such that he cannot distinguish right from wrong or cannot rationally aid in his defense." See also Rowe v. State, 199 A.2d 785 (Md. 1964), cert. denied, 379 U.S. 924 (1964), declaring the M'Naghten test applicable for competency; Commonwealth v. Cox, 100 N.E.2d 14, 16 (Mass. 1951); Davidson v. Commonwealth, 188 S.W. 631 (Ky.
use of the procedures for illegitimate purposes are probably the major reasons why incorrect decisions regarding competency to stand trial have been made. Almost all of the effort in the last ten years has been directed toward the education of those who apply the test as to what the proper test is and toward the development of safeguards that lessen the attractiveness of using the competency process for improper purposes.

Confusion over the nature of the test is easily reduced if

1916) holding that the instructions to the jury were proper even though they stated that the accused could be acquitted of the rape of a female if he were found insane at the time of the offense or at the time of trial.

128 For articles on the confusion between the different tests, see, e.g., Morris, The Confusion of Confinement Syndrome Extended: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York, 18 BUFFALO L. REV. 393, 412 n.153 (1969) (return for trial delayed by erroneous requirement that defendant no longer be mentally ill rather than that he merely be fit to stand trial); Slough & Wilson, Mental Capacity to Stand Trial, 21 U. PITT. L. REV. 593 (1960) (identification of the competency to stand trial standard employed in practice as to whether an accused is mentally ill and in need of hospitalization); Vann & Morganroth, Psychiatrists and the Competence to Stand Trial, 42 U. DEW. L.J. 75, 84 (1964) (study of New York psychiatrists' misunderstandings of the standard).

To make competency procedures less attractive as a means of circumventing the death penalty, the vagaries of jurors, the prevailing standard for criminal non-responsibility when it is believed too harsh, and the need to prove guilt, it is necessary to persuade social palliators misclassifying the defendant that confinement in an institution for the mentally insane rather than prison may not be in the best interest of the defendant and to devise and adopt procedures that make the use of competency procedures as a means of preventive detention more difficult and less effective. If fuller hearings are required before commitment, the maximum duration of the commitment is limited, and periodic review of progress is required, it is more difficult to dispose of persons labeled incompetent and forget about them. For articles on the misuse of the competency procedures and ways suggested to safeguard against these misuses, see, e.g., J. KATZ, J. GOLSTEIN, & A.M. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 701-02 (1967); Arens, Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch, 13 CATH. U. L. REV. 3 (1964); Fried, Impromptu Remarks, 76 HARV. L.REV. 1319-20 (1963); Halleck, The Insanity Defense in the District of Columbia—A Legal Lorelei, 49 GEO. L.J. 294, 319 (1960); Hess & Thomas, supra note 44, at 713-20; Lewin, Disposition of the Irresponsible: Protection Following Commitment, 66 Mich. L. REV. 721, 725 (1968); Slovenko, The Psychiatrist Patient, Liberty, and the Law, 13 KAN. L. REV. 59, 70 (1964); Smith, From Insanity to Incompetency: Fitness to Stand Trial, 51 L.A.B.J. 340 (1976); Vann & Morganroth, The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial, 43 U. DET. L.J. 1, 3 (1965); Note, Incompetency to Stand Trial, 13 Ariz. L. REV. 160, 161-62 (1971)(prosecutors and defense attorneys admitted using the competency procedures as a dilatory tactic, as a means of avoiding prolonged trials involving the insanity defense, and as a pre-trial discovery device of the defendant's mental condition at the time of the alleged crime); Note, Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey, 110 U. Pa. L. Rev. 78, 89-92 (1961)(median stay for pre-trial commitment in Pennsylvania was 15 ½ years compared to five months in New Jersey).
the court articulates the proper test\textsuperscript{133} and the legislature replaces semantically similar terms—insanity at the time of the act, insanity at the time of trial, and insanity requiring involuntary commitment—with more distinctive terms, such as insanity, incompetency, and civil commitability respectively. Application of the correct test avoids the over-inclusiveness that results from reliance on the inappropriate criterion of mental illness and the underinclusiveness that results from use of the stricter test for criminal responsibility.

Procedures designed to insure that the competency doctrine is restricted to its true purposes also tend to reduce over-inclusiveness. The less frequently the procedures are used as a means of preventive detention, to get undesirables off the streets without trial or to mitigate punishment, the fewer competent likely to be classified as incompetent.

Adoption of the function-paradigm scheme proposed in this Note should also reduce misclassifications. Courts implementing this scheme should receive more relevant and complete information upon which to base their decisions, and courts should be better able to perform their analytical and evaluative functions.

To facilitate the identification of a set of functions the defendant must be able to perform in order to satisfy due process, a preliminary investigation of eighteen potential functions is made in section III of this Note. In section IV of this Note a four-parameter paradigm is suggested as one format that could be used to encourage a more organized analysis and presentation of information on the effect of the defendant's disability on his capacity to perform his functions.

The more that commentators, courts, and legislatures suc-

\textsuperscript{133} In Lyles v. United States, 254 F.2d 725, 729-30 (D.C. Cir. 1957), overruled, 471 F.2d 969, 997 (1972), (recast instruction for commitment after finding of not guilty by reason of insanity) the court distinguishes the different tests for sanity:

The test for criminal responsibility focuses on whether the accused was in such a mental condition at the time of the criminal act that he should not be held responsible for his act, a question the jury should answer unless there is no real conflict in the evidence. The test for fitness to stand trial focuses on whether the accused is mentally able at the time of his trial to participate effectively in his defense, a question solely for the judge. The test for commitability focuses on whether the accused is sane at the time of his release from incompetency confinement, since, if he is not, there may be reason to initiate civil commitment proceedings.
ceed in implementing the following objectives, the more vital and accepted the competency-to-stand-trial doctrine will become. First, a set of functions should be developed, defining the kinds of activities a defendant might be expected to perform to satisfy the test for competency to stand trial. Second, each function should be analyzed to identify the attitudes, knowledge, skills, and capabilities a person needs to perform each function. Finally, statutory and decisional tests should be revised to reflect the expanded interpretation of the competency test set forth in *Dusky*, and limiting words should be removed, so that all similarly disabled defendants will be treated similarly, regardless of the source of the dysfunction.

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