

“RE-EVALUATING COMPETENCE TO STAND TRIAL”

Hon. Justice David Collins

ABSTRACT

The current federal law governing a defendant’s competence to stand trial is substantially contained in 18 U.S.C. § 4241 that can be traced to a 1949 statute and, in *Dusky v. United States*, a three paragraph opinion of the Supreme Court, delivered in 1960. The federal statute was initially drafted by a committee of the Judicial Conference of the United States. Thus, material aspects of the federal tests for assessing a defendant’s competence to stand trial were composed by federal judges.

This paper explains why the current federal law concerning a defendant’s competence to stand trial is antiquated and no longer fit for purpose. The deficiencies in the current law primarily stem from the fact that the legislative test is confined to defendants who suffer a “mental disease or defect” that renders them incompetent and fails to address the circumstances of defendants whose incompetence is caused by other factors, including psychological and neurological conditions. The *Dusky* test, while more broadly based than 18 U.S.C. § 4241 also suffers from a number of limitations and has led to conflicting decisions from the Supreme Court and significant uncertainty about its scope. As responsibility for the deficiencies in the current federal law rests almost entirely with the federal judiciary, this paper suggests that federal judges should address the errors of their predecessors and reform the way a defendant’s competence to stand trial is assessed. This can be achieved by the Supreme Court, in an appropriate case, revisiting its decision in *Dusky* and adopting a test that focuses upon a defendant’s ability to effectively participate in their trial. The effective participation test is

derived from jurisprudence from the European Court of Human Rights, and has recently been endorsed by the Law Commission of England and Wales. It is a test that is gaining international traction and is one that would enhance the way the law responds to a significant cohort of defendants in the federal criminal justice system.

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PART I

INTRODUCTION

Overview

The term, “competence to stand trial” refers to a defendant’s ability to “participate” in their trial,¹ and encompasses those who plead guilty² and those who are to be sentenced.³ This paper examines the current federal law governing a defendant’s competence to stand trial in the federal criminal jurisdiction and identifies a number of deficiencies in the current law. It proposes a new test whereby a defendant’s competence to stand trial would be determined by reference to their capacity to participate effectively in their trial.

Summary of the current federal law and its consequences

The development of the federal law concerning a defendant’s competence to stand trial, and its consequences, is the focus of Part II of this paper. The principal federal statute governing a defendant’s competence to stand trial – 18 U.S.C. § 4241 – has been correctly characterised as a “complex enactment”,⁴ that was initially drafted by a committee of the United States Judicial

¹ Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35(4) J. AM. ACAD. PSYCHIATRY & L. S3, S3 (2007).

² By far the vast majority of defendants in the federal criminal justice system plead guilty. In 2016 97.3% of federal offenders pleaded guilty. This rate has been consistent for more than 15 years: U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2016, 4 (May 2017). Some authorities have suggested that because most defendants plead guilty before trial, the term “competence to stand trial” is misleading. They suggest terms such as “adjudicative competence” or “competence to proceed” are more apposite (Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10(3) BEHAV. SCI. & L. 291, 291-316 (1992)); (NORMAN G. POYTHRESS, RICHARD J. BONNIE, JOHN MONAHAN, RANDY OTTO & STEVEN K. HOGE, ADJUDICATIVE COMPETENCE – THE MACARTHUR STUDIES (Ronald Roesch et al. eds., 2002)). The term “competence to stand trial” is however, well ingrained in American jurisprudence as referring to a defendant’s competence at all stages of criminal proceedings, from the laying of charges to sentencing: *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975); *Godinez v. Moran*, 509 U.S. 389 (1993). That is the way the competence to stand trial concept is referred to in this paper.

³ *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997).

⁴ FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 51 (Mar. 2013).

Conference between 1942 and 1946 and enacted in 1949. That legislation applies only to defendants suffering from “a mental disease or defect” that renders him or her “mentally incompetent to the extent that [they are] unable to understand the nature and consequences of the proceeding against [them] or to assist properly in [their] defense”. Deficiencies in the current federal legislation were not alleviated to any significant extent when, in 1960, the Supreme Court delivered its opinion in *Dusky v United States*,⁵ the Court’s leading decision concerning a defendant’s competence to stand trial. In its three paragraph opinion the Court said a defendant’s competence to stand trial depends upon:⁶

“... whether he [or she] has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding – and whether he [or she] has a rational as well as a factual understanding of the proceedings against him [or her].”

In *Drope v. Missouri*,⁷ the Supreme Court summarized aspects of the *Dusky* test when it said a defendant must have the “capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing [their] defense”. The emphasis is upon the defendant’s capacity, thus, conscious decisions by a defendant not to understand, consult or assist their counsel do not satisfy the *Dusky* test.⁸ It is the defendant who carries the burden of demonstrating, on the preponderance of the evidence, that they are not competent to stand trial.⁹ Research indicates that in the United States, between 50,000 and 60,000 defendants undergo competence assessments each year.¹⁰ Of those who are assessed, approximately 15,000 defendants are found to be not competent to stand trial.¹¹

⁵ *Dusky v. United States*, 362 U.S. 403 (1960).

⁶ *Id.* at 402.

⁷ *Drope*, 420 U.S. at 171.

⁸ *Bell v. Evatt*, 72 F.3d 421, 432 (4th Cir. 1995); *see also* *United States v. Battle*, 613 F.3d 258, 263 (D.C. Cir. 2010).

⁹ *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005).

¹⁰ Douglas R. Morris & Nathaniel J. DeYoung, *Psycholegal Abilities and Restoration of Competence to Stand Trial*, 30 BEHAV. SCI. & L., 710, 710-728 (2012); Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, *A Meta-Analytic Review of Competency to Stand Trial Research*, 17(1) PSYCHOL. PUB. POL’Y & L. 2, 1-53 (2011); Mossman, et al., *supra* note 1, at S3.

¹¹ Pirelli, et al., *supra* note 10, at 3; Patricia A. Zapf & Ronald Roesch, *Competency to Stand Trial: A Guideline for Evaluators*, in THE HANDBOOK OF FORENSIC PSYCHOLOGY 305-331 (Allen K. Hess & Irving B. Weiner

The consequences of a finding that a defendant is not competent to stand trial includes significant curtailment of their liberty, which is elaborated on in Part II. Thus, a finding that a defendant is not competent to stand trial is rarely perceived as a victory for the defendant. It is therefore not surprising to find cases in which a defendant has expressly instructed their attorney not to challenge their competence to stand trial.¹²

Summary of the key deficiencies in the current law

The jurisprudential and institutional difficulties arising from the deficiencies in the federal legislation and case law concerning a defendant's competence to stand trial are examined in Part III of this paper. Those deficiencies include the narrowness of the criteria for a defendant to be declared incompetent to stand trial. This has meant that many defendants with significant mental illness have been found competent to stand trial.¹³ This in turn has contributed to an intolerable phenomenon in United States prisons, namely the "criminalization of mental illness".¹⁴ One estimate suggests there are ten times as many people with mental illnesses in jails and prisons in the United States as there are in all psychiatric hospitals.¹⁵ It has been

eds., 3rd ed. 2006); Daniel C. Murrie et al., *Opinion Formation in Evaluation of Competence to Stand Trial, Results from 8,146 Evaluations*, 24 BEHAV. SCI. & L. 113, 113-132 (2006). There are few published statistics concerning the frequency of competence hearings in the United States. The Administrative Office of the United States Courts has stated that Federal Magistrate Judges conducted 610 criminal competency proceedings in the 12 month period ending September 30 2016, an increase from the 439 competency hearings they conducted in the preceding 12 month period. The Administrative Office does not however publish statistics on the number of competency hearings conducted by Federal District Court Judges. It is therefore not possible to accurately determine what proportion of the 77,357 criminal proceedings commenced in the federal courts in the year ending September 30 2016 resulted in competency hearings. See United States Courts: Judicial Business Table M-4 U.S. District Courts Criminal Pre-Trial Matters Conducted by U.S. Magistrate Judges Under 28 U.S.C. § 636(b) During the 12-Month Period Ending September 30, 2015 and 2016 and Judicial Business 2016: Caseload Highlights: U.S. District Courts: Criminal Filings, <http://www.uscourts.gov/statistics-reports/judicial-business-2016-tables> (last visited June 12, 2017).

¹² See *State v. Johnson*, 133 Wis. 2d 207, 395 N.W. 2d 176 (1986) discussed in Rodney J. Uphoff, *Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, WIS. L. REV. 65, 77-98 (1988).

¹³ For example, *United States v. Riggin*, 732 F. Supp. 958 (S.D. Ind. 1990), *United States v. Mitchell*, 706 F. Supp. 2d 1148 (D. Utah. 2010) at 1193 and *Bradley v. Preston*, 263 F. Supp. 283 (D.C. Cir. 1967).

¹⁴ RISDON N. SLATE, JACQUELINE K. BUFFINGTON-VOLLUM & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM* 43 (2d ed. 2013).

¹⁵ E. FULLER TORREY ET AL., *THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY*, (Treatment Advocacy Center, 2014).

suggested there are nearly 1.2 million people with mental illnesses in jails and prisons throughout the United States.¹⁶

The narrowness of the qualifying criteria in the current federal tests governing a defendant's competence to stand trial has also led to ad hoc and at times inconsistent outcomes where defendants are incapacitated by conditions that do not fit into the current incompetency criteria. Defendants with profound personality disorders (which are not a mental disease or defect) and those who suffer from neurological disorders, such as amnesia are two classes of defendants that have created challenges for federal courts called upon to determine if such defendants lack the requisite competence to stand trial. As explained in Part III, these cases have led to inconsistent outcomes and illustrate the difficulties caused by the preoccupation of the federal law with the causes of a defendant's possible incompetence rather than the effects of a defendant's condition upon their ability to participate in their trial. Other forms of incapacity are not pursued in this paper but could also be examined to demonstrate the difficulties generated by the federal laws myopic focus on the causes of a defendant's incompetence to stand trial. For example, defendants who are incapacitated through medication are dealt with differently from defendants who are incapacitated by using illegal drugs, even though both categories of defendants may exhibit identical symptoms and suffer the same inability to participate in their trials.¹⁷ Similarly, defendants who suffer from physical disabilities¹⁸ such

¹⁶ Jillian Peterson, *Mental Illness Not Usually Linked to Crime, Research Finds* (Am. Psychol. Ass'n, 2014), <http://www.apa.org/news/press/releases/2014/04/mental-illness-crime.aspx>.

¹⁷ In *Whitehead v. Wainwright*, 609 F.2d 223 (5th Cir. 1980) a defendant who had been administered tranquilizers and subsequently fell asleep during his trial was held not to have been competent to stand trial. In *Watts v. Singletary*, 87 F.3d 1282 (11th Cir. 1996) a defendant who consistently fell asleep during his trial after using illicit drugs was held by a majority of the Eleventh Circuit Court of Appeals to have been competent to stand trial. The issue as to whether Watts should have been treated differently from Whitehead because Watts had voluntarily used incapacitating illicit drugs was not explored in the majority's judgment.

¹⁸ Physical incompetence is not covered by any federal competency statute and is treated as an issue for trial courts to assess on a case by case basis by reference to five factors identified in *United States v. Doran*, 328 F. Supp. 1261, 1263 (S.D.N.Y. 1971). Those factors are the medical evidence, the defendant's activities outside of the courthouse, the possibility of measures to minimise the risks to the defendant's health when subjecting them to trial, the temporary or permanent character of the physical problem and the magnitude

as deafness¹⁹ or cancer²⁰ can face difficult hurdles when demonstrating their incapacity to stand trial.

Also troubling is the assessment of unrepresented defendants²¹ to stand trial. Two decisions from the Supreme Court concerning the competence of unrepresented defendants to stand trial²² have produced a disconcerting body of jurisprudence that attempts to draw a distinction between a defendant's competence to plead guilty and their competence to conduct a defended hearing without counsel. The difficulties created by the approaches taken by the Supreme Court in these cases are examined in further detail in Part III.

Further issues have developed in relation to the way the concept of rationality has unfolded in cases decided after *Dusky*. The requirement in the *Dusky* test that a defendant have the ability to consult with their lawyer with a "reasonable degree of rational understanding" and have "a rational ... understanding of the proceedings against [them]" has not been universally understood or embraced. Subsequent decisions from the Supreme Court have generated confusion about what the Supreme Court meant when it referred to a defendant having a "rational understanding".²³ This issue is explored in Part III which also contains an explanation

and seriousness of the case, i.e., the public interest in continuing with the trial. *Refer also* United States v. Knohl, 379 F.2d 427, 436 (2nd Cir. 1967) cert denied 389 U.S. 973, 88 S. Ct. 472 (1967); United States v. Jones, 876 F. Supp. 395, 397 (N.D.N.Y. 1995); United States v. Gigante, 982 F. Supp. 140 (E.D.N.Y. 1997).

¹⁹ In *State v. Burnett*, No.20496 (Ohio. Ct. App. 2005) a defendant's inability to communicate because of his deafness was equated with mental incompetence. In *Jones*, 876 F. Supp. a deaf defendant who could not understand sign language was held to be "physically incompetent" to stand trial.

²⁰ In *United States v. DeNunzio*, 174 F. Supp. 3d 582 (D. Mass. 2016) a defendant who was recovering from chemotherapy was held to be competent to stand trial because requiring him to stand trial would not endanger his life or health. In contrast, in *United States v. Reddy*, No.01 CR0058(LTS) (S.D.N.Y. 2003) a defendant suffering cancer that the government argued was in remission was held to be not competent to stand trial.

²¹ The terms *pro se* and "self-represented" are not used in this paper. Instead defendants who do not have the benefit of counsel are described as being "unrepresented" as this more accurately describes the reality of their circumstances.

²² *Godinez v. Moran*, 509 U.S. 389 (1993) & *Indiana v. Edwards*, 554 U.S. 164 (2008).

²³ *Drope v. Missouri*, 420 U.S. 162 (1975) and *Godinez*, 509 U.S..

of the importance of a defendant having a rational understanding of the relevant aspects of their trial in order to be competent to stand trial.

There are also challenges under the current law for clinicians engaged in assessing a defendant's competence to stand trial. Assessing defendants whose competence to stand trial has become "a core skill" in forensic psychiatry.²⁴ Competency to stand trial evaluations are also now "by far the most frequently adjudicated" form of competency in the judicial system.²⁵ The frequency and importance of assessments of a defendant's competence to stand trial places considerable pressure on health professionals engaged in these assessments to ensure their recommendations are sound. A closely related deficiency in the current federal law concerning a defendant's competence to stand trial relates to the institutional difficulties that arise from the way in which a defendant's competence is currently assessed. This issue has evolved as psychologists and psychiatrists have developed screening instruments, of varying qualities, that have become the focal point of assessments of a defendant's competence to stand trial. The defects in screening instruments and the importance of lawyers and judges in testing the validity of the conclusions reached by health professionals is examined in further detail in Part III.

The analysis in Part III leads to the conclusion that the current federal law governing a defendant's competence to stand trial is antiquated and no longer fit for purpose. The challenge that then arises is to propose a new test for assessing a defendant's competence to stand trial. That assignment is undertaken in Part IV of this paper.

²⁴ Mossman, et al., *supra* note 1.

²⁵ GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (3rd ed. 2007); Derek Chiswick, *Fitness to Stand Trial and Plead, Mutism and Deafness*, in 171 *PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY* (Robert Bluglass and Paul Bowden eds., 1990).

Guiding principles

Any test for assessing a defendant's competence to stand trial must be firmly grounded upon an understanding as to why the criminal justice system should only place on trial those who are competent. The following four principles underpin the requirement that only defendants who are competent to do so, should stand trial.

First, defendants who are forced to stand trial in circumstances where they are not competent to do so are deprived of most of their basic constitutional fair trial rights. These rights, which can be traced from the Code of Hammurabi,²⁶ through Chapter 39 of the Magna Carta,²⁷ to the Fifth, Sixth and Fourteenth Amendments of the Constitution²⁸ are recognised internationally as being fundamental to a fair and legitimate trial.²⁹ As Justice Kennedy emphasised in *Riggins v Nevada*:

“Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so ...”³⁰

²⁶ DINAH SHELTON, *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 165 (2013).

²⁷ TOM BINGHAM, *THE RULE OF LAW* 10 (Penguin 2010) *referring to* Magna Carta (1215) chpt 39: “No free man shall be arrested or imprisoned or deprived of his freehold or outlawed or banished or in any way ruined, nor will we take or order action against him, except by the lawful judgment of his equals and according to the law of the land.”

²⁸ U.S. Const. amend V guarantees in criminal proceedings the right to a jury, forbids “double jeopardy” and protects against self-incrimination. It requires “due process of law” to be part of any proceeding denying a citizen “life, liberty or property”. U.S. Const. amend. VI requires an accused “enjoy the right to a speedy and public trial, by an impartial jury... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense”. U.S. Const. amend. XIV prescribes “due process of law” and “equal protection of the laws”.

²⁹ G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948), arts. 7, 8, 10 and 11 and Prot. Nos. 11 and 14 European Convention on Human Rights (Nov. 4 1950), art. 6.

³⁰ *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992).

The key rationale for the competence to stand trial requirement is that it promotes fairness for a defendant by protecting their right to defend themselves and ensures that they are not inappropriately exposed to the risks of a criminal trial without access to fair trial rights.³¹

Second, the integrity and legitimacy of the criminal justice system hinges in part upon holding those who have breached criminal laws accountable for their wrongdoing. In order to hold a defendant truly accountable they must understand the reasons why they have been prosecuted, convicted and punished. Absent such understanding, the criminal justice system is merely a vehicle to appease the aggrieved rather than to genuinely punish an offender. This concept also underpins decisions of the Supreme Court banning the execution of defendants with profound mental illness.³²

Third, allowing the prosecution of an incompetent defendant also undermines society's interest in having a reliable criminal justice system and creates a greater risk of unreliable verdicts.³³ The need for the state to uphold the integrity and legitimacy of the criminal justice system by ensuring only competent defendants are tried was emphasised in the following way in *United States v. Chisholm*.³⁴

³¹ *Cooper v. Oklahoma*, 517 U.S. 348, 349 (1996):

“An erroneous determination of competence has dire consequences for a defendant who has already demonstrated that he is more likely than not incompetent, threatening the basic fairness of the trial itself. A defendant’s inability to communicate effectively with counsel may leave him unable to exercise other rights deemed essential to a fair trial-e.g., choosing to plead guilty, waiving his privilege against compulsory self-incrimination by taking the witness stand, or waiving his rights to a jury trial or to cross-examine witnesses- and to make a myriad of smaller decisions concerning the course of his defense. These risks outweigh the State’s interest in the efficient operation of its criminal justice system...”.

See also Stephen J. Morse, *Involuntary Competence*, 21 BEHAV. SCI. & L. 313, 313-328 (2003).

³² *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 572 U.S. (2014); *Moore v. Texas*, 581 U.S. (2017); see Barry C. Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOSFSTRA L. REV. 463, 465 (2003):

“Some nominally responsible actors are not as blameworthy as other offenders, and the criminal law formally or informally mitigates the punishment of those with ‘diminished capacity’. Because the idea of deserved punishment emphasizes culpability and blameworthiness, the criminal law confronts the special cases of those who are criminally responsible and yet manifestly impaired, mentally ill, or developmentally different from competent adult offenders”.

³³ *Cooper*, 517 U.S. at 367.

³⁴ *United States v. Chisholm*, 149 F. 284 (C.C.S.D. Ala. 1906) at 288.

“It would be ... a reproach to justice and our institutions, if a human being ... were compelled to go to trial at a time when he is not sufficiently in possession of his mental faculties 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 unwhipped 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.”

The reliability of the criminal justice system is founded in part upon the adversarial system in which the prosecution and defense are afforded the opportunity to challenge the veracity and reliability of opposing evidence, thereby enhancing the reliability of the ultimate verdict. Trying and convicting an incompetent defendant will not however serve society’s greater interest in convicting only those who are guilty if the defendant, because of their incompetence, is unable to advance an available defense.

Finally, the American criminal justice system, like that in cognate jurisdictions, is founded upon respect for the autonomy and dignity of all participants in a trial.³⁵ A defendant’s right to autonomy and self-determination is compromised if they are placed on trial in circumstances where they lack the capacity to make trial decisions that are reserved for them and not their lawyer.³⁶ Decisions in this category include the defendant’s right to decide how they plead,³⁷ whether they testify,³⁸ whether to waive trial by jury³⁹ and adduce evidence.⁴⁰ These rights do not really exist if a defendant lacks the capacity to exercise them.

³⁵ R v. Swain, [1991] 1 S.C.R. 933 (Can.).

³⁶ Florida v. Nixon, 543 U.S. 175 (2004); Faretta v. California, 422 U.S. 806 (1975). See Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L & CRIMINOLOGY 885, 911 (2011):

“... an incompetent defendant is incapable of exercising the autonomy and self-determination expected of criminal defendants who must make crucial decisions”.

³⁷ Brookhart v. Janis, 384 U.S. 1 (1966).

³⁸ Rock v. Arkansas, 483 U.S. 44 (1987).

³⁹ Adams v. United States *ex rel* McCann, 317 U.S. 269 (1942).

⁴⁰ Riggins v. Nevada, 504 U.S. 127 (1992). See *Faretta*, 422 U.S. at 834, in which it was emphasised that “The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction”. See also Erica J. Hashimoto, *Resurrecting Autonomy: the Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147 (2010).

To summarise, underpinning the requirement that only a competent defendant should stand trial are the principles that a defendant should be entitled to rights essential to a fair trial; be held genuinely accountable for any wrongdoing; be tried in a reliable criminal justice system; and be free to exercise their autonomy and dignity as a trial participant. These governing principles are put at risk if the law concerning a defendant's competence to stand trial is not fit for purpose.

A proposed new test

With these governing principles in mind, Part IV proposes a new test. The focus of any assessment of a defendant's competence to stand trial should be upon their ability to participate effectively in their trial. The effective participation test is a unitary test that covers all phases of a criminal trial and involves a judicial assessment of four functions:⁴¹

Understanding: this relates to a defendant's capacity to understand relevant information including the charge they are facing, the trial process, the role of participants in the trial, evidence, and the purpose and possible outcomes of the trial.

Evaluation: this concerns a defendant's capacity to process information, particularly evidence, the case against them, trial directions and to evaluate the impact of that information on the defense.

Decision making: this concerns the defendant's capacity to make decisions normally required of the defendant during the course of a trial, including how to plead, whether to give evidence or put forward a particular defense. This also concerns the ability of an unrepresented defendant to conduct their defense in a way that does not breach their fair trial rights.

Communication: this concerns a defendant's capacity to communicate their account of their case, and includes their capacity to instruct their lawyer and to give evidence if they elect to do so.

Each of these functions must be able to be carried out rationally, that is to say, in a way that is not affected by delusions or other conditions that may impact upon a defendant's mental

⁴¹ Russ Scott, *Fitness to Stand Trial in Queensland*, 14(2) PSYCH., PSYCHOL. L. 327, 341 (2007).

functioning. Where necessary, these functions must also be able to be carried out in real time, particularly where a defendant is required to understand, evaluate, make decisions and communicate in response to evidence and issues that arise during the course of their trial. The effective participation test, which owes its origins to jurisprudence developed by the European Court of Human Rights involves a judicial assessment of a defendant's capacity to understand and rationally evaluate key information during a criminal trial and then communicate their decisions in a rational manner regardless of the causes of any condition that may impact upon a defendant's competence to stand trial.

Part V of this paper builds upon the conclusions reached in Parts III and IV and examines why the effective participation test offers significant advantages over the current federal tests for assessing a defendant's competence to stand trial. Those reasons are linked to the four governing principles set out in this introduction.

State legislation

This paper focuses upon the federal legislation governing a defendant's competence to stand trial. It is not feasible to undertake a comprehensive analysis of state legislation governing the same topic. The appendix to this paper contains a summary of the key legislative provisions found in each of the states relating to a defendant's competence to stand trial. That appendix demonstrates that 33 states have provisions similar to 18 U.S.C § 4241 and 12 states have legislation that reflects the test set out by the Supreme Court in *Dusky*. Thus, while the focus of this paper is upon the federal law, many of the conclusions drawn can apply with equal effect to those states with provisions similar to 18 U.S.C § 4241 and the *Dusky* standard.

PART II

THE CURRENT LAW, HOW IT EVOLVED AND ITS CONSEQUENCES

To understand the deficiencies in the current federal law governing a defendant's competence to stand trial and why reform is desirable, it is helpful to first understand the current law and how it evolved. Learning from our past also assists in deciding what path we should take in the future. Part II of this paper examines the common law origins of the current federal law and the development of 18 U.S.C. § 4241. It also contains an analysis of *Dusky* and an explanation of the key features of the current law and its consequences.

Early common law

The common law of the 17th century recognised that:

“If a man in his sound memory commits a capital offense and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment ...”⁴²

Many of the early leading common law cases concerning a defendant's competence to stand trial involved defendants who were deaf and mute. In such cases, a jury would be empanelled to determine if the defendant was “mute of malice” or mute *ex visitatione Dei* (by visitation of God). Those adjudged “mute of malice” were subjected to torture in order to force a plea.⁴³ Those who were found to be mute by visitation of God would have a plea of not guilty entered on their behalf on the assumption that was the plea they would have entered if they could have done so. *Dyson's case* is an example of an early 19th century case in which the defendant was

⁴² SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 34-35 (Sollom Emlyn ed., 1736). The first publication of HALE'S PLEAS OF THE CROWN was based upon the manuscript left by him at his death in 1676, see SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 489-90 (Vol.7., London: Methuen, 1924). See also *Drope v. Missouri*, 420 U.S. 162 (1975) at 903 (quoting 4 W. Blackstone, Commentaries *24). The word “advisedly” used by Hale and Blackstone was defined at the time to mean “deliberately; purposely; by design; prudently”. Refer “Advisedly”, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (ed., Brandi Besalke) <http://johnsonsdictionaryonline.com/?p=15235> (last visited July 13, 2017).

⁴³ MELTON ET AL., *supra* note 25, at 126.

found to be mute by visitation of God. It became evident during her trial however, that Dyson could not understand basic trial procedures, such as how to challenge jurors. Parke J instructed the jury that if they found Dyson lacked “intelligence enough to understand the matter of the proceedings against her” due to “the defect of her faculties” then the jury “ought to find her not sane”.⁴⁴ This was the verdict the jury duly returned. *Dyson’s case* foreshadowed a distinction which emerged in 20th century jurisprudence between factual competence (having the ability to plead) and the more refined concept of decisional competence (having the ability to for example, give evidence and be cross-examined). Five years after *Dyson’s case* Alderson B gave his seminal direction in *R v. Pritchard*,⁴⁵ which also concerned a deaf and mute defendant who was found to be mute “by visitation of God”. Alderson B instructed the jury to decide whether or not the defendant had:

“... sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defense – to know that he might challenge any of you to whom he may object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue ... if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defense to the charge; you ought to find that he is not of sane mind. It is not enough, that he may have a general capacity of communicating on ordinary matters.”⁴⁶

The test in *Pritchard* could be distilled to three questions; did the defendant understand the nature and object of the proceedings? Did the defendant understand their relationship to the proceedings? Could the defendant assist in their defense?⁴⁷

Alderson B’s directions in *Pritchard* recognized it was not sufficient for a defendant to simply have the capacity to plead. The common law at the time also required that a trial not continue

⁴⁴ *Esther Dyson’s Case*, (1831) 7 Car.&P. 305, 307 (Eng.).

⁴⁵ *R v. Pritchard*, (1836) 173 Eng. Rep. 135, 7 Car.&P. 303. *Pritchard* was ultimately found to be insane and he was confined to a prison pursuant to the Criminal Lunatics Act 1800 (UK).

⁴⁶ *Id.* at 304.

⁴⁷ P. S. Lindsay, *Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada*, 19 CRIM. L.Q. 303, 306–307 (1976-1977).

if the defendant lacked the cognitive ability to participate in their trial. Also significant is how the early common law blurred a finding of competence to stand trial with insanity. As will be explained later, vestiges of this aspect of the early common law can still be seen in 18 U.S.C. § 4241.

The *Pritchard* requirements for being found unfit to stand trial evolved so that today, in many common law jurisdictions,⁴⁸ six criteria are usually referred to when determining whether or not a defendant is competent to stand trial.⁴⁹

The *Pritchard* test for competence to stand trial was adopted in 19th century American cases⁵⁰ where the *Pritchard* test was also construed to mean that a defendant lacked the requisite competence to stand trial if he or she did not have the intellectual abilities to advance a “rational defense”. The requirement that a defendant have the ability to rationally understand the proceedings, confer with counsel and defend themselves can be traced to *Youtsey v United States*,⁵¹ in which the Sixth Circuit Court of Appeals ordered the retrial of a defendant who had been found guilty in circumstances where he suffered debilitating epilepsy that rendered him “unable to advise his counsel as to his defense”.⁵² In its opinion, the Court of Appeals explained that when issues arose concerning a defendant’s capacity to stand trial, the trial court must determine whether or not “the accused [could] make a rational defense”.⁵³ The Court of

⁴⁸ See, e.g., in the State of Victoria, Australia *R v. Presser* [1958] V.R. 45 (Austl.).

⁴⁹ (1) the ability to plead to the indictment;
(2) the ability to understand the course of the proceedings;
(3) the ability to instruct a lawyer;
(4) the ability to challenge a juror;
(5) the ability to understand the evidence; and
(6) the ability to give evidence.

Refer *R v. M (John)*, [2003] EWCA Crim 3452 (Eng.), 20.

⁵⁰ *Freeman v. People*, 47 Am. Dec. 216 (N.Y. 1847) and *State v. Harris*, 78 Am. Dec. 272, 272-275 (N.C. 1860).

⁵¹ *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899).

⁵² *Id.* at 942.

⁵³ *Id.* at 943, citing 2 Bish.Cr.Proc. at § 666; *Guagando v. State*, 41 Tex. 627 (1874); *R v Frith*, 22 How.Str.Tr. 307; *Reg. v. Berry*, 1 Q.B. Div. 447-450; *R v. Pritchard*, 7 Car.&P. 303.

Appeals also said that a trial court should ascertain if the defendant has “the mental capacity ... to understand the proceedings against him, ... rationally advise with his counsel as to his defense ...” and “rationally defend himself”.⁵⁴ The reference in *Youtsey* to a defendant having the capacity to “rationally advise with his counsel as to his defense” arguably echoed that part of the early common law described by Hale and Blackstone when they spoke of the need for a defendant to have the capacity to plead “advisedly” to an indictment.⁵⁵ The concept of rationality also featured in *United States v. Chisholm*,⁵⁶ in which the issue as to the defendant’s competence to stand trial was left to a jury which was directed to consider whether, he had “such possession and control of his mental powers, including the faculty of memory, as [would] enable him to testify intelligently and give his counsel all the material facts ... and [had] such poise of his faculties as [to] enable him to rationally and properly exercise all the rights which the law [gave] ...”.⁵⁷ Aspects of the rationality criterion articulated in *Youtsey* and reaffirmed in *Chisholm* became interwoven into federal jurisprudence and ultimately became embedded in the Supreme Court’s opinion in *Dusky*. As it will be explained in Part III, the rationality criterion remains part of the federal law today, albeit in a confused and diluted form.

18 U.S.C. § 4241

In 1949 Congress passed An Act To Provide for the Care and Custody of Insane Persons Charged with or Convicted of Criminal Offenses Against the United States, and for Other Purposes. That statute was initially incorporated into federal law as 18 U.S.C. § 4244.⁵⁸ The provisions of that Act were amended when Congress passed the Comprehensive Crime Control Act 1984 and became incorporated into federal law as 18 U.S.C. § 4241.⁵⁹ When first enacted,

⁵⁴ *Youtsey*, 97 F. at 944, 947.

⁵⁵ Besalke, *supra* note 42.

⁵⁶ *United States v. Chisholm*, 149 F. 284 (C.C.S.D. Ala. 1906).

⁵⁷ *Id.* at 287.

⁵⁸ 535, 63 Stat. 686 (1949).

⁵⁹ 18 U.S.C. § 4241 (2006). Determination of mental competency to stand trial to undergo post-release

the federal legislative test referred to a defendant lacking competence to stand trial by reason of them being “presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense”. While this aspect of the legislation has become more refined, the essential features of the 1949 legislation may still be seen in 18 U.S.C. § 4241.

proceedings¹

- (a) Motion to determine competency of defendant.--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.
- (b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).
- (c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).
- (d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—
 - (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and
 - (2) for an additional reasonable period of time until—
 - (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or
 - (B) the pending charges against him are disposed of according to law;whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

- (e) Discharge.--When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.
- (f) Admissibility of finding of competency.--A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

The origins of this legislation can be traced to a meeting of the Judicial Conference of the United States in September 1942, during which a committee of federal judges was appointed to study, in co-operation with the Attorney-General, “The Treatment Accorded by the Federal Courts to Insane Persons Charged with Crime”.⁶⁰ Seven senior judges, including Chief Judge Hand, made up the committee that was chaired by Chief Judge Magruder. The Judicial Conference proceeded on the basis that issues concerning a defendant’s competence to stand trial should be considered in conjunction with an examination of the way insane persons were dealt with in federal courts. The reasons for this can be traced to an arguable legal lacuna that prevented federal authorities detaining criminal defendants who were insane because, jurisdiction over such persons was thought to reside exclusively within the *parens patriae* jurisdiction of the states.⁶¹ The committee’s final report reflected a degree of merger of the treatment of insane defendants and the assessment and disposition of those defendants who lack competence to stand trial by reason of mental illness. The committee deliberated until January 1946 when its report and a draft bill was circulated to all federal judges for comment. In October 1946 the Judicial Conference adopted with some amendments the draft bill prepared by the committee.⁶² The draft bill was then forwarded to Congress by the Attorney-General and passed into law on September 7, 1949.

The reference in 18 U.S.C. § 4241 to a defendant suffering “from a mental disease or defect ” bears some similarity to aspects of the *M’Naghten* test for insanity.⁶³ That test refers to a

⁶⁰ HARLAN F. STONE ET AL., REPORT OF THE JUDICIAL CONFERENCE OF THE U.S. 18-19 (Sept. 1942). For a description of the role of the Judicial Conference of the United States in developing the federal legislation see *Greenwood v. United States*, 219 F.2d 376 (8th Cir. 1955).

⁶¹ *Federal Hospitalization of Insane Defendants Under Section 4246 of the Criminal Code*, 64 YALE L.J. 1019, 1070 (1955); CALVERT MAGRUDER ET AL., JUDICIAL CONFERENCE OF THE UNITED STATES REPORT OF COMMITTEE TO STUDY TREATMENT ACCORDED BY FEDERAL COURTS TO INSANE PERSONS CHARGED WITH CRIME 9 (1945); *Hearing Before the Sub-Committee of the Senate Committee on the Judiciary on S.850*, 80th Cong., 2d Sess. 5 (1945).

⁶² FRED M. VINSON ET AL., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 18 (Oct. 1946), <http://www.uscourts.gov/about-federal-courts/reports-proceedings-1940s> (last visited June 13, 2017).

⁶³ *M’Naghten’s case*, [1843-60] All Eng. Rep. 229 (HL).

defendant not being guilty by reason of insanity if at the time of the alleged offending the defendant was suffering “such a *defect of reason, from disease of the mind* as not to know the nature and quality of the act he was doing” (emphasis added). More significantly, the phrase “mental disease or defect” in 18 U.S.C. § 4241 replicated that part of the test for insanity adopted in New Hampshire in 1870 under which a defendant was not criminally responsible if their unlawful act was the product of mental disease or defect.⁶⁴ That test was incorporated into federal law by the Court of Appeals for the District of Columbia Circuit in *Durham v United States*⁶⁵ (the Durham Rule), but ceased to be part of the federal law following the passing of the Insanity Defense Reform Act 1984. The federal insanity defense now requires a defendant relying on the defense of insanity to prove that “at the time of the commission of the acts constituting the offense”, the defendant, “as a result of severe mental disease or defect, was unable to appreciate the nature or quality of the wrongfulness of his acts.”⁶⁶ Thus, the federal statutory tests for insanity and lack of competence to stand trial are both confined to defendants who suffer, albeit to different degrees, a mental disease or defect. This concurrence between the test for insanity and lack of competence to stand trial is a lingering vestige of the early 19th century common law under which those who were found incompetent to stand trial were deemed to be insane.

*Dusky v United States*⁶⁷

In 1958 Dusky, who had a history of psychiatric illness, was charged with kidnapping a 15 year old girl in Kansas and taking her to Missouri, where she was raped by two of Dusky’s accomplices. Following his arrest he was referred for a mental health evaluation under the

⁶⁴ State v. Pike, 49 N.H. 399 (1870) and State v. Jones, 50 N.H. 369, 398 (1871).

⁶⁵ Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

⁶⁶ 18 U.S.C. § 17 (1986).

⁶⁷ Dusky v. United States, 362 U.S. 403 (1960).

precursor to 18 U.S.C. § 4241. Dusky, who denied all memory of the events surrounding the alleged kidnapping, was found by one psychiatrist to be suffering schizophrenia but nevertheless “orientated as to time, place and person”. A second psychiatrist reported that Dusky could not “properly assist” his trial counsel because of his inability to “properly interpret the meaning of the things that had happened”. A third psychiatrist confirmed Dusky suffered from schizophrenia. The United States District Court for the Western District of Missouri ruled Dusky was competent to stand trial because he was orientated in time and place and because he was able to provide some information to his attorney about the kidnapping incident. Dusky was convicted and sentenced to 45 years’ imprisonment. The Eighth Circuit Court of Appeals upheld Dusky’s conviction and sentence.⁶⁸

In a three paragraph opinion, the Supreme Court granted Dusky’s petition for certiorari, quashed his conviction and remanded his case back to the District Court for a new hearing to determine if he was competent to stand trial.⁶⁹ The brevity of the Court’s opinion renders it difficult to extract significant assistance from the Court’s decision. More assistance can be derived from the Solicitor-General’s brief, which the Supreme Court adopted when issuing its opinion.

The Solicitor-General’s brief⁷⁰ set out his concerns about the equivocal nature of the psychiatric evidence relating to Dusky’s competence to stand trial and that the trial court appeared to have given insufficient weight to the medical evidence that Dusky was suffering from delusions and hallucinations and required tranquilizers during his trial. The Solicitor-General was also

⁶⁸ *Dusky v. United States*, 271 F.2d 385 (8th Cir. 1959).

⁶⁹ *Dusky*, 362 U.S. Dusky was again found to be competent to stand trial. He was convicted following his retrial and sentenced to 20 years’ imprisonment; *ENCYCLOPAEDIA OF CLINICAL NEUROPSYCHOLOGY* 904 (Jeffrey S. Kreutzer, John DeLuca & Bruce Caplan eds., 2011).

⁷⁰ J. Lee Rankin, Solicitor General, Memorandum for the United States In the Supreme Court of the United States, No. 504 Misc; *Dusky*, 362 U.S., 1-16 (Mar. 1960).

concerned that the trial judge had considered it sufficient that Dusky was orientated as to time and place and had some recollection of events. The brief filed by the Solicitor-General records:

“The test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her].”⁷¹

In its decision the Court agreed in all respects with the position argued for by the Solicitor-General. The Court agreed that the record did not sufficiently support the finding that Dusky was competent to stand trial and that the trial judge required more information before directing that Dusky’s trial continue. The Court also agreed that it was not sufficient for the trial judge to have found that Dusky was “orientated in time and place and had some recollection of events”. Finally, the Court adopted the Solicitor-General’s recommended test (set out in the preceding paragraph) for determining whether or not a defendant is competent to stand trial.

Some commentators have suggested that there are just two limbs to the *Dusky* test, namely, “the defendant’s capacity to understand the criminal process as it applies to him or her ... and the defendant’s ability to function in that process, primarily through consulting with counsel in the preparation of a defense”.⁷² Some other authorities have suggested the *Dusky* test may have three discrete requirements,⁷³ while others have suggested that in its subsequent opinion in *Drope v Missouri*,⁷⁴ which is briefly examined in the following paragraph, the Supreme Court added a further limb to the *Dusky* test, namely an ability “to assist in preparing [a] defense”.⁷⁵

⁷¹ Rankin, *supra* note 70, at 11.

⁷² MELTON ET AL., *supra* note 25; Alan R. Felthous, *Competence to Stand Trial Should Require Rational Understanding*, 39 J. AM. ACAD. PSYCHIATRY & L. 19, 19-30 (2011).

⁷³ RICHARD ROGERS & DANIEL W. SHUMAN, FUNDAMENTALS OF FORENSIC PRACTICE: MENTAL HEALTH AND CRIMINAL LAW (2006). Those requirements are that a defendant have:

- (1) sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding;
- (2) a factual understanding of the proceedings; and
- (3) a rational understanding of the proceedings.

⁷⁴ *Drope v. Missouri*, 420 U.S. 162 (1975).

⁷⁵ *United States v. Duhon*, 104 F. Supp. 2d 663 (W.D. La. 2000); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 539-601 (1993); AMERICAN BAR

The confusion that has prevailed in relation to the federal tests for assessing a defendant's competence to stand trial is further demonstrated by the erroneous suggestion that when Congress passed 18 U.S.C. § 4241 it "codified" *Dusky*.⁷⁶

In *Drope*,⁷⁷ the Court allowed an appeal from the Missouri Court of Appeals,⁷⁸ which had upheld Drope's conviction for raping his wife. At issue was whether Drope had been deprived of his right to a fair trial when the trial judge declined to conduct a competency hearing prior to and during Drope's trial. There was, prior to trial, psychiatric evidence that raised questions about Drope's competence to stand trial. Those issues were compounded when, during the course of the trial, Drope attempted to take his own life and was hospitalized for the remaining period of his trial. The Missouri state legislation governing the competence of a defendant to stand trial is in all material respects the same as 18 U.S.C. § 4241.⁷⁹ In delivering the Court's opinion, Chief Justice Burger reaffirmed that in federal cases, the test for determining a defendant's competence to stand trial was that set out by the Court in *Dusky*. The Chief Justice then paraphrased his understanding of the law in the following way:

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."⁸⁰

The Chief Justice's summary of *Dusky* made no reference to the "rationality" components of the *Dusky* test. This was because the Missouri statute that governed *Drope's* case, like 18 U.S.C. § 4241 contains no reference to a defendant having a "rational" understanding of the

ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARD (1989).

⁷⁶ U.S. v. Renfoe, 825 F.2d 763, 766 (1987); United States v. Gigante, 982 F. Supp. 140, 167 (E.D.N.Y. 1997).

⁷⁷ *Drope*, 420 U.S.

⁷⁸ *Drope v. Missouri* 498 S.W. 2d 838 (Mo.Crim.App. 1973).

⁷⁹ Mo. Rev. Stat. 552-020(1) (1969) "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures".

⁸⁰ *Drope*, 420 U.S. at 171.

proceedings or to being able to communicate with their counsel with “rational” understanding. In effect, what the Chief Justice did in *Drope* was summarize aspects of the *Dusky* test and simultaneously merge parts of the *Dusky* test with the legislation governing the assessment of a defendant’s competence to stand trial. It is clear from his opinion in *Drope* that the Chief Justice intended to reaffirm the *Dusky* test but, in doing so, he failed to refer to the rationality components of the *Dusky* test. Nevertheless, while the Chief Justice’s opinion in *Drope* omitted an important part of the *Dusky* test, it did not add in any material way to what the Court had said in *Dusky*.

The divergences of views in the literature and case law concerning the precise requirements of the *Dusky* test illustrates how much uncertainty has arisen concerning what the Supreme Court meant in *Dusky*. The following elements may, however, be extracted from the Supreme Court’s decision. First, the test focuses upon the defendant’s “present” abilities thereby drawing a temporal distinction between competence to stand trial and the defense of insanity which focuses upon the defendant’s state of mind at the time of the alleged offending. Second, the two trial tasks which form the focus of the test are the defendant’s capacity to consult with their lawyer and their understanding of the proceedings against them. Third, the *Dusky* test concerns the defendant’s actual capacity in terms of “ability” and “understanding” and not their willingness to participate in the proceedings or communicate with counsel. Fourth, the Court drew an important distinction between a defendant’s factual and their rational understanding of the proceeding. The rationality test requires a qualitative assessment of a defendant’s capacity to assist in their defense and have a rational understanding of the proceeding, which is discussed further in Pt III. Under this limb of the *Dusky* test, a defendant who suffers from a mental disorder that affects their ability to perceive reality, may not necessarily be competent to stand trial. The factual understanding requirement on the other hand is a narrower test that

involves an assessment of a defendant's cognitive ability to understand basic issues such as the fact that they have been charged and could be punished if convicted. A defendant with a limited factual understanding of the proceedings may not have the ability to appreciate the importance of relevant information or be able to evaluate that information and make choices in a rational manner.

The key features and consequences of the current law

Issues concerning a defendant's competence to stand trial may be raised at any time during the criminal trial process, from before a plea is entered through to the time of sentencing. The threshold for initiating an assessment of a defendant's competence to stand trial is satisfied if a bona fide doubt is raised about the defendant's competence.⁸¹ The low threshold for initiating a competency hearing is anchored upon the due process provisions of the Fourteenth Amendment. There is, however, considerable disconnection between the low procedural threshold for conducting an assessment of a defendant's competence to stand trial and the high substantive bar to determining that a defendant is not competent to stand trial.

A consequence of the way that the *Dusky* test and 18 U.S.C. § 4241 are framed is that even defendants with significant mental illness may be assessed as being competent to stand trial. This is because a defendant with a significant mental illness may nevertheless satisfy the balance of the criteria for being competent to stand trial set out in the *Dusky* test and 18 U.S.C. § 4241.⁸² Thus, "not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the

⁸¹ *Pate v. Robinson*, 383 U.S. 375 (1966).

⁸² *Wolf v. United States*, 430 F.2d 433 (10th Cir. 1970); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Myles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995); *United States v. Leggat*, 162 F.3d 237 (3rd Cir. 1998); *United States v. Morrison*, 153 F.3d 34 (2nd Cir. 1998); *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000); *Moody v. Johnson*, 139 F.3d 477 (5th Cir. 1998); *United States v. Chischilly*, 30 F.3d 1144 (9th Cir. 1994); *Oats v. Singletary*, 141 F.3d 1018 (11th Cir. 1998); *People v. Baugh*, 832 N.E. 2d 903 (Ill.App.Ct 2005) and *Lawrence v. State*, 169 S.W. 3d 319 (Tex.Crim.App. 2005).

charges. Likewise, neither low intelligence, mental deficiency, nor bizarre, volatile and irrational behaviour can be equated with mental incompetence to stand trial”.⁸³

The consequences of a finding that a defendant is not competent to stand trial may be very profound for the defendant. Under 18 U.S.C. § 4241(d) a defendant found to be not competent to stand trial is placed in the custody of the Attorney-General and hospitalised “for treatment in a suitable facility”. The defendant may be detained for a “reasonable period” initially, not exceeding four months, or “for an additional reasonable period of time”. The commitment of a defendant to the custody of the Attorney-General is mandatory under 18 U.S.C. § 4241(d) where there is a finding that they are not competent to stand trial. If, after a reasonable period of time the treating facility certifies the defendant has recovered, the court is required to hold another hearing to determine if they are competent to stand trial. If the court holds the defendant has recovered it orders the defendant to be discharged from the facility and sets the case for trial. Where a defendant does not recover, or, where they are found to be still incompetent, they may be released from the treating facility provided they will not pose a substantial risk of causing injury to another person or serious damage to the property of another person.⁸⁴ Where it is established by clear and convincing evidence that releasing the defendant found to be incompetent to stand trial will create a substantial risk of bodily injury to another person or serious damage to another’s property then they are held in the custody of the Attorney-General. This requirement must be read in conjunction with the Supreme Court’s ruling in *Jackson v Indiana*,⁸⁵ in which it was held that the indefinite commitment of a defendant solely on the basis of their incompetence to stand trial violates the Fourteenth Amendment, and that the duration of a defendant’s commitment must bear some relationship

⁸³ *Burket*, 208 F.3d at 192 *citing* *Medina v. Singletary*, 59 F.3d 1095, 1106-1107 (11th Cir. 1995).

⁸⁴ *United States v. Duhon*, 104 F. Supp. 2d 663 (W.D. La. 2000); 18 U.S.C. § 4246 (2007).

⁸⁵ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

to the purpose for which they are detained. Treatment facilities are required to treat defendants who are incompetent to stand trial with the aim of ensuring they gain sufficient capacity to enable the proceeding to continue.⁸⁶ Restoration programs are primarily housed in both federal and state facilities. However, while state defendants who are incompetent to stand trial are waiting for a bed to become available in a state hospital, they may find themselves in a county jail receiving inadequate mental health treatment. In *Trueblood v. Washington State* it was held that detention in a jail is not appropriate for mentally ill detainees who need therapeutic evaluation and treatment.⁸⁷ In *Oregon Advocacy Center v. Mink*, the Ninth Circuit Court of Appeals addressed the circumstances of individuals who had been found incompetent to stand trial and who were awaiting treatment. The Court held that forcing defendants to wait in jail for significant periods violated their due process rights because the nature and duration of their incarceration bore no reasonable relationship to the purposes for they were committed.⁸⁸

The liberty of defendants found incompetent to stand trial is also adversely affected by complexities arising from the intersection of legal and clinical roads when a defendant is placed in a treatment facility. From the legal perspective, the purpose of treatment is to restore a “defendant” back to competency. From a clinical perspective, the rehabilitation of the “patient” is the primary focus. This intersection raises numerous issues which are beyond the scope of this paper but have been explored elsewhere.⁸⁹ One particularly obvious concern however arises when a defendant’s liberty is put at risk through the provision of forced medication in order to render them competent to stand trial.⁹⁰ The Supreme Court in *Sell v. United States*

⁸⁶ 18 U.S.C. § 4241(d) (2006).

⁸⁷ *Trueblood v. Washington State Dept. of Social and Health Services*, 822 F.3d 1037, 1039 (9th Cir. 2016).

⁸⁸ *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2014).

⁸⁹ See generally Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial From a Clinical Perspective*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 81 (2005).

⁹⁰ See generally *Riggins v. Nevada*, 504 U.S. 127 (1992); *United States v. Weston*, 225 F.3d 873 (DC. Cir. 2001) and *Sell v. United States*, 539 U.S. 166 (2003).

detailed the circumstances which justify intervention to restore a defendant's competence against their objections. The Supreme Court concluded that a defendant who is not dangerous could be forcibly medicated solely to gain competency to stand trial, provided certain conditions, set out in a four-factor test, were met.⁹¹ The decision illustrates the tension between the government's interest in creating a defendant competent to stand trial and an individual's interest to refuse medication.⁹²

A defendant who is not competent to stand trial is faced with significant curtailment of his or his liberty. The consequences of a defendant being found incompetent to stand trial are even more significant when one reviews the frequency with which competency findings are made in the United States. Research indicates that approximately 20 to 30% of those defendants who undergo a competence assessment are found not to be competent to stand trial. This equates to approximately 15,000 people being found not competent to stand trial each year in the United States.⁹³ It is therefore essential that any test for assessing a defendant's competence to stand trial ensures accuracy and reflects the principles set out in Part I of this paper which underpin the rationale for only prosecuting a defendant when they are competent to stand trial.

As the preceding paragraphs demonstrate, the current federal law concerning the competence of a defendant to stand trial was formulated by a Committee of the Judicial Conference of the United States in the 1940s as part of its inquiry into how federal courts treat defendants with

⁹¹ See *Sell*, 539 U.S. at 180-181. First, a court must find that *important* governmental interests are at stake. Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. Third, the court must conclude that involuntary medication is *necessary* to further those interests. Fourth, the court must conclude that administration of the drugs is *medically appropriate*.

⁹² See *Id.*; *Forcibly Medicating the Mentally Ill to Stand Trial*, 121 HARV. L. REV. 1121, 1121 (2008) where it is argued that "lower courts have adopted weaker protections for the liberty interests of mentally ill defendants than what *Sell* requires". See also Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS. L. REV. 1 (1993) where it is argued states have not fully implemented the Supreme Court's decision in *Jackson*.

⁹³ Pirelli, et al., *supra* note 10.

mental illness. The Supreme Court efforts in *Dusky* to add further substance to the federal law created a number of issues concerning the scope of the federal law, and how it can be applied in individual cases. Thus, almost all features of the federal tests for determining a defendant's competence to stand trial were either constructed or adopted by federal judges. Responsibility for deficiencies in the current federal law rests therefore almost entirely upon the shoulders of the federal judiciary. Some of those deficiencies are considered in Part III of this paper.

PART III

DEFICIENCIES IN THE CURRENT LAW

The brevity of the Supreme Court's opinion meant that the *Dusky* test failed to address a number of issues germane to determining whether or not a defendant is competent to stand trial. Soon after it was decided, one federal judge bemoaned that the test in *Dusky* was "... not overly helpful in regard to the competency to stand trial question ... unhappiness with *Dusky* is produced by the fact that the Supreme Court said so little as to why it held what it did".⁹⁴ The summation of the *Dusky* test by the Court in *Drope* did little to address many of the questions left unanswered and the absence of meaningful explanations by the Court about the scope of the *Dusky* test has led to inconsistencies in the way the test has been applied by federal courts.

Similarly, 18 U.S.C. § 4241 suffers from having a narrow target, namely defendants who have a "mental disease or defect" that renders them "mentally incompetent". This test by-passes defendants who may lack the competence to stand trial for reasons unrelated to a "mental disease or defect". The focus of the federal legislation upon defendants with a "mental disease or defect" has generated issues concerning the way assessments are undertaken to determine a

⁹⁴ John W. Oliver, *Judicial Hearings to Determine Mental Competency to Stand Trial*, 39 F.R.D. 533 (1965).

defendant's competence to stand trial. It has also led to well-founded and troubling concerns that judges may have abdicated their judicial responsibilities in favour of health experts when determining whether or not a defendant is competent to stand trial.

The deficiencies in the current federal law governing the competence of a defendant to stand trial can be placed into two broad categories namely, jurisprudential and institutional shortcomings. The jurisprudential shortcomings of the current federal tests will be demonstrated by examining the limited scope of the current tests, the problems that stem from Supreme Court opinions concerning unrepresented defendants whose competence to stand trial is in issue and the misunderstandings that have arisen concerning the "rationality" component of the *Dusky* test. The institutional shortcomings will be examined by explaining the challenges posed by clinical methodologies that have been developed by health professionals to assess a defendant's competence to stand trial and, the difficulties faced by lawyers and judges in understanding and responding to the current federal tests which have become heavily reliant upon clinical opinions.

Jurisprudential shortcomings

The narrow focus of the federal tests

The limited focus of the federal legislation and uncertainties about the extent of the *Dusky* test has led to federal judges responding in ad hoc and at times inconsistent ways when faced with a defendant whose competence to stand trial is called into question in circumstances where they do not suffer from a mental disease or defect. The conceptual and practical difficulties in the current federal law are illustrated by considering defendants who suffer from personality disorders and those who suffer from neurological disorders such as amnesia.

Personality disorders

Those who suffer a personality disorder do not necessarily have a concurrent mental disease or defect within the meaning of 18 U.S.C. § 4241, and may therefore not satisfy the statutory qualifying criteria for not being competent to stand trial. At times the boundary between a “mental disease or defect” and a personality disorder may be difficult to discern. The criteria for diagnosing a personality disorder are, however, not the same as those that apply to mental disease. The Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association, and the International Statistical Classification of Diseases and Related Health Problems (ICD-10), published by the World Health Organisation recognise that personality disorders are a form of mental disorder, but are not mental diseases. From a medical perspective, a personality disorder may also not necessarily be a “mental defect” within the meaning of 18 U.S.C. § 4241.

Personality disorders are described in the DSM-5 as being a class of mental disorder “characterized by enduring maladaptive patterns of behavior, cognition and inner experience, exhibited across many contexts and deviating markedly from those accepted by the individual’s culture”.⁹⁵ Examples of personality disorders include paranoid, narcissistic and obsessive-compulsive personality conditions.

One commentator has recently observed that it is unclear whether personality disorders can ever qualify as a mental illness and that “[m]ost courts that have addressed the question have held that they do not, but their findings on this issue are muddled or have been limited to the diagnosis before them”.⁹⁶

⁹⁵ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 646-649 (5th ed. 2013).

⁹⁶ E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 *FORDHAM L. REV.* 2121, 2160

Adding to these definitional difficulties is the reluctance of some judges to place weight on the importance of a personality disorder when assessing a defendant's competence to stand trial. One reason for that reluctance stems from the overlap between the statutory test for insanity and incompetence to stand trial. As noted in Part II, the term "mental disease or defect" in 18 U.S.C. § 4241 is linked to the federal standard for insanity that requires the presence of a "severe mental disease or defect".⁹⁷ That high threshold for absolving a defendant from criminal responsibility through the insanity defense has infused the test in 18 U.S.C. § 4241 for determining whether or not a defendant is competent to stand trial. This in turn has made it more challenging for some courts to accept that those who suffer a personality disorder may not be competent to stand trial.

Other factors that have contributed to judicial scepticism about the significance of personality disorders include the lack of precision around the diagnostic categorisation of some personality disorders;⁹⁸ the high incidence of personality disorders in some groups in society, including defendants in criminal trials;⁹⁹ and, the difficulty of identifying where, on a continuum of a personality disorder, questions about a defendant's competence to stand trial are triggered. Those issues are particularly evident when a defendant's competence to stand trial is called into question by reason of them having a profound personality disorder and in circumstances where it is clear they do not suffer from a mental disease or defect.

It should be noted that, in some cases however, courts have adopted a pragmatic response to this issue. In *United States v Veatch*,¹⁰⁰ for example, the defendant was found to understand

(2015-2016).

⁹⁷ 18 U.S.C. § 17 (1986).

⁹⁸ Thomas A. Widiger & Timothy J. Trull, *Plate Tectonics in the Classification of Personality Disorder*, 62 AM. PSYCHOL. 71, 71-83 (2003).

⁹⁹ Stephen D. Hart, *Commentary: The Forensic Relevance of Personality Disorder*, 30 J. AM. ACAD. PSYCHIATRY & L. 510, 510-512 (2012).

¹⁰⁰ *United States v. Veatch*, 842 F. Supp. 480 (W.D. Okla. 1993).

what was happening at his trial but, “his severe personality disorder ... wrought with paranoid, narcissistic and antisocial traits, rendered him incapable of effectively assisting counsel in his defense or conducting his own defense”.¹⁰¹ Veatch’s case demonstrated how a significant personality disorder can render a defendant incompetent to stand trial and where the Court was not willing to give effect to the distinction between personality disorders and mental disease. While the approach taken in *Veatch* achieved a laudable outcome, it required the Court to disregard the qualifying criteria in 18 U.S.C. § 4241 which requires Courts to first determine if a defendant has a mental disease or defect.

There are however, other cases in which federal courts have concluded there is both a legal and a medical distinction between personality disorders and mental diseases or defects. In the *United States v Riggin*,¹⁰² it was said a “personality disorder is separate and distinct from a mental disease or defect”. Similarly in *United States v Diehl Armstrong*,¹⁰³ a federal district judge said:

“There is uncontradicted evidence ... that, while [schizophrenia or bipolar disorder] is considered a serious “mental disease or defect” for purposes of establishing an individual’s mental competence, a personality disorder is not.”

The same distinction was advanced by the government in *United States v Wayt*,¹⁰⁴ although the Tenth Circuit Court of Appeals in that case found it unnecessary to analyze the government’s submissions when it upheld the federal District Court’s determination that *Wayt* was competent to stand trial. *United States v McKinney*¹⁰⁵ further illustrates the distinction which is often drawn between personality disorders and “severe mental illness”.¹⁰⁶ McKinney, who

¹⁰¹ *Id.* at 482.

¹⁰² *United States v. Riggin*, 732 F. Supp. 958, 964 (S.D. Ind. 1990).

¹⁰³ *United States v. Diehl Armstrong*, 2008 W.L. 2963056, 26 (W.D. Pa. 2008).

¹⁰⁴ *United States v. Wayt*, 24 Fed. Appx. 880 (10th Cir. 2001).

¹⁰⁵ *United States v. McKinney*, 737 F.3d 773 (D.C. Cir. 2013).

¹⁰⁶ The test adopted by the Supreme Court in *Indiana v. Edwards*, 554 U.S. 164 (2008), for determining whether a State may insist on certain defendants being represented at trial.

represented himself for part of his trial before the federal District Court ordered an assessment of his competence to stand trial, was found to have a personality disorder that gave him grandiose ideas about his ability to represent himself. There was, however, no evidence of severe mental illness. In rejecting McKinney's appeal against the determination that he was competent to stand trial, the Court of Appeals for the District of Columbia Circuit observed that McKinney had failed to advance any basis upon which the Court could conclude that a "personality disorder can, in a clinical sense, constitute serious mental illness ...".¹⁰⁷

The distinction drawn in these cases between personality disorders and mental disease can be contrasted with the approach in *United States v De-Shazer*,¹⁰⁸ in which the Tenth Circuit Court of Appeals accepted the defendant's uncontested argument that there was no distinction in law between a personality disorder and a mental disease for the purposes of 18 U.S.C. § 4241. It is questionable what weight should be placed on *De-Shazer* in view of the fact the point in issue was not argued and, in any event, the appeal was decided on the basis that the defendant could rationally assist in his defense. Nevertheless, *De-Shazer* was followed in *United States v Mitchell*,¹⁰⁹ in which a federal district judge had to determine whether the defendant was competent to stand trial in relation to charges of kidnapping and unlawful transportation of a minor. Mitchell had extreme religious beliefs, including that he was a prophet who received instructions from God to abduct his "followers". Two psychiatrists concluded Mitchell suffered a narcissistic personality disorder and an anti-social personality disorder. A third psychiatrist concluded Mitchell had a mental illness namely, paranoid schizophrenia. The Court reasoned Mitchell did suffer one or more personality disorders but not a mental disease. Applying *De-Shazer*, the Court said "it [was] not particularly necessary ... to determine a

¹⁰⁷ *McKinney*, 737 F.3d at 778.

¹⁰⁸ *United States v. De-Shazer*, 554 F.3d 1281 (10th Cir. 2009).

¹⁰⁹ *United States v. Mitchell*, 706 F. Supp. 2d 1148 (D. Utah. 2010).

specific diagnosis in determining competency”,¹¹⁰ but that in any event, Mitchell’s personality disorder did not render him incompetent to stand trial and even if he had a mental disease or defect he was nevertheless competent.

This sample of cases illustrates the conflicting views between federal courts about the relevance of the distinction between personality disorders and mental diseases or defects to an assessment under 18 U.S.C. § 4241. This conflict reflects what Professor Johnston describes as “muddled” approaches by the courts and a misunderstanding in some cases that there is no meaningful distinction between personality disorders and mental diseases or defects.¹¹¹ This tension in the case law also reflects a view that any distinction between these concepts can be obfuscated by inquiring into a defendant’s capacity to understand the nature and consequences of the proceedings or to assist properly in their defense without determining whether or not the defendant has a qualifying condition under 18 U.S.C. § 4241.

The narrow scope of the current federal tests for assessing a defendant’s competence to stand trial renders those who have severe personality disorders vulnerable. Such defendants may suffer very debilitating anxiety or other personality disorders that can significantly impact upon their ability to understand and evaluate information relevant to their trial and make and communicate decisions of the kind normally required of a defendant in a criminal trial. This in turn places at risk the ability of such defendants to receive a fair trial and also risks compromising the integrity and accuracy of their trial.

¹¹⁰ *Id.* at 1193.

¹¹¹ Johnston, *supra* note 96, at 2610.

Amnesia

Amnesia may be caused by injury, disease or a psychological trauma to the brain.¹¹² Amnesia is usually classified as a neurological disorder and thus 18 U.S.C. § 4241 is not engaged in cases where a defendant presents with amnesia. The competence of an amnesic defendant to stand trial is therefore determined by applying the *Dusky* test. Cases involving defendants with amnesia provide a helpful lens through which to examine some of the defects in the *Dusky* test.

There are two broad categories of amnesia. Retrospective amnesia limits the ability of a defendant to retrieve information that predates the cause of the amnesia (such as a traumatic head injury) while anterograde amnesia affects the sufferer's ability to transfer new information from their active memory to their long-term memory. Those who suffer anterograde amnesia are usually deprived of their memory for long periods of time. It is very difficult to determine the extent to which defendants may be affected by amnesia. One study suggests that 23% of male forensic inpatients charged with serious crimes claim to have been suffering from either partial or total amnesia,¹¹³ but this figure may not accurately reflect the number of defendants who actually do have amnesia.

Amnesia by itself is unlikely to be sufficient to result in a defendant being found incompetent to stand trial. In *Bradley v Preston*,¹¹⁴ the federal District Court for the District of Columbia held that the defendant's "persistent amnesic condition" did not negate the clinical evidence that he was able to assist in the preparation of his defense and therefore competent to stand

¹¹² MICHAEL S. GAZZANIGA, RICHARD B. IVRY & GEORGE R. MANGUN, *COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND* (3rd ed. 2009).

¹¹³ Maaïke Cima, Henk Nijman, Harald Merckelbach, et al., *Claims of Crime Related Amnesia in Forensic Patients*, 27 INT'L. J.L. & PSYCHIATRY 215 (2004).

¹¹⁴ *Bradley v. Preston*, 263 F. Supp. 283 (D.C. Cir. 1967).

trial. In its decision the Court said “... there is no record of any court holding a defendant incompetent to stand trial solely on the basis of amnesia”.¹¹⁵

Factors that have led to courts being reluctant to recognise amnesia as a basis for finding a defendant incompetent to stand trial include “judicial distrust of the authenticity” of claims of amnesia¹¹⁶ and the fear that deciding an amnesic defendant is incompetent to stand trial risks leaving the determination of criminal liability “... to psychiatrists, whose opinions are usually based in large part upon defendants’ self-serving statements”.¹¹⁷ Judicial scepticism about the effects of amnesia on a defendant’s competence to stand trial can also be traced to a misunderstanding in some judicial quarters about the true nature of amnesia. It has been erroneously suggested by some judges that because most people are forgetful then, everyone is amnesic to some degree.¹¹⁸ From a clinical perspective however, there is a vast gap between common forgetfulness and amnesia.¹¹⁹

Dusky himself denied all memory of the events surrounding the alleged kidnapping of the complainant and the Supreme Court noted that it was not sufficient for the District Judge to have found Dusky “had some recollection of events”. The focus of the *Dusky* test is, however, not upon the degree to which a defendant can recall events but upon whether he or she has “sufficient present ability to consult with [counsel] with a reasonable degree of rational

¹¹⁵ *Id.* at 285 *see also* United States v. Stevens, 461 F.2d 317 (7th Cir. 1972); State v. Madden, 33 P.3d 549 (Haw.Ct.App. 2001); State v. Kleypas, 40 P.3d 139, 272 Kan. 894 (Kan. 2001); Sadashiv D. Parwatikar et al., *The Detection of Malingered Amnesia in Accused Murderers*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 97-102 (1985).

¹¹⁶ MELTON ET AL., *supra* note 25, at 130.

¹¹⁷ *Id.*

¹¹⁸ *Morrow v. Maryland*, 443 A.2d 108, 112-113 (Ct.App.Md. 1 1982); United States *ex rel* Parson v. Anderson, 354 F. Supp. 1060, 1072-1073 (D. Del. 1972).

¹¹⁹ Elizabeth W. Rubinsky & Jason Brandt, *Amnesia and Criminal Law: A Clinical Overview*, 4 BEHAV. SCI. & L. 27, 33 (1986).

understanding” and a “rational as well as factual understanding of the proceedings against [them]”.

It may be possible to construct an argument that an amnesic defendant lacks a “rational as well as factual understanding of the proceedings against [them]”.¹²⁰ Most authorities however focus on the first criteria in the *Dusky* test and in doing so, courts have tended to adopt a narrow approach, by placing emphasis on whether or not the defendant has a “present ability to consult with [counsel]”.¹²¹ As one commentator has noted the “present ability to consult with counsel” test is easily met. Almost anyone who can actually speak or otherwise communicate will, literally, be able to consult with their lawyer. “This literal reading places the bar so low that anyone who can actually discuss trial strategy and choose possible defenses is competent to stand trial”.¹²² This approach undermines the *Dusky* test by removing an assessment of the defendant’s “rational as well as factual understanding of the proceedings against [them]”.

This observation reflects cases such as *United States ex re, Parson v. Anderson*¹²³ where it was said:

“While amnesia may be relevant as a symptom evidencing a present infirmity in the defendant’s reasoning capacity, if the defendant has the present ability to understand the proceedings against him, to communicate with his lawyer and generally to conduct his defense in a rational manner, memory or want thereof is irrelevant to the issue of incompetence.”

¹²⁰ See *Wilson v. United States*, 391 F.2d 460, 466 (D.C. Cir. 1968) (Fahy, J., dissenting) (arguing that a “complete lack of factual understanding of the period involved in the charges on trial” could result in a finding of incompetency).

¹²¹ James E. Tysse, *The Right to an 'Imperfect' Trial - Amnesia, Malingering, and Competency to Stand Trial*, 32 WM. MITCHELL L. REV. 352, 352-361 (2005). In *U.S. v No Runner*, 590 F.3d 962 (9th Cir. 2009) the Ninth Circuit Court of Appeals dismissed a pre-trial ruling that an involuntary manslaughter defendant was competent to stand trial, despite unrebutted expert evidence she had post-traumatic amnesic disorder and her memory of the events was non-existent, for lack of jurisdiction. The psychologist had opined No Runner was competent to stand trial because “she’s going to be able to consult with and assist her attorney beyond that very circumscribed memory loss”.

¹²² Tysse, *supra* note 121, at 365.

¹²³ *United States ex rel Parson v. Anderson*, 354 F.Supp. 1060, 1071 (D.Del. 1972).

The federal District Court for the District of Delaware held Parson was competent to stand trial notwithstanding that amnesia had deprived him of any substantial independent recollection of events occurring on the evening of the crime, and notwithstanding he also suffered from personality disorders. By adopting a restrictive approach to the *Dusky* test when assessing the competence of amnesic defendants, such as in *Parson*, the federal courts have usually found that amnesic defendants are competent to stand trial.¹²⁴

The narrow approach taken in most federal courts when considering the ability of an amnesic defendant to consult with counsel can however be compared with the approach taken by the Court of Appeals for the District of Columbia in *Wilson v United States*.¹²⁵ The defendant in that case was charged with offences arising from a bank robbery. He was severely injured in a car crash while fleeing the scene of the crime and was in a coma for three weeks. When Wilson regained consciousness he had no memory of the events surrounding the robbery. The government conceded at trial that Wilson was suffering permanent retrograde amnesia. Following his conviction Wilson appealed. A majority of the Circuit Court of Appeals for the District of Columbia remitted the case back to the trial court for a further evaluation as to whether or not Wilson's amnesia had deprived him of his right to a fair trial. The appellate court identified six factors for the trial court to consider when undertaking the reassessment of the impact of Wilson's amnesia on his right to a fair trial.¹²⁶ Those factors included the strength

¹²⁴ SUSAN HATTERS FRIEDMAN & JOHN P. SHAND, CLAIMING AMNESIA MAY NOT IMPACT COMPETENCY TO STAND TRIAL, Am. Psychiatric Association, 166th Annual Meeting, San Francisco, (2013). The authors studied 147 cases in which defendants claimed to have suffered amnesia and in only seven per cent of cases was it found the defendant was not competent to stand trial.

¹²⁵ *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968).

¹²⁶ *Id.* at 463-464:

- The extent to which amnesia had affected Wilson's ability to consult with and assist his lawyer.
- The extent to which amnesia had affected Wilson's ability to testify.
- The extent to which the relevant events could be extrinsically reconstructed.
- The extent to which the government assisted in that reconstruction.
- The strength of the prosecution case and whether the government's case negated all reasonable hypotheses of innocence.
- Any other matters that might impact on whether or not Wilson had received a fair trial.

of the prosecution case, a factor that the Seventh Circuit Court of Appeals has also said is relevant when determining if an allegedly amnesic defendant was competent to stand trial.¹²⁷ This consideration however blurs the underlying purpose of an assessment of a defendant's competence to stand trial. A competence hearing should only be concerned with whether or not a defendant is competent to stand trial in order to determine their guilt or innocence. Those who are incompetent, and who are facing a compelling prosecution case, are still incompetent. Competence hearings should not be colored by assessments of the strengths and weaknesses of the case against the defendant.

The approach in *Wilson* in which the Court concluded that an amnesic defendant lacked the requisite competence to stand trial has, however, not been widely endorsed by other federal courts. One commentator has stated that *Wilson* "has almost never been followed".¹²⁸

The preceding discussion of the way the *Dusky* test has been applied by federal courts when deciding whether or not an amnesic defendant is competent to stand trial raises two principal concerns with the current law. First, as demonstrated by *Wilson* and *Parson*, there are material divergences of view concerning the extent to which amnesia may impact upon the assessment of a defendant's competence to stand trial. In *Parson*, the Court proceeded on the basis that the defendant's amnesia had little relevance to the assessment of his competence to stand trial. In *Wilson*, amnesia was regarded as a significant factor that needed to be considered when determining whether or not the defendant's right to a fair trial had been adversely affected. Second, the narrow construction of the *Dusky* test by most federal courts has had the effect of diluting that part of the test that requires an evaluation of a defendant's present ability to consult

¹²⁷ United States v. Andrews, 469 F.3d 1113 (7th Cir. 2006).

¹²⁸ Tysse, *supra* note 121, at 368, *citing* Robert D. Miller, *People v Palmer: Amnesia and Competency to Proceed Revisited*, 31 J. PSYCHIATRY & L. 165, 168-169 (2003). *See also* Delaney Smith & Philip Resnick, *Amnesia and Competence to Stand Trial*, 35(4) J. AM. ACAD. PSYCHIATRY & L. 541 (2007).

with counsel “*with a reasonable degree of rational understanding*” (emphasis added). This is relevant for amnesic defendants who may literally be able to consult with counsel but not to a reasonable degree of rational understanding if, they have no memory of the events.¹²⁹ In making this error the courts concerned have failed to appreciate a defendant cannot rationally assist in their own defense unless they can advise their counsel of relevant matters in a way that is cogent and reasonable.¹³⁰

The ad hoc and at times inconsistent ways in which the federal law currently responds to the causes of a defendant’s possible incompetence to stand trial leads to the conclusion that the focus of any test for determining a defendant’s competence to stand trial should be upon their capacity to participate in their trial, and not upon the reasons for a defendant’s incompetence. This point can be summarised by asking, “why does it matter that a defendant’s incompetence is caused by a mental disease, a personality disorder, a neurological condition or a physical condition”? The answer to that question lies in the realisation that the principles that require the society to not prosecute defendants who lack the requisite competence to stand trial are engaged whenever a defendant lacks the capacity to effectively participate in their trial, regardless of the cause of their incompetence.

Unrepresented defendants

The first limb of the *Dusky* test focuses upon the ability of a defendant “to consult with his lawyer” and compliments that part of 18 U.S.C. § 4241 that refers to a defendant being unable “to *assist* properly in his defense” (emphasis added). Neither the *Dusky* test nor 18 U.S.C. § 4241 provide guidance on how a court should determine if an unrepresented defendant is competent to stand trial without the assistance of counsel. This issue has produced vexing

¹²⁹ Tysse, *supra* note 121, at 362.

¹³⁰ United States v. Sermon, 228 F. Supp. 972, 977 (W.D. Mo. 1964).

decisions from the Supreme Court in *Godinez v Moran*¹³¹ and *Indiana v Edwards*¹³² that highlight a significant deficiency in the current law.

The right of a defendant to have an attorney is a comparatively recent development that post-dates the origins of the common law concerning a defendant's competence to stand trial.¹³³ It was in 1932 that the Supreme Court held that a defendant facing a capital charge was entitled to counsel under the due process provisions of the Sixth and Fourteenth Amendments.¹³⁴

In 1948 the Court recognized that special care may be required before a court allows a defendant to represent him or herself in circumstances where their competence to stand trial was questionable. In *Wade v Mayo*,¹³⁵ the Court said:

“There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.”¹³⁶

A defendant's right to a state-provided defense attorney was, however, not affirmed by the Supreme Court as a constitutional right until two years after *Dusky* was decided.¹³⁷ Even more recent is a defendant's constitutional right to self-representation. In *Faretta v. California*,¹³⁸ the Supreme Court held that a defendant in a state criminal trial had the right to decline the

¹³¹ *Godinez v. Moran*, 509 U.S. 389 (1993).

¹³² *Indiana v. Edwards*, 554 U.S. 164 (2008).

¹³³ In England, a defendant charged with a felony was not entitled to counsel as of right until 1836 following the passing of the Trial for Felony Act 6 & 7 Will. IV. 114, although counsel were permitted to assist any defendant charged with treason from 1696, refer John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 309 (1978).

¹³⁴ *Powell v. Alabama*, 287 U.S. 45, 60 (1932).

¹³⁵ *Wade v. Mayo*, 334 U.S. 672 (1948).

¹³⁶ *Id.* at 684.

¹³⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹³⁸ *Faretta v. California*, 422 U.S. 806 (1975).

services of an appointed attorney and could represent him or herself provided their decision was made “voluntarily” and “intelligently”. The Court said:

“The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, and not counsel, who must be “informed of the nature and cause of the accusation”, who must be “confronted with the witnesses against him”, and who must be accorded “compulsory process for obtaining witnesses in his favour”. Although not stated in the Amendment in so many words, the right to self-representation – to make one’s own defense personally – is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”¹³⁹

The principle underscoring the Court’s decision in *Faretta* was its desire to uphold the defendant’s right to self-determination. The principles underpinning *Faretta* can however be difficult to apply in cases where a defendant’s competence to stand trial is in issue. This difficulty is illustrated by the Court’s conflicting decisions in *Moran* and *Edwards*, where the Supreme Court placed different emphasis on a defendant’s rights to self-determination and a fair trial.

*Moran*¹⁴⁰ concerned the standard of competence required for a defendant to validly waive his right to counsel and plead guilty. Moran had shot dead three people in Nevada, including his former wife after which, he endeavoured to kill himself. After he initially pleaded not guilty Moran was assessed by two psychiatrists, who concluded he was competent to stand trial. The state then announced its intention to seek the death penalty. At his next court appearance Moran said he wished to dismiss his attorney and plead guilty because he did not want his counsel to mount a defense or present any mitigating evidence during the sentencing phase of his trial. The trial judge granted Moran’s applications after applying *Faretta* and concluding Moran had “knowingly and intelligently” waived his right to counsel and that his guilty pleas were “freely

¹³⁹ *Id.* at 819-820.

¹⁴⁰ *Godinez v. Moran*, 509 U.S. 389 (1993).

and voluntarily given”. Moran was sentenced to death, after which he applied to set aside his convictions on the grounds that he was not mentally competent to represent himself. This application and Moran’s subsequent appeals were dismissed by the State appellate courts and the United States District Court for Nevada. The Ninth Circuit Court of Appeals however allowed Moran’s appeal on the basis that a defendant’s competence to waive their constitutional right to an attorney required a higher level of mental functioning than that required to stand trial. The State appealed. By a 7 to 2 majority the Supreme Court overturned the Court of Appeals decision and ruled that the *Dusky* test for assessing a defendant’s competence to stand trial also governed their competence to dispense with their counsel and plead guilty.

In *Edwards*,¹⁴¹ decided fifteen years later, a majority of the Supreme Court held a defendant could be competent to stand trial but not necessarily competent to represent themselves in a defended hearing. Edwards, who suffered schizophrenia, shot and wounded a security officer when trying to steal a pair of shoes from a department store. He was initially found to be not competent to stand trial. After a period of treatment in a psychiatric facility it was determined Edwards had gained sufficient competence to stand trial. When his trial commenced, Edwards asked to represent himself and for his assigned attorney to be dismissed. Those applications were declined. Following his conviction, Edwards appealed on the basis that his constitutional right to defend himself had been violated. The Indiana Court of Appeals and Supreme Court agreed with Edwards and ordered a new trial. The State successfully appealed to the Supreme Court, which held a state may compel an otherwise competent defendant to be represented by counsel when defending a criminal charge. Justice Breyer, for the majority said:

¹⁴¹ *Indiana v. Edwards*, 554 U.S. 164 (2008).

“... the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”¹⁴²

The Court in *Edwards* conferred a discretion upon trial courts to insist upon defendants suffering from severe mental illness to be represented by counsel.¹⁴³ In doing so the Court did not enunciate exactly what standard was required for a defendant to defend himself without counsel in a contested trial. Instead, the Court said it was content to leave this issue to trial judges whom the Court said “... will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant”.¹⁴⁴ The Court acknowledged the similarities between *Moran* and *Edwards*. Both cases involved defendants who, notwithstanding their significant mental health difficulties, were found to be competent to stand trial under the *Dusky* standard. In both cases the defendants wished to dispense with their counsel and represent themselves.

One possible route to rationalizing the Court’s decisions in *Moran* and *Edwards* is to take the view that *Edwards* is a discrete exception to the *Dusky* test for determining a defendant’s competence to stand trial. The “exception” approach reasons that a defendant in a criminal trial may be found competent to stand trial, waive counsel and enter a guilty plea by applying the *Dusky* test but still not be competent to represent themselves at a contested trial.¹⁴⁵ This approach involves a distinction being drawn between a defendant’s competence to dispense with their attorney and plead guilty, compared to the more complex and challenging task of representing themselves in a contested hearing. This approach also pays deference to the

¹⁴² *Id.* at 2387-2388.

¹⁴³ *United States v. Ferguson*, 560 F.3d 1060, 1070 N6 (9th Cir. 2009); *United States v. De-Shazer*, 554 F.3d 1281 (10th Cir. 2009).

¹⁴⁴ *Edwards*, 554 U.S. at 178.

¹⁴⁵ Joanmarie I. Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313 (2009); Eulen E. Jang, *Mental Capacity: Reevaluating the Standards*, 43 G.A. J. INT’L & COMP. L. 531 (2015).

principles of autonomy and self determination evident in *Faretta* by creating a very narrow exception to a defendant’s right to dispense with counsel on the basis that, in the absence of a serious mental condition, defendants possess the “right to represent themselves and go down in flames if they wished”.¹⁴⁶

The Court’s decision in *Edwards* has however led to both state¹⁴⁷ and federal courts frequently trying to manage defendants who represent themselves for reasons that are not objectively rational.¹⁴⁸ The issues arising from the lack of direction in *Edwards* are evident the recent decision in *United States v Roof*,¹⁴⁹ in which the defendant was diagnosed with autism spectrum disorder, attenuated psychosis and potential personality disorders. He faced the death penalty and elected to represent himself in sentencing and present no mitigation witnesses. The Court considered it had no discretion to deny Roof’s constitutional right to self-representation, despite his legal strategy being unsound. The decision re-iterates the high standard in *Edwards* for intervening with a defendant’s decision to dispense with counsel.

Some scholars have argued that the Court in *Edwards* was motivated by a fear of the criminal justice system being brought into disrepute by the spectacle of incompetent defendants

¹⁴⁶ *United States v. Johnson*, 610 F.3d 1138, 1139 (9th Cir. 2010).

¹⁴⁷ *Johnston*, *supra* note 96, at 2139.

¹⁴⁸ *See e.g.*, *United States v. Bernard*, 708 F.3d 583 (4th Cir. 2013) in which the defendant, who had a history of profound mental illness persuaded the trial court to allow him to represent himself. In his trial Bernard “... rambled during open and closing statements, and offered self-inculpatory explanations for his behavior ... Bernard cast himself as an undercover agent for the ... police, explaining that his criminal conduct was an elaborate ploy to attract police attention to the real drug traffickers that were present in the neighbourhood” (at 595); *Johnson*, 610 F.3d, in which the defendants were permitted to represent themselves against a background of having advanced “an absurd legal theory wrapped up in Uniform Commercial Code gibberish” (at 1140) and filed “meaningless and nonsensical documents” and made “off-the-wall comments” to the jury (at 1143); *United States v. James*, 328 F.3d 953 (7th Cir. 2003) in which an unrepresented defendant claimed “that his ancestors came from Africa ... he [was] therefore a Moorish national, and that as a result he need[ed] [to] obey only those laws mentioned in an ancient treaty between the United States and Morocco” (at 954). The defendant also demanded payment every time his name was spoken in court (at 954); *United States v. Alden*, 527 F.3d 653 (7th Cir. 2008) in which the unrepresented defendant engaged in “irrational behavior throughout the proceedings, namely his obsession with irrelevant issues and his paranoia and distrust of the criminal justice system” (at 659).

¹⁴⁹ *United States v. Roof*, 225 F. Supp. 3d 394 (D. S.C., Charleston Div. 2016).

representing themselves at trial.¹⁵⁰ This assessment refers to that aspect of *Edwards* in which the Court cited a psychiatrist's criticism of the current state of the law when he rhetorically asked "how in the world can our legal system allow an insane man to defend himself?" Professor Davoli has said it was "startling" that the Court in *Edwards* acknowledged its discomfort with the vision of incompetent defendants representing themselves at trial but chose not to address the inherent flaws in *Dusky*.¹⁵¹

The unsatisfactory state of this area of the law stems from two troublesome aspects of *Moran* and *Edwards*. First, the assessment of a defendant's competence to dispense with their attorney and plead guilty involves the application of the *Dusky* test that was developed in the context of a defendant who was represented during all phases of his trial. The Court in *Dusky* did not purport to devise a test for assessing the competence of a defendant who wishes to defend himself at trial. Second, in *Edwards*, the Court recognised the limitations of the *Dusky* test but failed to provide any meaningful guidance on how a trial court should assess a defendant's competence to represent himself in a contested hearing. The Supreme Court decision in *Edwards* to refrain from providing guidance to assessing a defendant's competence to represent himself has created a lacuna in the current law. This deficiency can be addressed by revisiting the basis upon which a defendant is adjudged competent to stand trial. As will be explained in Parts IV and V of this paper, the effective participation test can satisfactorily fill the gap created by the Court in *Edwards*. The effective participation test would involve a trial court addressing four interrelated questions in relation to a unrepresented defendant. First, the Court should inquire into the defendant's ability to understand information relevant to the tasks associated with representing himself. Second, an assessment should be made of the defendant's ability

¹⁵⁰ Tiffany Frigenti, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn - People v. Smith*, 28(3) TOURO L. REV. 1,019 (2013); Jang, *supra* note 145.

¹⁵¹ Davoli, *supra* note 145, at 324.

to evaluate what self-representation entails, and the risks associated with a defendant representing themselves. The third inquiry involves an assessment of whether or not there is a rational basis to the defendant's decision to represent themselves. Finally, the Court should satisfy itself that the defendant has the capacity to communicate in a rational way during their trial.

Rationality: a misunderstood concept

In *Dusky* the Court identified two ways in which a defendant's rationality is engaged when assessing their competence to stand trial. The Court said that in order to be adjudged competent a defendant needs to have the ability to consult with their lawyer with a reasonable degree of *rational understanding* and have a *rational understanding* of the proceedings against them. The rationality assessment specified by the Court bore close similarity to the approach taken in *Youtsey* in which it was said that in order to be competent a defendant needed to be able to "rationally advise with his counsel as to his defense" and "make a rational defense".¹⁵² The Supreme Court did not explain in *Dusky* if it contemplated different levels of rationality when it said the need for a defendant to be able to consult with their lawyer with a "reasonable" degree of rational understanding but omitted a similar epithet when stating that a defendant must also have a rational as well as a factual understanding of the proceedings against them. More significantly, the Court did not explain what test it had in mind when it stipulated the need for a defendant to have a rational understanding. The uncertainty as to what the Court intended when it referred to the rationality criterion in the *Dusky* test has led to both jurisprudential and conceptual uncertainties about the rationality requirements in the *Dusky* test.

¹⁵² *Youtsey v. United States*, 97 F. 937, 943-944 (6th Cir. 1899).

The jurisprudential uncertainties about the rationality criterion in *Dusky* are illustrated by comments of members of the Supreme Court in *Moran* and *Edwards*. To understand those comments it is necessary to briefly recall that in *Drope* the Court applied the Missouri legislation which, like 18 U.S.C. § 4241 makes no reference to “rationality”. Thus, while the Court in *Drope* reaffirmed the *Dusky* test, the Court’s decision in *Drope* involved the application of the Missouri equivalent of 18 U.S.C. § 4241. The distinction between the *Dusky* test and the legislative competence test applied by the Court in *Drope* was subsequently blurred by other members of the Supreme Court in *Moran* and in *Edwards*. Writing for the majority in *Moran*, Justice Thomas treated the *Dusky* test as being identical to the test applied by the Court in *Drope* even though the Court in *Drope* made no reference to the rationality criterion found in *Dusky*.¹⁵³ In a concurring opinion, Justice Kennedy explained the test for competency to stand trial was that set out by the Court in *Dusky* but did not comment on Justice Thomas’ merger of the tests articulated in *Dusky* and *Drope*. In his dissenting opinion, Justice Blackmun also failed to draw any distinction between the *Dusky* and *Drope* tests. The merging of the *Dusky* and *Drope* tests by members of the Court in *Moran* cast into doubt the significance of the rationality component of the *Dusky* test.

The doubts created in *Moran* about the importance of an inquiry into a defendant’s rational understanding were further compounded by the opinion of Justice Breyer in *Edwards*, in which he followed the path set by members of the Court in *Moran*, who had merged the tests set out in *Dusky* and *Drope*. After setting out the *Dusky* test, Justice Breyer proceeded to say:

¹⁵³ *Godinez v. Moran*, 509 U.S. 389, 396 (1993):

“In *Dusky v. United States* ... we held the standard for competence to stand trial is whether the defendant has ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and has ‘a rational as well as a factual understanding of the proceedings against him’ ... Accord, *Drope v. Missouri* ... ‘([a] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subject to a trial’”.

“*Drope repeats that standard*, stating that it “has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense may not be subjected to a trial” (emphasis added).”¹⁵⁴

The merger of the *Dusky* and the *Drope* tests by the majorities in *Moran* and *Edwards* has had the unfortunate effect of diluting the significance of the rationality ingredient of the *Dusky* test. The apparent demise of the rationality inquiry has been lamented by one commentator in the following way:

“The *Dusky* rationality standard was a progressive step with widespread influence. Sadly, its significance is fading, even as the standard itself maintains familiarity. Its important requirement for rationality is slipping into oblivion with nary a word.”¹⁵⁵

The uncertainties in the Court’s decisions about the ongoing role of the rationality component of the *Dusky* test may be explained by the conceptual challenges associated with understanding what the Court meant in *Dusky* when it referred to the need for a defendant to have a “rational understanding”.

In *Panetti v. Quarterman*,¹⁵⁶ Justice Kennedy suggested that “... a concept like rational understanding is difficult to define”.¹⁵⁷ This remark was made in the context of a challenge to the constitutionality of the proposed execution of *Panetti* by Texas for the murder of his parents-in-law. There was psychiatric evidence that although Panetti understood the State intended to execute him for murder, his understanding was based on the delusional belief that he was really to be executed in order to prevent him from continuing to preach. The Court accepted Panetti had been denied an adequate opportunity to argue his right not to be subjected to cruel and unreasonable punishment. However, rather than develop a “rule governing all

¹⁵⁴ *Indiana v. Edwards*, 554 U.S. 164, 170 (2008).

¹⁵⁵ Felthous, *supra* note 72, at 20.

¹⁵⁶ *Panetti v. Quarterman*, 551 U.S. 930 (2007).

¹⁵⁷ *Id.* at 959.

competency [to be executed] determinations”¹⁵⁸ the Court remitted Panetti’s case to the trial court for further evaluation and assessment.

Other authorities have suggested that the rationality concept suffers from being vague and an absence of consensus as to exactly what it means.¹⁵⁹ The requirement that a defendant be assessed as having a rational understanding may also risk undermining a defendant’s right to self-determination when the assessment is carried out solely on the basis of objective considerations. This concern recognizes a defendant’s understanding may not be considered objectively rational but be found to be rational when the subjective context of the defendant’s understanding is taken into account.

Notwithstanding these concerns, it is possible to construct a coherent definition of what is entailed by the requirement that a defendant have a rational understanding in order to be adjudged competent to stand trial. That construction draws on the distinction in *Dusky* between a defendant’s factual understanding and the need for them to have a rational understanding, a distinction that can be traced back to *Dyson’s case* in the 19th Century. The distinction acknowledges that it is not sufficient for a defendant to have just a factual understanding of the information that underpins their decisions. Thus, for example, in *Panetti*, it was not sufficient that the defendant knew he was to be executed for murder. In order for Panetti to have a rational understanding as to why the State wished to execute him, his understanding could not be affected by pathological delusions such as, the belief that he was to be executed in order to stop him preaching. The American Academy of Psychiatry and Law,¹⁶⁰ distinguishes “factual

¹⁵⁸ *Id.* at 960-961.

¹⁵⁹ LAW COMMISSION OF ENGLAND AND WALES, UNFITNESS TO PLEAD, Consultation Paper No. 197, 3-48 (2010), *citing* ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 69 (1990).

¹⁶⁰ Mossman, et al., *supra* note 1, at S45-46.

understanding” from “rational understanding” by providing the following two examples. First, a defendant “may have an accurate factual understanding of the legal process as it applies to ‘ordinary humans’. Because however he suffers a grandiose religious delusion that no court on earth can impose punishment on him, he lacks a rational understanding that if found guilty he would be subject to imprisonment”. Second, a defendant may be able to cite by rote the role of his defense counsel but if at the same time he holds the delusional belief that his attorney is really an FBI Agent who is working for the prosecution then he lacks a rational understanding of the role of his attorney.

The confusion that has emerged in the Supreme Court’s jurisprudence about the meaning and significance of the rationality requirements of *Dusky* should not detract from the importance of this element of the current federal tests for determining a defendant’s competence to stand trial. It is important however to address any uncertainty about what is meant by a defendant needing to have a rational understanding of the proceedings, and to be able to communicate rationally. Any reform of the current law should specify that, in order to have a rational understanding when making important decisions in relation to their trial, a defendant’s understanding must not be affected by delusions or other genuine disorders that adversely affects their ability to make decisions that are based upon reality.

Institutional shortcomings

Clinical assessments

The jurisprudential and conceptual weaknesses in the *Dusky* and federal legislative tests for assessing a defendant’s competence to stand trial have created a lacuna into which have stepped clinicians, researchers and social workers trained in psychiatry and psychology. While decisions concerning a defendant’s competence to stand trial are ultimately for a court, judges

have become increasingly reliant on evidence from health professionals¹⁶¹ who, in most instances are trained either in psychology or psychiatry.¹⁶² The intersection of law and health sciences in cases concerning a defendant's competence to stand trial is fraught with opportunity for misunderstanding and confusion between health professionals, the defendant, their lawyer and the judge, due in part because the legislation and legal principles that govern judicial decisions concerning a defendant's competence to stand trial have evolved slowly and continue to reflect vestiges of the 18th century common law. Conversely, psychiatrists and psychologists provide their evidence from the perspective of mental health disciplines that have developed at a pace which vastly exceeds the glacial evolution of the law. These two disciplines have rapidly evolved from forming diagnoses on the basis of subjective assessments of patients to evidence based diagnoses using population based data about psychiatric and psychological conditions.¹⁶³ A further factor is that there is no direct alignment between the legal construct of competence to stand trial and conventional diagnostic categories in psychiatry or psychology. The language of psychiatrists and psychologists on the one hand and that of lawyers and judges on the other hand creates significant room for misunderstanding in this context.¹⁶⁴ This point was observed by the Solicitor General in his brief to the Supreme Court in *Dusky* when he said "... a court, charged by statute with making the determination of whether a man is capable of standing trial for a crime ... is faced with a difficult task in endeavouring to translate medical terminology into legal judgment".¹⁶⁵

¹⁶¹ *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961); *Hall v. Florida*, 572 U.S. (2014); *Moore v. Texas*, 581 U.S. (2017).

¹⁶² MELTON ET AL., *supra* note 25.

¹⁶³ Joel Paris, *Canadian Psychiatry Across 5 Decades: From Clinical Inference to Evidence-Based Practice*, 45 CAN. J. PSYCHIATRY 34, 34-39 (2000); INTERNATIONAL PERSPECTIVES ON MENTAL HEALTH (Hamid Ghodse ed., 2011).

¹⁶⁴ Carl E. Fisher, David L. Faigman & Paul S. Appelbaum, *Towards a Jurisprudence of Psychiatric Evidence: Examining the Challenges of Reasoning from Group Data in Psychiatry to Individual Decisions in the Law*, U.C., HASTINGS COLLEGE OF THE LAW, LEGAL STUDIES RESEARCH PAPER NO. 110, 214.

¹⁶⁵ Rankin, *supra* note 70, at 9.

The challenges created by the extensive reliance that courts now place upon the assessment of health assessors when determining whether or not a defendant is competent to stand trial, are exacerbated by concerns about variations between psychiatrists, psychologists and social workers when reporting on a defendant's competence. This issue was exposed in a study of the assessments of 60 assessors in Virginia and Alabama who had, between them, conducted more than 7,000 competency evaluations. The researchers found a statistically significant amount of variance in competence to stand trial evaluations due to differences between evaluators.¹⁶⁶ The authors also concluded that the evaluator's professional training was a significant predictor of the evaluator's recommendations with social workers 3.5 times more likely than psychologists to find a defendant was incompetent and psychologists 2.04 times more likely than psychiatrists to make that same finding.¹⁶⁷

Three broad methodologies are available to clinicians when undertaking an assessment of a defendant's competence to stand trial, namely, a clinical evaluation, the application of traditional psychiatric and psychological instruments and the application of competency screening instruments. It is the development of competency screening instruments that has proven to be most problematic for judges and lawyers when faced with clinical evidence about the competence of a defendant to stand trial. These challenges are brought into stark relief when issues arise concerning the admissibility of evidence derived from the application and interpretation of competency screening instruments. For completeness, a brief explanation will first be provided about clinical evaluations and traditional screening instruments before focusing upon the legal problems generated by competency screening instruments.

¹⁶⁶ Daniel C. Murrie, Marcus T. Boccaccini, Patricia A. Zapf, Janet I. Warren & Craig E. Henderson, *Clinician Variation in Findings of Competence to Stand Trial*, 14:3 PSYCHOL. PUB. POL'Y & L. 177, 177-193 (2008).

¹⁶⁷ *Id.* at 185.

Clinical evaluations and traditional screening instruments

Clinical evaluations are a vital part of a clinician's inquiry into a defendant's competence to stand trial. The American Academy of Psychiatry and Law¹⁶⁸ has developed a comprehensive guideline for clinical evaluations which covers, amongst other topics, the defendant's understanding of the events that led to them being charged and their mental status.¹⁶⁹ Although not in the form of constructed questions, the guidelines recommend that clinicians systematically explore a defendant's competence related abilities. The guidelines also recognise the importance of collateral information in assisting a clinician when forming their opinion about a defendant's competence to stand trial. Collateral data may be derived from a variety of sources, including previous psychiatric or psychological assessments and the accounts of family and friends of the defendant concerning their functioning and symptoms. The authors of the guidelines recognise the weaknesses inherent in clinical evaluations, namely the difficulties in establishing the accuracy and reliability of assessments that are based on clinical observations and information that is primarily sourced to the defendant. The guidelines therefore recommend that clinical evaluations be supplemented by traditional assessment and/or competency screening instruments.

There are three traditional assessment instruments that are commonly used in assessing a defendant's competence to stand trial.¹⁷⁰ Authorities recognise, however, that while "traditional assessment instruments can be useful in competency evaluations; ... researchers

¹⁶⁸ MOSSMAN, ET AL., *supra* note 1, at S31-37.

¹⁶⁹ A mental status examination provides a clinician with information about a defendant's psychiatric symptoms, thought content, mood, memory, information processing and concentration.

¹⁷⁰ The Minnesota Multi-Phasic Personality Inventory; The Wechsler Adult-Intelligence Scale and The Brief Psychiatric Rating Scale.

and commentators to date have not adequately addressed when and how they may be used most effectively”.¹⁷¹

Competency screening instruments

In 1965, Dr A Robey, a forensic psychiatrist developed a checklist for assessing a defendant’s competence to stand trial.¹⁷² Since Dr Robey’s initial checklist was developed, researchers have constructed at least 13 competency screening instruments that are used to varying degrees to assess a defendant’s competence to stand trial.¹⁷³

The Georgia Court Competency Test (GCCT) developed in 1988, was seen as an advancement on earlier instruments and was described in 2007 by the American Academy of Psychiatry and Law as being “one of the more commonly used screening tools for [assessing] competency to stand trial”.¹⁷⁴ The Academy of Psychiatry and Law described the key weaknesses to the GCCT in the following way:

“The GCCT’s weaknesses include questionable content validity (a full one-third of the questions are about the drawing of the courtroom) and lack of meaningful assessment of a defendant’s ability to assist his defense”.¹⁷⁵

¹⁷¹ Pirelli, et al., *supra* note 10, at 34-35.

¹⁷² Ames Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIATRY 616, 616-623 (1965).

¹⁷³ Competency to Stand Trial Screening Test (CST), Lipsett and others (1971).
Competency to Stand Trial Assessment Instrument (CAI), Laboratory of Community Psychiatry, (1973).
Georgia Court Competency Test (GCCT/GCCT-MSH), Nicholson, Briggs and Robertson (1988).
Interdisciplinary Fitness Interview (IFI-IFI-R), Golding (1993).
Fitness Interview Test (FIT/FIT-R), Roesch, Zapf, Evers and Webster (1998).
Competence-Assisted Determination of Competency to Proceed (CADCOMP), Barnard and others (1991).
Competence Assessment of Standing Trial for Defendants With Mental Retardation (CAST-MR), Everington and Luckasson (1992).
Metropolitan Toronto Forensic Service (MET FORS).
Fitness Questionnaire (MFQ), Naussbaum, Mamuk, Trembassy, Wright and Callaghan (1998).
MacArthur Competence Assessment Tool - Criminal Adjudication (MacCAT-CA), Poythress and others (1999).
Evaluation for a Competency to Stand Trial - Revised (ECST-R), Rogers, Tillbrook and Sewel (2003).
The Test of Malingered Incompetence (TOMI), Colwell and others (2008).
Inventory of Legal Knowledge (ILK), Musick and Otto (2010).

¹⁷⁴ Mossman, et al., *supra* note 1, at S41, *citing* Robert P. Archer, Jacqueline K. Buffington-Vollum, Rebecca Vautner Stredny & Richard W. Handel, *A Survey of Psychological Test Use Patterns Among Forensic Psychologists*, 87 J. PERSONALITY ASSESS. 84, 84-94 (2006).

¹⁷⁵ Mossman, et al., *supra* note 1, at S40.

The GCCT was modified in 1992 when the GCCT-MSH was released. The American Academy of Psychiatry and Law warns however, that “users of the GCCT-MSH should ... recognize that it is focused on factual understanding and offers limited insight into a defendant’s rationality or appreciation of his legal situation”.¹⁷⁶

One of the most comprehensive screening instruments is the MacArthur Competence Assessment Tool – Criminal Adjudication (MacCAT-CA) that evolved from a broader research project into decisional competence. The MacCAT-CA comprises 22 topics, of which 16 do not address the defendant’s actual case. Instead, the defendant is asked for example to consider a hypothetical case about a violent assault between two acquaintances over a game of pool.¹⁷⁷

The American Academy of Psychiatry and Law has explained:

“Weaknesses of the MacCAT-CA include its limited focus on the complexity of the defendant’s case, the defendant’s memory of events, and legal demands such as appropriate behavior in court ... [I]ts verbal demands may exceed the expressive capabilities of mentally retarded defendants who nonetheless understand their charges and can converse satisfactorily with counsel. Evaluatees with severe thought disorders, memory impairment, or problems with concentration may not be able to complete assessments with the instrument”.¹⁷⁸

Another screening instrument, the Evaluation of Competency to Stand Trial – Revised (ECST-R) was first published in 2003¹⁷⁹ and was designed to specifically address what the authors say are the three limbs of the *Dusky* test. The ECST-R has been described as a “potentially attractive tool for examiners to use in the assessment” of a defendant’s competence to stand trial.¹⁸⁰ The same authors however, express concerns about the ECST-R in relation to some of

¹⁷⁶ Mossman, et al., *supra* note 1, at S40-41.

¹⁷⁷ Richard Rogers & Jill Johansson-Love, *Evaluating Competency to Stand Trial With Evidence-Based Practice*, 34(4) J. AM. ACAD. PSYCHIATRY & L. 450, 450-460 (2009).

¹⁷⁸ Mossman, et al., *supra* note 1, at S42.

¹⁷⁹ Richard Rogers, Rebecca L. Johnson, Chad E. Tillbrook, Mary A. Martin & Kenneth W. Sewell, *Assessing Dimensions and Competency to Stand Trial: Construct Validation of the ECST-R Assessment*, 10(4) SCHOLARWORKS, UNIVERSITY OF MASSACHUSETTS AMHERST 344-351 (2003).

¹⁸⁰ MELTON ET AL., *supra* note 25, at 153.

the rating scales used in the instrument and the “... internal validity of the scores obtained” that “... appear to permit gross incongruencies ... between ratings and scale interpretations”.¹⁸¹

The inherent weaknesses with any competency screening instrument is that there is no objective criteria against which to test the validity of the competence screening instrument data because it is not possible to clinically assess how a defendant is in fact performing in a trial setting.¹⁸² Thus, while some screening tools may be useful in helping to differentiate between defendants who are competent to stand trial and those who are not, commentators acknowledge the variability and usefulness of competence screening instruments.¹⁸³ The deficiencies with competency screening instruments identified in the literature by psychiatrists and psychologists are compounded when issues arise about the admissibility of evidence derived from the application of and interpretation of a screening instrument. In its opinion in *Daubert v. Merrell Dow Pharmaceuticals*,¹⁸⁴ the Supreme Court focused upon the dual indicia of relevance and reliability when assessing the admissibility of expert evidence. It held that, in order to be helpful to the trier of fact, there must be a “valid scientific connection” between the proposed evidence and the “pertinent inquiry”. The Court also said that when making a preliminary threshold determination as to admissibility, trial judges may consider, amongst other matters, whether the technique in issue has been tested, subjected to peer review, published in scientific journals, its general level of acceptance and the error rate associated with the technique. Subsequently, in *General Electric Co v. Joiner*,¹⁸⁵ the Court explained that trial court rulings

¹⁸¹ *Id.* at 154.

¹⁸² Patricia A. Zapf & Ronald Roesch, *Evaluation of Competence to Stand Trial in Adults*, in FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW 24 (Patricia A. Zapf & Ronald Roesch eds., 2013).

¹⁸³ THOMAS GRISSE, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2nd ed. 2006); MELTON ET AL., *supra* note 25; Patricia A. Zapf & Jodi L. Viljoen, *Issues and Considerations Regarding the Use of Assessment Instruments in the Evaluation and Competency to Stand Trial*, 21 BEHAV. SCI. & L. 351, 351-367 (2003).

¹⁸⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

¹⁸⁵ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

concerning the admissibility of expert testimony could only be successfully challenged if the trial judge had abused their discretion. One consequence of *Joiner* is that different trial judges may reach conflicting conclusions about the admissibility of clinical evidence based upon the application and interpretation of competency screening evaluations without being able to be reviewed on appeal.¹⁸⁶ The Court's requirement in *Daubert* that there be "a valid scientific connection to the pertinent inquiry as a precondition" to admitting evidence derived from a competency screening test is particularly engaged when clinicians rely on screening instruments that do not specifically address either 18 U.S.C. § 4241 or the *Dusky* test, or which are constructed upon hypothetical scenarios that are not connected to the defendant's circumstances. Thus, legitimate questions may be asked about the relevance of a defendant's responses to questions in the MacCAT-CA instrument about acquaintances fighting over a pool game to a case where the defendant is, for example, charged with abducting and raping victims and who believes he was commanded by God to carry out his crimes.¹⁸⁷

The decision of the Supreme Court of Connecticut in *State v Griffin*¹⁸⁸ illustrates the challenges presented by the *Daubert* criteria for the admissibility of expert testimony based upon a competence screening instrument. In that case, the competence of an 18 year old defendant to waive his Miranda rights was challenged in proposed testimony from a professor of psychology at Yale. She had used, amongst other methodologies, a competence screening instrument devised by Professor Grisso "Evaluating Juvenile Adjudicative Competence".¹⁸⁹ The Supreme Court of Connecticut held that the trial court had not misused its discretion when excluding any testimony based upon the competence screening instrument devised by Professor Grisso.

¹⁸⁶ See Cassandra H. Welch, *Flexible Standards, Differential Review: Daubert's Legacy of Confusion*, 29 HARV. J.L. PUB. POL'Y 1085, 1085-1105 (2006); ROGERS & SHUMAN, *supra* note 73.

¹⁸⁷ See *United States v. Mitchell*, 706 F. Supp. 2d 1148 (D. Utah. 2010).

¹⁸⁸ *State v. Griffin*, 869 A.2d 640 (Conn. 2005).

¹⁸⁹ Professor Grisso is a highly renowned psychologist who played a key role in the development of MacCAT-CA competency assessment instrument.

In particular, the Connecticut Supreme Court upheld the lower court's finding that the defendant had failed to establish under the *Daubert* standard that the screening instrument was reliable. This conclusion was based upon the Court's finding that the defendant had failed to establish the screening instrument had been critically evaluated by Professor Grisso's peers and that it was widely accepted.

Competency screening instruments have been developed by psychiatrists and psychologists to provide an evidence-based rationale for a clinician's opinion concerning a defendant's competence to stand trial. The fact so many competence screening tests have emerged over the past four decades underscores the concern that members of the psychiatric and psychological communities do not agree as to which type of instrument is most helpful in assessing a defendant's competence. These uncertainties, when combined with the reported weaknesses of a number of the instruments and the challenge for new instruments to pass the *Daubert* standards are factors that suggest judges and lawyers and not psychologists or psychiatrists should shoulder the bulk of the weight of any inquiry into a defendant's competence to stand trial. This conclusion is reinforced when regard is had to concerns about the discrepancies in recommendations that have been identified between mental health workers.

Attorney deficiencies

Lawyers rarely have the training required to identify in their clients, mental health issues that may be subtly masked. "[A] lawyer is not a trained mental health professional capable of accurately assessing the effects of paranoid delusions on the client's mental processes"¹⁹⁰ or for that matter, many other mental health conditions.

¹⁹⁰ United States v. Salley, 246 F. Supp. 2d 970, 976 (N.D. Ill. 2003) citing United States v. Timmins, 301 F.3d 974, 981 (9th Cir. 2002).

In addition to lacking the skills to appreciate when clients may not be competent to stand trial, defense lawyers are invariably too overwhelmed and under-resourced to give the attention required when a client may require a competence assessment. One commentator has noted “the ‘meet ‘em and plead ‘em’ model of representation is common in jurisdictions across the United States”.¹⁹¹ Defense lawyers “... cannot interview clients, investigate the facts of the case, or file appropriate motions, let alone effectively negotiate plea bargains ... Hurried conversations in the courtroom itself, or perhaps a hallway or holding cell, are the best that most ... [defense attorneys] can do”.¹⁹²

Attorneys often being unable to identify and assist clients who are not competent to stand trial is a tragic reality of the modern American system of criminal trials. The law reports are replete with cases in which defense lawyers have been found to have provided ineffective representation in cases where they failed to investigate or present to the court obvious concerns about a defendant’s competence to stand trial.¹⁹³

Sadly, attorneys are rarely able to fulfil the role envisaged in *United States v. Duhon*¹⁹⁴ in which the court, after hearing from medical experts and an independent trial lawyer called as a court appointed expert, stated, that a “multi-disciplinary approach is often critical in resolving competency issues, particularly, where, as here, the focus is on a defendant’s ability to assist counsel”.¹⁹⁵ In such a case, “one of the most evident issues is whether the assessing

¹⁹¹ Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 Law and Contemporary Problems 83, 94 (2017).

¹⁹² Griffin, *supra* note 191, at 95 *citing* Tina Peng, I’m a Public Defender. It’s impossible for me to do a good job representing my clients, Wash. Post (Sept. 3, 2015).

¹⁹³ *See for example* Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990); Harris By and Through Ramseyer v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994); Becton v. Barnett, 920 F.2d 1190 (4th Cir. 1990); United States *ex rel* Newman v. Rednour, 917 F. Supp. 2d 765 (N.D. Ill. 2012); Blakeney v. United States, 77 A.3d 328 (D.C. 2013); Matthews v. State, 358 S.C. 456, 596 S.E. 2d 49 (2004); Hummel v. Rosemeyer, 564 F.3d 290 (3rd Cir. 2009); United States *ex rel* Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981) and Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997).

¹⁹⁴ United States v. Duhon, 104 F. Supp. 2d 663 (W.D. La. 2000).

¹⁹⁵ *Id.* at 669.

professional, usually a psychiatrist or a psychologist, really knows what would normally go into the defense of the case”.¹⁹⁶ The Court appreciated in *Duhon* that medical assessors may not be ideally placed to assess whether or not a defendant is able to genuinely assist their counsel in preparing the defense case because a psychiatrist or psychologist may not really know from a defense attorney’s perspective what is required from a defendant to defend charges.¹⁹⁷

While the practical challenges faced by defense attorneys for assessing a defendant’s competence to stand trial are unlikely to be addressed in the immediate future, a new formula would more likely achieve the multi-disciplinary approach that appealed to the Court in *Duhon*, which recognized the important role that lawyers can and should play in assisting the Court to determine whether or not a defendant is competent to stand trial.

Judicial deficiencies

Clinicians now occupy a pivotal role in the assessment of a defendant’s competence to stand trial.¹⁹⁸ The reasons for this state of affairs can be distilled to three factors.

First, judges, like attorneys are unlikely to have the technical knowledge required to question and challenge assessments made by psychiatrists and psychologists concerning a defendant’s competence to stand trial. Thus, while ultimately the decision as to whether or not a defendant

¹⁹⁶ *Id.* at 669, citing Michael N. Burt and John T. Philipsborn, *Assessment of Client Competence, A Suggested Approach*, CHAMPION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (June 1988).

¹⁹⁷ See Uphoff, *supra* note 12. John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM.U.L. REV. 207 (2008); Sarah Hur, *An Attorney’s Dilemma: Representing a Mentally Incompetent Client Who Does Not Wish to Raise Mental Health Issues in Court*, 27 GEO. J. LEGAL ETHICS 555 (2014).

¹⁹⁸ Patricia A. Zapf, Karen L. Hubbard, Virginia G. Cooper, Melissa C. Wheelles & Kathleen A. Ronan, *Have the Courts Abdicated their Responsibility for Determination of Competency to Stand Trial to Clinicians?*, 4(1) J. FORENSIC PSYCHOL. PRACT. 27 (2004).

is competent to stand trial is within the exclusive domain of the judge, in reality, there is a high degree of judicial adoption of the views put forward by clinicians.¹⁹⁹ As noted by Judge H Edwards, “the judicial system is encumbered by judges ... who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner”.²⁰⁰ The deficiencies in judicial training and knowledge are very evident in cases where judges routinely rely without question, upon the evidence of mental health professionals when deciding whether or not a defendant is competent to stand trial. Second, the adversarial process of a criminal trial is not an optimum forum for testing complex scientific evidence about a defendant’s competence to stand trial. The adversarial model is predicated on the basis that a criminal trial is “a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest”.²⁰¹ This theory does not reflect the reality of most prosecutions today in which the defense attorney is more likely to direct their limited resources towards achieving a resolution through a plea bargain, rather than embark on the time consuming, challenging and potentially expensive task of testing the prosecution’s arguments concerning a defendant’s competence to stand trial. Third, the judicial system involves a “case by case” adjudicatory approach²⁰² which does not align with the training of psychologists and psychiatrists who, in the pursuit of evidence-based methodologies, apply to individual cases, data developed from groups.²⁰³ The mismatch between the case by case route that judges are trained to follow and the broader group databases from which clinicians draw conclusions is

¹⁹⁹ Keith R. Cruise & Richard Rogers, *An Analysis of Competency to Stand Trial: An Integration of Case Law and Clinical Knowledge*, 16(1) BEHAV. SCI. & L. 35 (1998); Zapf, et al., *supra* note 198.

²⁰⁰ Harry T. Edwards, Reflecting on the Findings of the National Academy of Sciences Committee on Identifying the Needs of the Forensic Science Community, Address to the National Commission on Forensic Science, Washington, D.C. (2014).

²⁰¹ Mirjan R. Damaska, *Evidentiary Barriers to Conviction and Two Morals of Criminal Procedure: A Comparative Study*, 21 U. PA. L. REV. 506, 663 (1972-73).

²⁰² Edwards, *supra* note 200.

²⁰³ Fisher, et al., *supra* note 164; David L. Faigman, *Judges as “Amateur Scientists”*, 86 B.U.L. REV. 1207 (2006).

particularly problematic in cases where mental health experts rely upon competency assessment instruments that do not address the unique circumstances of each defendant.

Research confirms that judges have developed a high level of dependence upon the views of psychiatrists and psychologists concerning a defendant's competence to stand trial. In one study, which focused upon a cohort of 328 competency determinations in state courts in Alabama, where the statutory test for determining competency to stand trial replicates the *Dusky* test, researchers found that in all but one case the courts accepted the recommendations of the mental health professionals concerning the competence of the defendant to stand trial.²⁰⁴ In the Alabama study, researchers questioned judges in order to try and understand the high rate of agreement between judicial determinations concerning a defendant's competence to stand trial and the clinician's report. The judges who were interviewed all indicated their belief that mental health professionals are more qualified to determine if a defendant is competent to stand trial than judges or lawyers. One judge in particular expressed his frustration with clinical reports that did not answer the ultimate question concerning a defendant's competence to stand trial. He said his job would be "much easier" if the mental health professional would "simply state whether the defendant was competent or not".²⁰⁵ Caution must be exercised before extrapolating studies of state courts' practices into the federal setting. The Alabama study is, however, generally consistent with other studies which have found that judges have tended to accept the recommendations of health professionals concerning the competence of a defendant to stand trial in at least 90% of cases.²⁰⁶

²⁰⁴ Zapf, et al., *supra* note 198.

²⁰⁵ *Id.* at 35.

²⁰⁶ Cruise & Rogers, *supra* note 199; Ian Freckelton, *Rationality and Flexibility in Assessment of Fitness to Stand Trial*, 19 INT'L J.L. & PSYCHIATRY 39, 39-59 (1996); Stephen D. Hart & Robert D. Hare, *Predicting Fitness to Stand Trial: The Relative Power of Demographic Criminal and Clinical Variables*, 5 FORENSIC REP. 53, 53-65 (1992); James H. Reich & Linda Tookey, *Disagreements Between Court and Psychiatrist on Competence to Stand Trial*, 47 CLINICAL PSYCHIATRY 29, 29-30 (1986).

The heavy dependence which judges place upon clinicians' opinions when determining a defendant's competence to stand trial leads to three adverse consequences. First, the tendency of judges to systematically accept the recommendations of clinicians may lead to judges and lawyers bypassing making their own appropriate inquiries into a defendant's competence to stand trial. This concern has led to one commentator lamenting that "decision-making in this area is effectively delegated to clinical evaluators making low visibility, unreviewable decisions pursuant to a vague open textured [clinical] standard".²⁰⁷ Second, if judges simply follow recommendations made by clinicians, they risk not properly testing those recommendations. It is entirely appropriate that the opinions of clinicians be tested by judges through their own observations, and that the subtleties of any competing contentions from health professionals be weighed in the judge's overall assessment of a defendant's competence to stand trial. Third, if, as some commentators have suggested, judges are abdicating responsibility for determining a defendant's competence to stand trial in favour of clinicians²⁰⁸ then serious questions arise about how effectively judges are preserving the fair trial rights of defendants whose competence to stand trial is in issue. The fundamental integrity and legitimacy of the criminal justice system, and society's interest in having a reliable criminal justice system is also placed at risk if judges fail to independently inquire into and assess the competence of a defendant to stand trial.

The deficiencies in the current federal law for determining a defendant's competence to stand trial justify the adoption of a more appropriate test for addressing this vital aspect of the criminal law. That new approach should strive to overcome the limitations of the existing law

²⁰⁷ Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal in Response to Professor Bonnie*, 85(3) J. CRIM. L. & CRIMINOLOGY 571, 571-582 (1995).

²⁰⁸ Zapf, et al., *supra* note 198.

by providing a comprehensive test for determining a defendant's competence that places lawyers and judges, not clinicians, at the center of the inquiry.

PART IV

A MORE APPROPRIATE TEST FOR ASSESSING COMPETENCE

The current federal tests governing the competence of a defendant to stand trial are antiquated, deficient and no longer fit for purpose. Other comparable jurisdictions have adopted or are considering adopting the effective participation test for assessing a defendant's competence to stand trial. Part IV of this paper contains an explanation of the provenance of the effective participation test, what it entails and explores the reasons why the effective participation test is superior to the current federal law for determining a defendant's competence to stand trial.

Provenance of the effective participation test

The origins of the effective participation test can be traced to the minimum fair trial rights in art 6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). While art 6(3) of the European Convention does not expressly refer to a defendant's right to effective participation in his or her trial, the European Court of Human Rights has said that the effective participation standard is an overarching trial

right that encompasses the enumerated rights set out in art 6(3).²⁰⁹ Thus, in *Stanford v United Kingdom*,²¹⁰ the European Court of Human Rights said:

“Article 6 ... read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in ... Article [6(3)] ... ‘to defend himself in person’, ‘to examine or have examined witnesses’, and ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’.”²¹¹

In *S.C. v. United Kingdom*,²¹² the European Court of Human Rights expanded upon the meaning of the effective participation test when it said:

“‘[E]ffective participation’” in this context presupposes that the accused has a broad understanding of the nature of the trial process and what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defense.”²¹³

The effective participation test has been adopted by the Appellate Chamber of the International Criminal Tribunal of the former Yugoslavia.²¹⁴ That tribunal reviewed the competence to stand trial test previously adopted by another international criminal

²⁰⁹ Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

²¹⁰ *Stanford v. United Kingdom*, App. No. 16757/90, Eur. Ct. H.R. (1994) ; Liselotte van den Anker, Lydia Dalhuisen & Marije Stokkel, *Fitness to Stand Trial: A General Principle of European Criminal Law?*, 7(3) UTRECHT L. REV. 120 (2011).

²¹¹ *Id.* at 7.

²¹² *S.C. v. United Kingdom*, App No. 60958/00, 40 Eur. H.R. Rep. 10 (2005). .

²¹³ *Id.* at 29.

²¹⁴ Ian Freckelton & Magda Karagiannakis, *Unfitness to Stand Trial under International Criminal Law: The Influential Decision of the International Criminal Tribunal of the former Yugoslavia in Relation to the Pavle Strugar and its Ramifications*, 21 PSYCHIATRY PSYCHOL. & L. 611, 611-621 (2014).

tribunal that had favored an adaptation of the *Dusky* standard.²¹⁵ The Appellate Chamber for the International Criminal Tribunal of the former Yugoslavia decided not to follow the *Dusky* approach and opted instead for the effective participation test.

The basic elements of the effective participation test as developed by the European Court of Human Rights, for determining a defendant's competence to stand trial have been endorsed by the Law Commission of England and Wales.²¹⁶ In its 2016 report, the Law Commission recommends replacing the common law test for competence to stand trial with a statutory test that focuses upon a defendant's ability to effectively participate in their trial. The effective participation test has also been accepted in Scotland after the Scottish Law Commission recommended Scotland follow the European Court of Justices' approach to assessing a defendant's competence to stand trial.²¹⁷

The effective participation test: what it entails

Three broad questions are addressed when describing what the effective participation test entails; namely, what matters must the defendant understand in order to be assessed as competent to stand trial under the effective participation test? What level of understanding must the defendant possess? How is the effective participation test applied?

²¹⁵ Deputy-General Prosecutor for Serious Crimes v. Josep Nahak, [2014] 1 March, Special Panels for Serious Crimes, Dili District Court, Democratic Republic of East Timor.

²¹⁶ LAW COMMISSION OF ENGLAND AND WALES, UNFITNESS TO PLEAD, Report No. 364, (2016).

²¹⁷ Criminal Justice and Licensing (Scotland) Act 2010, s 170, which inserted the following provision into the Criminal Procedure (Scotland) Act 1995:

“53F Unfitness for trial

- (1) A person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of mental or physical condition, of participating effectively in a trial.
- (2) In determining whether a person is unfit for trial the court is to have regard to –
 - (a) the ability of the person to –
 - (i) understand the nature of the charge,
 - (ii) understand the requirement to tender a plea to the charge and the effect of such a plea,
 - (iii) understand the purpose of, and follow the course of, the trial,
 - (iv) understand the evidence that may be given against the person,
 - (v) instruct and otherwise communicate with the person's legal representative, and
 - (b) any other factor which the court considers relevant”.

The matters that a defendant must understand under the effective participation test

Nine trial tasks can be extracted from the literature and judgments of the European Court of Human Rights as being matters that should be inquired into when deciding whether or not a defendant is competent to stand trial under an effective participation test.²¹⁸

The defendant must understand the charges they are facing. In order to satisfy this requirement the defendant must understand more than just the details of the charge. What is required is that the defendant understand in general terms how the prosecution says the charge will be proven against them.

When deciding how to plead, the defendant must be able to evaluate the significance of entering a plea of guilty or not guilty and what consequences will flow from whichever plea is entered. The defendant must be able to decide how to plead and to do so rationally.

If a plea of not guilty is to be entered, and if it is permissible for the charges to be heard by a judge sitting without a jury then, the defendant must understand the significance of opting for a trial before a judge and jury or without a jury, evaluate relevant considerations and communicate his or her decision rationally.

The defendant should have the ability to understand the process of challenging jurors for cause or peremptorily, evaluate relevant factors and decide rationally whether or not to challenge a juror. The defendant must also be able to provide instructions to counsel in relation to jury challenges or, if they are representing themselves, the defendant must have the ability to challenge jurors on a rational and informed basis.

The defendant must have the ability to follow the proceeding. This includes understanding essential points made by witnesses in order to understand the case against them, evaluate evidence and trial rulings, decide how to advance their own defense either in person or through counsel and communicate their decisions in a rational manner.

The defendant must understand what is at stake in their trial. This criterion includes a requirement that the defendant understand the significance of any conviction and any sentence that may be imposed. This requirement is different from the need for a defendant to understand the charges that they are facing as it necessitates that they understand the purpose of the trial, what the potential outcomes are and how those consequences may affect them.

²¹⁸ Stanford v. United Kingdom, App. No. 16757/90, Eur. Ct. H.R. (1994) & S.C. v. United Kingdom, App No. 60958/00, 40 Eur. H.R. Rep. 10 (2005).

The defendant must have the ability to instruct his or her counsel with sufficient rationality so as to enable their lawyer to understand and advance the defendant's account of events and challenge those parts of the prosecution case that are in issue.

If representing themselves, a defendant must have the ability to conduct their own case in a way that does not breach their right to a fair trial. This can be a particularly challenging consideration, especially in cases when the defendant's delusional beliefs cause them to dispense with the services of an attorney.

If the defendant elects to give evidence they must understand the significance of that decision. It is crucial that if a defendant gives evidence they genuinely understand questions put to them and have the capacity to provide answers in a rational way.

These nine trial tasks that underpin the effective participation test demonstrate that the test extends beyond a defendant's capacity to consult with their lawyer and their capacity to understand the proceedings against them. The effective participation test encompasses all aspects of the defendant's trial and the decisions that they may be required to make at all stages of their criminal trial, from the time they are required to plead through to sentencing. On occasions giving effect to the effective participation test requires the defendant having the services of a suitably qualified person to assist them in understanding information and in communicating their decision. It may also be necessary in some cases for the Court to facilitate the defendant's effective participation by providing the defendant with sufficient time to be able to carry out these functions during their trial. This may be achieved by frequent recesses and by the Court engaging the services of a professional evaluator to monitor the defendant's engagement and responsiveness during the trial.

What level of understanding does the effective participation test entail?

In its reports advocating an effective participation test in England and Wales, the Law Commission suggests a defendant's competence to stand trial should focus upon their decision-making capacity.²¹⁹ The authors of the Law Commission report recommended in their

²¹⁹ LAW COMMISSION OF ENGLAND AND WALES, *supra* note 216, at 1.46.

consultation paper that the assessment of a defendant's capacity to stand trial involves an examination of their ability "to make a particular decision in relation to a particular set of circumstances".²²⁰ Although some commentators have suggested that a capacity-based test is less "abstract" than tests that focus upon a defendant's cognitive abilities,²²¹ the Law Commission did not suggest the complete abandonment of an assessment of a defendant's cognitive abilities. Instead, it recommended that in addition to assessing a defendant's cognitive capabilities, the effective participation test should also incorporate an assessment of a defendant's reasoning deficiencies.²²²

Less straightforward is whether or not the current requirement of rational understanding set out in the *Dusky* test should be retained if the Supreme Court were to mould the *Dusky* test into an effective participation test. In its consultation paper, the Law Commission of England and Wales suggested that "rationality" is a concept that suffers from being vague and that it is not universally understood.²²³ The Law Commission argued that requiring a defendant have a rational understanding in order to be competent to stand trial risks undermining their autonomy simply because their understanding may not be rational when judged objectively.²²⁴ The Law Commission considered there should not be a "blanket requirement" that a defendant's understanding be rational in order for them to be adjudged competent to stand trial.²²⁵ The approach of the Law Commission for England and Wales in relation to "rationality" can be compared to that taken in South Australia where the statutory test for assessing a defendant's

²²⁰ LAW COMMISSION OF ENGLAND AND WALES, *supra* note 159, (C.P.197, 2010) at 2.73.

²²¹ Helen Howard, *Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission's Proposals for a New Competency Test*, 75(3) J.C.L. 194,199 (2011).

²²² LAW COMMISSION OF ENGLAND AND WALES, *supra* note 159, at 3.38.

²²³ LAW COMMISSION OF ENGLAND AND WALES, *supra* note 159, at 3.48-3.58.

²²⁴ LAW COMMISSION OF ENGLAND AND WALES, *supra* note 159, at 3.52.

²²⁵ LAW COMMISSION OF ENGLAND AND WALES, *supra* note 159, at 3.54.

competence to stand trial requires an assessment of the defendant's ability "to understand, or respond rationally to, the charge or the allegations ...".²²⁶

The apprehensions expressed by the Law Commission of England and Wales concerning the need for a rationality component in an effective participation test appears in part to be based upon a misapprehension that rationality equates with a defendant acting in their best interests. These two concepts should not be conflated. In the context of being able to effectively participate in their trial, the requirement that a defendant be able to rationally understand and evaluate relevant information and communicate in a rational way means that when judged objectively, their capacity to understand, evaluate, make decisions, and communicate are unaffected by delusions or other conditions that may affect the defendant's perceptions. This requirement ensures the defendant is genuinely receiving the benefit of their rights to a fair trial and is able to exercise their autonomy in a way that enhances the accuracy and dignity of the criminal justice system.

In addition, uncertainties in English jurisprudence about what is meant by a defendant having a rational understanding do not translate with any degree of synergy into American experiences where rationality has been part of the federal law governing competence to stand trial since *Youtsey's* case was decided in the late 20th century. The United States has also had the further advantage of the Supreme Court's guidance in *Panetti* that in order for a defendant to have a rational understanding, their understanding must not be influenced by psychotic delusions.

²²⁶ Criminal Law Consolidation Act 1935 (SA) 269(H) (Austl.); see also LAW REFORM COMMISSION OF CANADA, CRIMINAL PROCESS AND MENTAL DISORDER, Working Paper 14, Ottawa, 31-44 (1975), in which it was recorded that "Instructing counsel is tied to the accused's participation at trial and implies the ability to communicate rationally" (at 36). The New South Wales Law Reform Commission also recommended that the test for unfitness to stand trial should include reference to a defendant's ability to use information as part of a "rational decision-making process" in NEW SOUTH WALES LAW REFORM COMMISSION, PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM: CRIMINAL RESPONSIBILITY AND CONSEQUENCES, Report No. 138, 31-50 (2013) (at 37).

The importance of retaining the rationality understanding criterion when assessing a defendant's competence to stand trial is illustrated by *United States v. Timmins*,²²⁷ in which the Court of Appeals for the Ninth Circuit quashed the defendant's conviction on the basis that the trial court had not properly considered the rationality requirements of the *Dusky* test. The evidence before the trial judge from two psychiatrists was that Timmins had "'persecutory and grandiose delusional beliefs', including the perception that he was being harassed by police because they were jealous of him".²²⁸ One psychiatrist however, minimised the importance of Timmins' irrational beliefs by saying the preponderance of the evidence suggested Timmins was competent although "there [was] room for disagreement".²²⁹ Even though there was persuasive evidence Timmins did not understand the significance of a plea offer from the prosecution, the trial judge found Timmins was competent to stand trial because his counsel believed he was "able to aid and assist in his defense".²³⁰ The Court of Appeals rejected the approach taken by the trial judge because Timmins' lack of understanding about the significance of the plea bargain offer meant he could not rationally assist in his defense. Absent a requirement that Timmins have a rational understanding, his conviction would, in all likelihood, have been affirmed notwithstanding that his delusional and persecutory beliefs significantly affected his ability to genuinely understand key features of his trial.²³¹ *Timmins* illustrates why the rationality component in *Dusky* should be an essential feature of the effective participation test.

²²⁷ *United States v. Timmins*, 301 F.3d 974 (9th Cir. 2002).

²²⁸ *Id.* at 977.

²²⁹ *Id.*

²³⁰ *Id.* at 979.

²³¹ Thomas O. Osinowo & Debra A. Pinals, *Capacity to Make Rational Decisions: Defense Counsel Representation of Defendants' Competence* 31 J. AM. ACAD. PSYCHIATRY & L. 261, 261-264 (2003); Felthous, *supra* note 72, at 19.

How is the effective participation test applied?

An effective participation test requires that a judge's assessment as to whether or not a defendant is competent to stand trial be informed by relevant clinical evidence. This evidence would continue to be mainly provided by psychiatrists and psychologists, who would be expected to provide the Court with evidence about the defendant's cognitive abilities and their capacity to rationally understand and evaluate relevant information and make and communicate their decisions in a rational manner. The psychiatrist or psychologist should provide evidence about any psychiatric or psychological disorder that the defendant suffers from, however identification of a mental disease or defect should not be determinative of a defendant's competence to stand trial.

Lawyers would also be expected to play a significant role in assisting the Court in deciding whether or not a defendant was competent to stand trial through being able to effectively participate in his or her trial, particularly where the inquiry is into a defendant's ability to assist his or her counsel. In this respect, the overriding responsibility of a defense attorney is to discharge his or her duty as an officer of the Court by communicating to the Court freely and frankly any concerns they harbor about their client's competence to stand trial. Such communications must not be encumbered by concerns about client confidentiality or instructions from the defendant not to challenge his or her competence to stand trial. As Chief Justice Burger said in *Nix v. Whiteside*,²³² while the lawyers "overarching duty" is to advocate and advance a client's interests and instructions, that duty is limited by the lawyers "equally solemn" responsibility and duties as an officer of the Court.²³³ The responsibilities of a defense

²³² *Nix v. Whiteside*, 475 U.S. 157 (1986).

²³³ *Id.* at 166-168. See also American Bar Association, *Criminal Justice Standards: for the Defense Function* (4th ed. 2015), 4-5.2 (c) which states:

"If defense counsel has a good faith doubt regarding the client's competence to make important decisions, counsel should consider seeking an expert evaluation from a mental health professional,

attorney, as an officer of the Court, are particularly important in cases where a defendant's competence to stand trial is questionable and where the defendant instructs their attorney they do not want to challenge their competence to stand trial. The Eleventh Circuit Court of Appeals has said that "if defense counsel suspects that the defendant is unable to consult with him 'with a reasonable degree of rational understanding' ... he cannot blindly accept his client's demand that his competence not be challenged."²³⁴ Other courts have also found that an attorney who fails in the face of credible evidence to investigate a defendant's competence to stand trial risks a finding that the attorney has provided ineffective assistance to his or her client.²³⁵ Recognizing the significant role of a defense attorney in assessing a defendant's competence to stand trial reflects the approach taken in *Duhon*, in which the Court emphasized the value of a "multi-disciplinary approach" towards assessing a defendant's competence to stand trial.²³⁶ As the Court suggested in *Duhon*, it is the defense lawyer and not a psychiatrist or psychologist who may be best positioned to assess their client's ability to advance their defense.

The trial judge must be given every reasonable opportunity to form his or her own view about the defendant's capacity to "effectively participate" in their trial. The very nature of the effective participation test re-asserts the judge's crucial position in making these assessments. This may require a competency assessment hearing in the nature of a voir dire in which the defendant is required to give evidence relevant to their capacity to effectively participate in their trial. Such a hearing may be particularly useful where it is submitted prior to trial the defendant needs to be able to give evidence in order to advance their defense but lacks the

within the protection of confidentiality and privilege rules if applicable".

²³⁴ *Bundy v. Dugger*, 816 F.2d 564, 566 (11th Cir. 1987), *citing* *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986).

²³⁵ *Hull v. Freeman*, 932 F.2d 159, 169 (3rd Cir. 1991); *Blakeney v. United States*, 77 A.3d 328 (D.C. 2013).

²³⁶ *United States v. Duhon*, 104 F. Supp. 2d 663, 669 (W.D. La. 2000).

capacity to do so. Such a hearing would need to be carefully controlled by the trial judge so as to ensure the defendant's right not to incriminate themselves is respected.

This process may add to the time and costs associated with conducting a trial. For many this will be an unattractive proposition in the context of what is already an overburdened and under-resourced process. Nevertheless, concerns about costs and resources cannot be permitted to deflect from the ultimate goals of ensuring a defendant receives a fair trial, that the integrity, legitimacy and accuracy of the criminal justice system is not undermined and that the autonomy and dignity of defendants is preserved.

PART V

WHY THE EFFECTIVE PARTICIPATION TEST SHOULD BE ADOPTED

Advantages to the effective participation test

In order for the thesis in this paper to gain traction it is necessary to demonstrate the effective participation test offers advantages over the current federal law governing the determination of whether or not a defendant is competent to stand trial. That will be done by explaining how the effective participation test successfully addresses the key criticisms of the current federal law set out in Part III of this paper. The explanation of the advantages of the effective participation test over the current federal law will be undertaken by examining both the conceptual and practical advantages of the effective participation test.

There are three key advantages to the effective participation test. First, the cause of a defendant's incompetence becomes a peripheral consideration under the effective participation test. Second, the effective participation test provides one test for all contexts. Third, judicial

responsibilities are returned to the forefront of the inquiry into a whether or not a defendant is incompetent to stand trial.

The peripheral relevance of the cause of a defendant's incompetence

As explained in Part III, 18 U.S.C. § 4241 is confined to defendants who suffer a “mental disease or defect”, and, although the *Dusky* test has a wider ambit, it was also decided in the context of a defendant who had been found to be suffering a psychiatric illness. The federal laws were developed against the backdrop of judges and legislators wishing to ensure that a finding that a defendant lacks competence to stand trial was reserved for cases where the cause of a defendant's incompetence was clearly established. Thus, a hallmark of federal jurisprudence in cases concerning a defendant's incompetence to stand trial has been the suspicion that applications to assess a defendant's competence to stand trial may be motivated by a defendant's desire to avoid accountability for criminal wrongdoing, rather than by a genuine concern about a defendant's competence. This in turn has placed a high onus on those who wish to challenge on appeal decisions made by trial judges not to inquire into a defendant's competence to stand trial.²³⁷

As Part III of this paper demonstrates, any genuine inquiry into a defendant's competence to stand trial should not be restricted by the “causes” of his or her incompetence but rather into the “effect” of the defendant's condition. In other words, the inquiry should be whether a defendant can effectively participate in his or her trial.

²³⁷ Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973); Sheley v. Singletary, 955 F.2d 1434, 1438 (11th Cir. 1992); Watts v. Singletary, 87 F.3d 1282, 1289 (1996); United States v. Morrison, 153 F.3d 34, 46 (2nd Cir. 1998); United States v. Nichols, 56 F.3d 403, 411 (2nd Cir. 1995).

The case of *Hernandez v. Ylst*²³⁸ illustrates the reluctance of appellate courts to critically question a trial court's decision not to inquire into a defendant's competence to stand trial in circumstances where the defendant was sane but suffering significant psychological disorders. Hernandez was convicted of shooting a man who, "at least in Hernandez's mind, was having an affair with Hernandez's wife".²³⁹ Prior to his trial Hernandez made "bizarre" and "delusional" statements that prison officers were injecting him with heroin through birth marks and moles on his skin and that he had been raped by prison guards while he was drugged. A psychologist assessed Hernandez before trial and concluded he suffered delusions and depression and that his condition "would have prevented him from appreciating the criminality of his alleged misconduct".²⁴⁰ Neither the defense counsel or trial judge initiated a competency assessment. Instead, during the course of his trial Hernandez changed his plea to "not guilty by reason of insanity". Three psychiatrists then examined Hernandez and concluded he was sane at the time of his alleged offending. No consideration appears to have been given however to conducting an assessment of Hernandez's competence to continue to stand trial. Ultimately, the Ninth Circuit Court of Appeals concluded Hernandez's right to a fair trial had not been breached because "the record ... contain[ed] no indication that the trial judge ever harbored any doubts as to Hernandez's competence to stand trial".²⁴¹ The unchallenged psychological evidence demonstrated however Hernandez suffered a significant psychological condition and that his delusions and depression prevented him from understanding the nature and significance of the allegations against him. The focus of the trial was upon whether or not Hernandez was insane at the time of his alleged offending rather than whether the psychological evidence demonstrated he lacked competence to stand trial. This error was compounded by the appellate

²³⁸ *Hernandez v. Ylst*, 930 F.2d 714 (9th Cir. 1991).

²³⁹ *Id.* at 715.

²⁴⁰ *Id.* at 718.

²⁴¹ *Id.* at 721.

court which noted the psychologist's assessment but explained he had not specifically opined on Hernandez's competence to stand trial. This was not a valid criticism given the clarity of the psychologist's finding and because it was for the trial judge, not the psychologist to determine the ultimate question concerning Hernandez's competence to stand trial.

In Hernandez's case the focus of inquiries during his trial was on whether or not Hernandez suffered a disease or defect of the mind. The evidence concerning his psychological illness was therefore not properly evaluated by the trial judge thereby allowing the cause of Hernandez's mental issues to assume center stage. The causes of a defendant's possible incompetence, however, should only be of peripheral relevance. The fact a defendant suffers a condition that may impact upon their competence to stand trial may trigger an inquiry into their competence. The focus of an inquiry should not however be upon the causes of a defendant's possible incompetence but whether or not they actually lack the requisite competence to stand trial.

Hernandez, alongside defendants who suffer from, for example, personality disorders or neurological conditions, or any defendant who fails to meet the narrow criteria in 18 U.S.C. § 4241 and *Dusky*, would be better assessed through the lens of the effective participation test. A key advantage of the effective participation test is that it is unencumbered by the current legislative criterion that requires a defendant to be demonstrably suffering a "mental disease or defect" or the uncertainty in some circles about whether or not a personality disorder or other condition is sufficient to lay the foundation for a finding that a defendant is not competent to stand trial. By focusing on a defendant's competence to understand, evaluate, decide and communicate in relation to key trial issues, the effective participation test ensures the causes of a defendant's possible incompetence are of secondary relevance. Had the focus in Hernandez's case been on whether or not he possessed the capacity to understand, evaluate and

make key decisions and communicate in a rational way, then his competence to stand trial would have been able to be properly assessed and determined. It is difficult to understand how Hernandez, who was so affected by delusions and depression that he could not understand the nature and significance of the charges he was facing, could make any rational decisions in relation to his trial.

A unitary test

The federal law has developed different tests for assessing a defendant's competence to stand trial in different contexts. For example, although not a focus of this paper, it has been observed that the assessment of a defendant who lacks physical competence to stand trial is assessed under different tests from 18 U.S.C. § 4241 and *Dusky*.²⁴² This paper has examined other ways in which the federal law has developed ad hoc tests for assessing a defendant's competence to stand trial in circumstances where one test could more than adequately cover the assessment of all defendants whose competence to stand trial is in issue.

As explained in Part III, in *Moran*, the Supreme Court ruled that the standard of competence required by the due process clause for pleading guilty and waiving one's right to counsel is the same as the *Dusky* standard for assessing competence to stand trial. Without overturning *Moran*, the Court in *Edwards* concluded a higher threshold of competence is required where a defendant wishes to dispense with counsel in a contested trial. This aspect of the federal law can be accurately described as arbitrary and inconsistent. This unsatisfactory state of affairs has come to pass because the Court appreciated in *Edwards* that the *Dusky* test, as applied in

²⁴² United States v. Doran, 328 F. Supp.1261, 1263 (S.D.N.Y. 1971); United States v. Knohl, 379 F.2d 427, 436 (2nd Cir. 1967 cert denied 389 U.S. 973, 88 S.Ct. 472 (1967); United States v. Jones, 876 F. Supp. 395, 397 (N.D.N.Y 1995); United States v. Gigante, 982 F. Supp. 140 (E.D.N.Y. 1997); see *supra* note 18.

Moran, was not an appropriate test for assessing a defendant's competence to proceed without representation in a contested trial.

On one level, the approach taken by the Court in *Edwards* was commendable. The Court recognised in *Edwards* that a defendant's competence cannot validly be assessed in a vacuum without reference to the context faced by the defendant. The Court appreciated in *Edwards* what the majority failed to understand in *Moran*, namely that a defendant's competence for one purpose in a criminal trial does not necessarily equate to competence for other purposes in the same trial.²⁴³ As Justice Blackmun colloquially said when dissenting in *Moran*, "a person who is 'competent' to play basketball is not thereby 'competent' to play the violin".²⁴⁴

The unsatisfactory state of the current law is not the product of the Court's attempt in *Edwards* to draw a distinction between a defendant's competence when he or she wishes to represent themselves at trial with other inquiries into a defendant's competence. The inconsistent and ad hoc state of the current law has arisen because the Court in *Edwards* elected not to address the shortcomings in the *Dusky* test.

In contrast, the effective participation test has the advantage of being a unitary test that applies in all circumstances that the defendant may face in a criminal trial. The effective participation test requires an assessment of a defendant's competence to stand trial by asking whether or not, in each circumstance to be faced by the defendant, they can effectively participate in the proceeding. The effective participation test recognizes that a defendant's capacity to participate in one phase of their trial does not necessarily translate to them being able to effectively participate in another phase of their trial. Thus, a defendant may be able to

²⁴³ Bonnie, *supra* note 2, at 299; RONALD ROESCH & STEPHEN L. GOLDING, COMPETENCY TO STAND TRIAL 10-13 (1980).

²⁴⁴ *Godinez v. Moran*, 509 U.S. 389, 413 (1993).

effectively instruct counsel to enter a plea of guilty and provide instructions to support a plea of mitigation. The same defendant may not, however, have the capacity to effectively participate in their trial if it is necessary for them to give evidence and be subject to cross-examination. Similarly, a defendant who has the capacity to provide effective instructions to counsel may not have the capacity to represent themselves in a contested hearing.

The recent decision of the Sixth Circuit Court of Appeals in *US v. Dubrule*²⁴⁵ demonstrates the challenges that arise when assessing a defendant's competence to represent him or herself and give evidence by applying the *Dusky* test.

Dubrule was a medical practitioner who was ultimately convicted of unlawfully distributing controlled substances. Prior to his trial Dubrule made a number of bizarre statements, including that the government was trying to kill him, that he was a world famous physician and that the Jewish people were responsible for destroying dams in New Orleans that led to extensive flooding during Hurricane Katrina. Dubrule's lawyer was granted leave to withdraw as counsel before the trial and Dubrule was permitted to represent himself, albeit with the limited assistance of a standby counsel. He gave evidence in his own defense. Counsel was assigned to Dubrule after he was convicted and before he was sentenced. The assigned counsel immediately moved for an evaluation of Dubrule's competence. Dubrule was assessed by a psychologist, who concluded he "suffered from paranoid or grandiose delusions, and that such delusions rendered him incompetent to proceed to sentencing".²⁴⁶ A second psychologist concluded that Dubrule suffered "personality and delusional disorders" that had "evidently impaired Dubrule's ability to represent himself at trial" because, based on Dubrule's raw intelligence, he "should have been able to either present a much more coherent defense or to

²⁴⁵ *United States v. Dubrule*, 822 F.3d 866 (6th Cir. 2016).

²⁴⁶ *Id.* at 873.

have accepted a plea agreement prior to trial”.²⁴⁷ A third psychologist, appointed at the request of the government “concluded that Dubrule suffered from personality and delusional disorders”.²⁴⁸ She concluded, however, that Dubrule’s condition “did not make him incompetent to stand trial, represent himself, or proceed to sentencing”.²⁴⁹ After reviewing the evidence of all three experts the District Court found the opinion of the third psychologist to be the most persuasive. On appeal, the Court of Appeals concluded the District Court’s finding was not clearly erroneous. In doing so the appellate court endorsed its earlier observations in *United States v. Davis*, in which it said, in cases where a criminal defendant elects to represent himself, “the mere fact that [he] espouses a far-fetched, or even bizarre, legal-defense theory is insufficient to clear the high hurdle for incompetency”.²⁵⁰ In responding to Dubrule’s argument on appeal that his over-confidence when representing himself was indicative of him being incompetent, the Court of Appeals said that “common sense” would suggest that a defendant who elects to represent himself after receiving a warning from the judge about the dangers inherent in self-representation is either over-confident or actually engaged in some form of “self-sabotage”.²⁵¹ There was, however, a further and more plausible explanation, namely that Dubrule’s over-confidence when representing himself was symptomatic of his delusional beliefs in his own competence. Although the appellate court examined the way Dubrule had represented himself when rejecting his appeal, it did so by expressly applying the *Dusky* test. If the trial and appellate courts had the option of applying the more nuanced effective participation test then Dubrule’s real abilities to represent himself and give evidence would have been able to be fully evaluated.

²⁴⁷ *Id.* at 873-874.

²⁴⁸ *Id.* at 874.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 876 *citing* *United States v. Davis*, 515 Fed. App. 486, 493 (6th Cir. 2013).

²⁵¹ *Dubrule*, 822 F.3d at 878.

The advantages of the effective participation test are also illustrated by returning to *Moran's* case in which the defendant chose to dispense with his defense attorney and plead guilty in order not to resist the state's plea for the death sentence to be imposed during the sentencing phase of Moran's trial. The reasons for Moran's self-destructive behavior can be found in the law reports. Moran's own testimony was that he was being administered simultaneously four different prescription medications at the time he made his critical decisions and was also suffering "deep depression".²⁵² Had the effective participation test been applied to *Moran's* case, the trial judge would have been compelled to inquire into whether or not Moran genuinely had the capacity to understand the nature and consequences of his decision to dispense with his counsel and plead guilty. As Justice Blackmun, with whom Justice Stevens joined in dissenting, correctly noted, in *Moran's* case the state sought to convict and sentence to death a defendant who was "helpless to defend himself".²⁵³ This in turn seriously compromised Moran's right to a fair trial and also undermined society's interests in having a reliable and legitimate criminal justice system.

Judicial responsibilities

The trial court must conduct a competency hearing if there is reasonable cause to believe that the defendant satisfies the tests for not being competent to stand trial. Failure to conduct a competency hearing in circumstances where such a hearing is required constitutes a violation of the defendant's due process rights.²⁵⁴ Usually competency hearings are triggered by an application from defense counsel but a competence hearing can also be carried out upon the motion of a prosecutor or by the trial Judge acting on his or her own volition.

²⁵² *Godinez v. Moran*, 509 U.S. 389, 417 (1993).

²⁵³ *Id.*

²⁵⁴ *Drope v. Missouri*, 420 U.S. 162 (1975).

Currently, expert testimony constitutes the primary source of evidence from which a trial judge makes a determination as to whether or not the defendant is competent to stand trial. However, as observed in Part III of this paper, the dependence which many judges now have upon the views of mental health experts when considering a defendant's competence to stand trial has raised legitimate questions about whether or not trial judges are handing their judicial responsibilities to health professionals when determining the outcome of a competence hearing. The reasons why trial judges, when assessing a defendant's competence to stand trial, have developed a high level of dependence upon the opinions of health professionals include the knowledge imbalance between judges and mental health professionals on issues concerning a defendant's mental health and the comparative inability of defense counsel to challenge medical evidence called by the prosecution concerning a defendant's competence to stand trial.

The effective participation test continues to rely upon expert medical testimony to assess a defendant's competence to stand trial. The effective participation test however requires more engagement from a trial judge when determining a defendant's competence to stand trial particularly in cases where the defendant seeks to represent themselves or engage in complex functions such as giving evidence. In these cases, the trial judge is required to draw upon their experience and understanding of how a criminal trial is conducted and how a defendant's rights to a fair trial are honored. Thus, when making an assessment of a defendant's competence to effectively participate in their trial, the trial judge is expected to make their own observations of the defendant, examine the defendant in court and consider other sources of information such as the observations of counsel and lay testimony. In this type of inquiry judges and not just health professionals must bear the burden of fully assessing a defendant's competence to participate effectively in their trial.

How then can judges reclaim the mantle of determining a defendant's competence to stand trial? The answer lies in judges acknowledging that while clinicians have valuable roles to play in assisting the court, their role is but one part of the equation for determining whether or not a defendant is competent to stand trial.

This was demonstrated with resounding effect 20 years ago in *U.S. v. Gigante*,²⁵⁵ a case that involved charges against the head of the Genovese family, part of the criminal organization known as La Cosa Nostra. In a hearing to assess Gigante's competence to stand trial concerning labor payoffs, extortions, mail frauds and conspiracies to murder, four psychiatrists initially concluded he was not competent to stand trial. In reaching their conclusions the psychiatrists took into account records from 1969 relating to Gigante's regular attendances at a psychiatric hospital. The federal judge however was concerned that Gigante was feigning his symptoms and held a hearing to determine the genuineness of Gigante's alleged mental incapacity. That hearing involved a detailed inquiry into Gigante's conduct throughout most of his life and resulted in the Court concluding Gigante had, for decades, engaged in an elaborate sham in which he pretended to be mentally defective while at the same time he directed and controlled a sophisticated criminal enterprise. The Court then presented its findings of fact to the psychiatrists who were directed to accept the Court's findings as correct and advise the Court how those findings would affect their earlier determinations that Gigante was competent to stand trial. In the next hearing,²⁵⁶ three of the four psychiatrists testified that the Court's factual findings satisfied them that Gigante was competent to stand trial and that much, if not all of Gigante's symptoms of mental illness had been feigned. One of the psychiatrists appeared to be unwilling to accept the Court's findings and continued to maintain

²⁵⁵ *United States v. Gigante*, 925 F. Supp. 967 (E.D.N.Y. 1996).

²⁵⁶ *United States v. Gigante*, 987 F. Supp. 143 (E.D.N.Y. 1996).

Gigante was not competent to stand trial. The Court concluded under 18 U.S.C. § 4241 that “Gigante [was] able to understand the nature and consequences of the proceedings against him and to assist properly in his own defense”.²⁵⁷ Gigante was convicted of multiple charges and sentenced to 12 years in prison. His appeal against his convictions, in which he challenged, amongst other matters the determination he was competent to stand trial, was dismissed by the Second Circuit Court of Appeals.²⁵⁸

The Court in *Gigante* demonstrated how trial judges can, “push back” from what might at first appear to be persuasive medical opinions concerning a defendant’s competence to stand trial. It is also instructive that *Gigante* involved a defendant who was a sophisticated malingerer. Defendants who feign their incompetence can be particularly challenging for all involved in a criminal trial. One authority has noted “... seasoned clinicians often rely on their own individualistic perspectives in deciding when to assess the malingerer Unfortunately, the overuse of clinical judgment can be a source of misdiagnosis and inaccurate information given to the Court”.²⁵⁹ Ironically, psychiatrists have, in recent years developed tools that can now accurately assess the likelihood of a defendant feigning symptoms. The designers of the E.C.S.T.-R Competency Screening Tool have, for example, also developed an “Atypical Presentation Scale” that is designed to identify feigned incompetence. Studies have shown this is a particularly useful screen for identifying malingered incompetency to stand trial evaluations.²⁶⁰ Thus, while judges must be alert to the fallibilities of medical opinions, health professionals can play a significant role in providing information that may assist a judge in deciding whether or not a defendant is competent to stand trial.

²⁵⁷ *Id.* at 151.

²⁵⁸ *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999).

²⁵⁹ Michael J. Vitacco, Richard Rogers, Jason Gabal and Janice Munizza, *An Evaluation of Malingering Screens With Competency to Stand Trial Patients: A Known-Groups Comparison*, L. & HUM. BEHAV., 31(3), 249, 250 (2007).

²⁶⁰ Vitacco. *supra* note 259, at 251 and 258.

Conclusion

In his dissenting opinion in *Watts v. Singletary*,²⁶¹ Judge Carnes of the Eleventh Circuit Court of Appeals lamented the deterioration of protections for an incompetent defendant. He observed that the contemporary understanding of the federal tests for assessing a defendant's competence to stand trial denies "... an American citizen the full benefit of an important trial right guaranteed [to] Englishman at least as early as the seventeenth century".²⁶² Judge Carnes' reference to seventeenth century English law reflected a misunderstanding of the historical evolution of the common law governing competence to stand trial. It can be said, however, that the emphasis that the 20th century common law placed upon a defendant's ability to participate rationally in their trial provided greater protections to a defendant than 18 U.S.C. § 4241. The *Dusky* test has also been diluted with now less emphasis being given to a defendant's ability to rationally understand the proceedings and consult their lawyer. The current federal law has devolved into an unenlightened, ad hoc and muddled state of affairs. Reform of this significant area of the federal law is well overdue.

The deficiencies in the current federal law place at risk defendants with severe mental illness and other conditions that affect their ability to participate in their trial. This in turn jeopardises the observance of the rights of these defendants to a fair trial. Equally disturbing is that the current federal law governing an assessment of a defendant's competence to stand trial risks undermining the integrity and dignity of the criminal law, a point observed by Justice Blackmun in *Moran* when he expressed his concern that the majority's decision enabled the State to convict and execute a defendant who was "helpless to defend himself".²⁶³ The current federal law also compromises the accuracy of verdicts by placing on trial defendants whose abilities

²⁶¹ *Watts v. Singletary*, 87 F.3d 1282 (11th Cir. 1996).

²⁶² *Id.* at 1293.

²⁶³ *Godinez v. Moran*, 509 U.S. 389, 417 (1993).

to challenge allegations against them is undermined by their inability to participate effectively in their trial. The current federal law also fails to give proper effect to a defendant's right to self-determination by undermining the principle that it is the defendant who should make key decisions about the conduct of their trial and that in order to do so they should have the capacity to participate effectively in their trial.

The current federal law governing a defendant's competence to stand trial is almost entirely a product of judicial innovation. The federal statute was substantially devised by federal judges serving on a committee of the Judicial Conference of the United States and the Supreme Court's efforts to divine a test for assessing a defendant's competence to stand trial led to the Court adopting recommendations of the Solicitor General in *Dusky*. Regrettably, the Supreme Court has not seized opportunities presented in subsequent cases to address deficiencies in the *Dusky* test. The *Dusky* test could evolve into an effective participation test by requiring an assessment of the defendant's competence to stand trial to focus upon their capacity to understand relevant information, evaluate that information, make decisions in relation to that information and communicate their decisions.

The federal law is antiquated and produces outcomes that are ad hoc and which at times are not reconcilable with the principles that underpin the requirement that incompetent defendants not stand trial. Concerns about the adequacy of tests for determining the competence of defendants to stand trial are currently being examined in a number of cognate jurisdictions.²⁶⁴ Those jurisdictions which have, or are in the process of reviewing their respective tests for assessing the competence of a defendant to stand trial have identified significant shortcomings in tests

²⁶⁴ LAW COMMISSION OF ENGLAND AND WALES, *supra* note 216; LAW COMMISSION OF VICTORIA, REVIEW OF THE CRIMES (MENTAL IMPAIRMENT OF UNFITNESS TO BE TRIED) ACT 1997 (2014); NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 226.

that are based upon the common law or which were devised in an era when the focus was on defendants found to be suffering from mental diseases or mental defects. While there is no universally accepted formula for assessing a defendant's competence to stand trial, the effective participation test has been accepted by the European Court of Human Rights and Scotland. It is also the test recommended by the Law Commission for England and Wales to replace the common law standard that currently applies in that jurisdiction.

The effective participation test has a number of advantages over the existing federal tests for determining a defendant's competence to stand trial. Those advantages include it being a unitary test that can apply to all phases of a criminal trial and that it can be engaged whenever a defendant's competence to stand trial is in issue, regardless of the reasons for their incompetence. The effective participation test relies to some extent upon the evidence of health professionals. Nevertheless, the assessment of a defendant's ability to effectively participate in their trial is quintessentially a judicial decision that is based upon a trial judge's knowledge of what the defendant needs to understand, evaluate, decide and communicate in the context of their trial. The effective participation test rightfully places the trial judge, and not medical professionals at the epicenter of the assessment of a defendant's competence to stand trial.

Appendix

State Legislative Definitions of Incompetence to Stand Trial

Jurisdiction	Source of Law	Definition of incompetence
Alabama	ARCrP Rule 11.1	<p>Rule 11.1. Definition of Incompetency A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant.</p>
Alaska	Alaska Stat AS 12.47.100 to 110	<p>12.47.100. Incompetency to proceed (a) A defendant who, as a result of mental disease or defect, is incompetent because the defendant is unable to understand the proceedings against the defendant or to assist in the defendant's own defense may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists.</p>
Arizona	A.R.S. 13-4501 to 17	<p>13-4501 Definitions "Incompetent to stand trial" means that as a result of mental illness, defect or disability a defendant is unable to understand the nature and object of the proceeding or to assist in the defendant's defense. In the case of a person under eighteen years of age when the issue of competency is raised, incompetent to stand trial also means a person who does not have sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual understanding of the proceedings against the person. The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial.</p>
Arkansas	Ark. Code § 5-2-302.	<p>5-2-302 Lack of fitness to proceed generally No person who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.</p> <p>A court shall not enter judgment of acquittal on the ground of mental disease or defect against a defendant who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect.</p>

California	Ca. Penal Code § 1367 to 1376	<p>1367. Mentally incompetent persons; trial or punishment prohibited; application of specified sections A person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, post release community supervision, or parole revoked while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.</p>
Colorado	Colo. Rev. Stat § 16-8.5-101	<p>16-8.5- 101. Definitions (11) “Incompetent to proceed” means that, as a result of a mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding in order to assist in the defense, or that, as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings.</p>
Connecticut	Conn. Gen Stat. § 54 to 56d.	<p>54 – 56D. Competency to stand trial (a) Competency requirement. Definition. A defendant shall not be tried, convicted or sentenced while the defendant is not competent. For the purposes of this section, a defendant is not competent if the defendant is unable to understand the proceedings against him or her to assist in his or her own defense.</p>
Delaware	11 Del C. § 404.	<p>404. Confinement in Delaware Psychiatric Center of persons too mentally ill to stand trial; requiring State to prove prima facie case in such circumstances; adjustment of sentences</p> <p>(a) Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or serious mental disorder, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own defense or to instruct counsel on the accused's own behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trial. However, upon motion of the defendant, the court may conduct a hearing to determine whether the State can make out a prima facie case against the defendant, and if the State fails to present sufficient evidence to constitute a prima facie case, the court shall dismiss the charge. This dismissal shall have the same effect as a judgment of acquittal.</p>

Florida	<p>F.S.A § 916.106</p> <p>F.S.A § 916.12</p> <p>F.S.A. § 916.3012</p>	<p>Definitions. (11) “Incompetent to proceed” means unable to proceed at any material stage of a criminal proceeding, which includes the trial of the case, pretrial hearings involving questions of fact on which the defendant might be expected to testify, entry of a plea, proceedings for violation of probation or violation of community control, sentencing, and hearings on issues regarding a defendant's failure to comply with court orders or conditions or other matters in which the mental competence of the defendant is necessary for a just resolution of the issues being considered.</p> <p>(1) A defendant is incompetent to proceed within the meaning of this chapter if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.</p> <p>(2) Mental health experts appointed pursuant to s 916.115 shall first determine whether the defendant has a mental illness and, if so, consider the factors related to the issue of whether the defendant meets the criteria for competence to proceed as described in subsection (1)...</p> <p>(3) In considering the issue of competence to proceed, an examining expert shall first consider and specifically include in his or her report the defendant’s capacity to:</p> <ul style="list-style-type: none"> (a) Appreciate the charges or allegations against the defendant. (b) Appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant. (c) Understand the adversarial nature of the legal process. (d) Disclose to counsel facts pertinent to the proceedings at issue. (e) Manifest appropriate courtroom behaviour (f) Testify relevantly <p>In addition, an examining expert shall consider and include in his or her report any other factor deemed relevant by the expert.</p> <p>...</p> <p>(1) A defendant whose suspected mental condition is intellectual disability or autism is incompetent to proceed within the meaning of this chapter if the defendant does not have sufficient present ability to consult with the defendant’s lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against the defendant.</p>
Georgia	Ga. Code. Ann. § 15-11-651 and 17-7-130.	<p>17-7-130 (b)(1)Plea of mental incompetency to stand trial</p> <p>If an accused files a motion requesting a competency</p>

		<p>evaluation, the court may order the department to conduct an evaluation by a physician or licensed psychologist to determine the accused's mental competency to stand trial and, if such physician or licensed psychologist determines the accused to be mentally incompetent to stand trial, to make recommendations as to restoring the accused to competency. If the accused is a child, the department shall be authorized to place such child in a secure facility designated by the department.</p> <p>15-11-651. Definition for incompetency for a child (Juvenile Code) (3) "Incompetent to proceed" means lacking sufficient present ability to understand the nature and object of the proceedings, to comprehend his or her own situation in relation to the proceedings, and to assist his or her attorney in the preparation and presentation of his or her case in all adjudication, disposition, or transfer hearings. Such term shall include consideration of a child's age or immaturity.</p>
Hawaii	HRS § 704-403	<p>704-403. Physical or mental disease, disorder, or defect excluding fitness to proceed No person who as a result of a physical or mental disease, disorder, or defect lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.</p>
Idaho	Idaho Code Ann § 18-210 to 212	<p>18-210. Lack of capacity to understand proceedings – delay of trial No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures.</p>
Illinois	725 Ill. Comp. Stat. 5/104-11 to 104-23	<p>104-10. Presumption of Fitness; Fitness Standard A defendant is presumed to be fit to stand trial or to plead, and to be sentenced. A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense.</p>
Indiana	Ind. Code 35-36-3 to 4.	<p>35-36-3-1. Hearing; psychiatric examination; delay or continuance of trial; confinement in psychiatric institution; competency restoration services; transmittal of information to NICS(a) If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the court shall immediately fix a time for a hearing to</p>

		<p>determine whether the defendant has that ability. The court shall appoint two (2) or three (3) competent, disinterested:</p> <ul style="list-style-type: none"> (1) psychiatrists; (2) psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology; or (3) physicians; <p>who have expertise in determining competency.</p>
Iowa	Iowa Code 812.3 to 812.9	<p>812.3 Mental incompetency of accused.</p> <p>If at any stage of a criminal proceeding the defendant or the defendant’s attorney, upon application to the court, alleges specific facts showing that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, the court shall suspend further proceedings and determine if probable cause exists to sustain the allegations. The applicant has the burden of establishing the probable cause.</p> <p>The court may on its own motion schedule a hearing to determine probable cause if the defendant or defendant's attorney has failed or refused to make an application under this section and the court finds that there are specific facts showing that a hearing should be held on that question. The defendant shall not be compelled to testify at the hearing and any testimony of the defendant given during the hearing shall not be admissible on the issue of guilt, except such testimony shall be admissible in proceedings under section 811.2, subsection 8, and section 811.8, and in perjury proceedings.</p> <p>2. Upon a finding of probable cause sustaining the allegations, the court shall suspend further criminal proceedings and order the defendant to undergo a psychiatric evaluation to determine whether the defendant is suffering a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense.</p>
Kansas	Kan. Crim. Proc. Code Ann 22-3301 to 3306	<p>22-3301. Definitions</p> <p>(1) For the purpose of this article, a person is “incompetent to stand trial” when he is charged with a crime and, because of mental illness or defect is unable:</p> <ul style="list-style-type: none"> (a) To understand the nature and purpose of the proceedings against him; or (b) to make or assist in making his defense. <p>(2) Whenever the words “competent,” “competency,” “incompetent” and “incompetency” are used without qualification in this article, they shall refer to the defendant's competency or incompetency to stand trial, as defined in subsection (1) of this section.</p>

Kentucky	Ky. Rev. Stat. Ann. 504.060, 504.090 to 110.	504.060 Definitions for chapter (4) “Incompetency to stand trial” means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one’s own defense.
Louisiana	La. Code Crim. Proc. Ann. Art 641-649.	641. Mental incapacity to proceed definition Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.
Maine	15 MRSA 101-D.	101-D. Mental examination of persons accused of crime Competency to proceed The court may for cause shown order that the defendant be examined to evaluate the defendant's competency to proceed as provided in this subsection. A. Upon motion by the defendant or by the State, or upon its own motion, a court having jurisdiction in any criminal case may for cause shown order that the defendant be examined by the State Forensic Service for evaluation of the defendant's competency to proceed...
Maryland	Md. Code Ann Crim. Proc 3-101 to 3-108.	3-101. Definitions (f) “Incompetent to stand trial” means not able: (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense.
Massachusetts	Mass. Gen. Laws ch 123- § 15.	15. Competency to stand trial or criminal responsibility; examination; period of observation; reports; hearing; commitment; delinquents Whenever a court of competent jurisdiction doubts whether a defendant in a criminal case is competent to stand trial or is criminally responsible by reason of mental illness or mental defect, it may at any stage of the proceedings after the return of an indictment or the issuance of a criminal complaint against the defendant, order an examination of such defendant to be conducted by one or more qualified physicians or one or more qualified psychologists. Whenever practicable, examinations shall be conducted at the court house or place of detention where the person is being held. When an examination is ordered, the court shall instruct the examining physician or psychologist in the law for determining mental competence to stand trial and criminal responsibility.
Michigan	Mich. Comp. Laws § 330.2020 to 330.2044	Sec. 1020. (1) A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to

		perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.
Minnesota	Minn. R. Crim. P. Rule 20.01	Subd. 2. Competency to Participate in the Proceedings. A defendant is incompetent and must not plead, be tried, or be sentenced if the defendant lacks ability to: (a) rationally consult with counsel; or (b) understand the proceedings or participate in the defense due to mental illness or deficiency.
Mississippi	Miss. Rules Crim. Proc. (Text of rule effective July 1, 2017).	Rule 12.1 Mental Competency; Definition (a) Mental competency. There is a presumption of mental competency. In order to be deemed mentally competent, a defendant must have the ability to perceive and understand the nature of the proceedings, to communicate rationally with the defendant's attorney about the case, to recall relevant facts, and to testify in the defendant's own defense, if appropriate. The presence of a mental illness, defect, or disability alone is not grounds for finding a defendant incompetent to stand trial. If as a result of mental illness, defect, or disability, a defendant lacks mental competency, then the defendant shall not be tried, convicted, or sentenced for a criminal offense. (b) Mental Illness, Defect, or Disability. Mental illness, defect, or disability means a psychiatric or neurological disorder that is evidenced by behavioural or emotional symptoms including congenital mental conditions, conditions resulting from injury or disease, or developmental disabilities.
Missouri	Mo. Rev. Stat § 552.020	552.020 Lack of mental capacity bar to trial or conviction – psychiatric examination, when, report of— commitment to hospital, when – statements of accused in admissible 1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.
Montana	Mont. Code Ann. § 46-14-103, 202, 206, 221, and 222	46-14-103. Mental disease or disorder or developmental disability excluding fitness to proceed A person who, as a result of mental disease or disorder or developmental disability, is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.
Nebraska	Neb. Rev. Stat. § 29-1822	29-1822. Mental incompetency of accused after crime commission; effect; capital punishment; stay of execution

	Neb. Rev. Stat. § 29-1823	<p>A person who becomes mentally incompetent after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the incompetency. If, after the verdict of guilty and before judgment pronounced, such person becomes mentally incompetent, then no judgment shall be given while such incompetency shall continue; and if, after judgment and before execution of the sentence, such person shall become mentally incompetent, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the incompetency.</p> <p>29-1823. Mental incompetency of accused before trial; determination by judge; effect; costs; hearing; commitment proceeding</p> <p>(1) If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial...</p>
Nevada	Nev. Rev. Stat. § 178.399 to 178.460	<p>178.400 Incompetent person cannot be tried or adjudged to punishment for public offense</p> <p>1. A person may not be tried or adjudged to punishment for a public offense while incompetent.</p> <p>2. For the purposes of this section, “incompetent” means that the person does not have the present ability to:</p> <p>(a) Understand the nature of the criminal charges against the person;</p> <p>(b) Understand the nature and purpose of the court proceedings; or</p> <p>(c) Aid and assist the person’s counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.</p>
New Hampshire	N.H. Rev. Stat. § 135:17	<p>135:17 Competency; Commitment for Evaluation</p> <p>II ... competency evaluations shall address:</p> <p>(a) Whether the defendant suffers from a mental disease or defect; and</p> <p>(b) Whether the defendant has a rational and factual understanding of the proceedings against him or her, and sufficient present ability to consult with and assist his or her lawyer on the case with a reasonable degree of rational understanding.</p>
New Jersey	N.J. Stat. Ann § 2C:4-5, 4-6.	<p>2C: 4-4 Mental incompetence excluding fitness to proceed</p> <p>a. No person who lacks capacity to understand the proceedings against him or to assist in his own defense shall</p>

		<p>be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.</p> <p>b. A person shall be considered mentally competent to stand trial on criminal charges if the proofs shall establish:</p> <p>(1) That the defendant has the mental capacity to appreciate his presence in relation to time, place and things; and</p> <p>(2) That his elementary mental processes are such that he comprehends:</p> <p>(a) That he is in a court of justice charged with a criminal offense;</p> <p>(b) That there is a judge on the bench;</p> <p>(c) That there is a prosecutor present who will try to convict him of a criminal charge;</p> <p>(d) That he has a lawyer who will undertake to defend him against that charge;</p> <p>(e) That he will be expected to tell to the best of his mental ability the facts surrounding him at the time and place where the alleged violation was committed if he chooses to testify and understands the right not to testify;</p> <p>(f) That there is or may be a jury present to pass upon evidence adduced as to guilt or innocence of such charge or, that if he should choose to enter into plea negotiations or to plead guilty, that he comprehend the consequences of a guilty plea and that he be able to knowingly, intelligently, and voluntarily waive those rights which are waived upon such entry of a guilty plea; and</p> <p>(g) That he has the ability to participate in an adequate presentation of his defense.</p>
New Mexico	NMRA, Crim. UJI 14-5104.	<p>UJI 14-5104. Determination of Present Competency</p> <p>... A person is competent to stand trial if he:</p> <ol style="list-style-type: none"> 1. understands the nature and significance of the criminal proceedings against him; 2. has a factual understanding of the criminal charges; and 3. is able to assist his attorney in his defense.
New York	N.Y. Crim. Proc. Law § 730.10 to 730.70	<p>730.10 Definitions</p> <p>1. "Incapacitated person" means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.</p>
North Carolina	N.C. Gen. Stat § 15A 1001-1009	<p>15A-1001. No proceedings when defendant mentally incapacitated; exception</p> <p>(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."</p>

		(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant.
North Dakota	NDCC § 12.1-04-04	12.1-04-04. Disposition of mentally unfit defendants No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against the person or to assist in the person's own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.
Ohio	Ohio Rev. Code Ann § 2945.37-39	5924.501 Competence to stand trial (F) An accused is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the accused's present mental condition, the accused is incapable of understanding the nature and objective of the proceedings against the accused or of assisting in the accused's defense, the court shall find the accused incompetent to stand trial and shall enter an order authorized by section 5924.503 of the Revised Code.
Oklahoma	Okla. Stat. tit. 22 § 115.1 to 1175.8	1175.1 Definitions 2. "Incompetent" or "incompetency" means the present inability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him or her and to effectively and rationally assist in his or her defense.
Oregon	Or. Re. Stat. § 161.360 to 161.370	161.360 Fitness to proceed; mental disease or defect (1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365. (2) A defendant may be found incapacitated if, as a result of mental disease or defect, the defendant is unable: (a) To understand the nature of the proceedings against the defendant; or (b) To assist and cooperate with the counsel of the defendant; or (c) To participate in the defense of the defendant.
Pennsylvania	Pa Stat. Ann § 7402-7406	7402. Incompetence to proceed on criminal charges and lack of criminal responsibility as defense (a) Definition of Incompetency. Whenever a person who has been charged with a crime is found to be substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his defense, he shall be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues.
Rhode Island	R.I. Gen Laws § 40.1-5.3-3	Definitions (5) "Incompetent" or "incompetency" means mentally incompetent to stand trial. A person is mentally incompetent to stand trial if he or she is unable to

		understand the character and consequences of the proceedings against him or her or is unable properly to assist in his or her defense.
South Carolina	S.C. Code Ann §44-23-410 to 460	<p>44-23-410 Determining fitness to stand trial; time for conducting examination; extension; independent examination; competency distinguished.</p> <p>(A) Whenever a judge of the circuit court or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:</p> <p>(1) order examination of the person by two examiners designated by the Department of Mental Health ... or</p> <p>(2) order the person committed for examination and observation to an appropriate facility ...</p>
South Dakota	S.D. Codified Laws § 23A – 10A-1 to 16.	<p>23A-10A-1 Definition of mental incompetency</p> <p>The term, “mentally incompetent to proceed,” as used in this chapter, means the condition of a person who is suffering from a mental disease, developmental disability, as defined in § 27B-1-18, or psychological, physiological, or etiological condition rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.</p> <p>→ 27B-1-18</p> <p>A developmental disability is any severe, chronic disability of a person that:</p> <p>(1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;</p> <p>(2) Is manifested before the person attains age twenty-two;</p> <p>(3) Is likely to continue indefinitely;</p> <p>(4) Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and</p> <p>(5) Reflects the person's need for an array of generic services, met through a system of individualized planning and supports over an extended time, including those of a life-long duration.</p> <p>23A-10A-3 Hearing on mental condition – Mental examination and report</p> <p>At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the prosecuting attorney may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable</p>

		<p>cause to believe that the defendant may presently be suffering from a mental disease or developmental disability, or other conditions set forth in § 23A-10A-1, rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceeding against him or to assist properly in his defense. Prior to the date of hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of §§ 23A-46-1 and 23A-46-2. The hearing shall be conducted pursuant to the provisions of § 23A-46-3.</p>
Tennessee	Tenn. Code Ann. § 33-7-301	<p>Not included as a definition in § 33-7-301.</p> <p>33-7-301 Outpatient evaluation; court ordered hospitalisation; reports</p> <p>(a)(1) When a defendant charged with a criminal offense is believed to be incompetent to stand trial, or there is a question about the defendant's mental capacity at the time of the commission of the crime, the criminal, circuit, or general sessions court judge may, upon the judge's own motion or upon petition by the district attorney general or by the attorney for the defendant and after hearing, order the defendant to be evaluated on an outpatient basis. The evaluation shall be done by the community mental health center or licensed private practitioner designated by the commissioner to serve the court or, if the evaluation cannot be made by the center or the private practitioner, on an outpatient basis by the state hospital or the state-supported hospital designated by the commissioner to serve the court. If, and only if, the outpatient evaluator concludes that further evaluation and treatment are needed, the court may order the defendant hospitalized, and if in a department facility, in the custody of the commissioner for not more than thirty (30) days for further evaluation and treatment for competence to stand trial subject to the availability of suitable accommodations.</p> <p>(4)(A) ... if it is believed that a defendant is incompetent to assist counsel in preparation for, or otherwise participate in, the post-conviction proceeding, the court may, upon its own motion, order that the defendant be evaluated on either an outpatient or inpatient basis, as may be appropriate...</p>
Texas	Tex. Code Crim. Proc. Ann. Art. 46B.003	<p>Art 46B.003</p> <p>(a) A person is incompetent to stand trial if the person does not have:</p> <p>(1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or</p> <p>(2) a rational as well as factual understanding of the proceedings against the person.</p>

		(b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.
Utah	Utah Code Ann. § 77-15-2	77-15-2 “Incompetent to proceed” defined For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in: (1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.
Vermont	Vt. Stat. Ann. Tit 13 § 4184-4822	4817. Competency to Stand Trial; Determination (a) A person shall not be tried for a criminal offense if he or she is incompetent to stand trial. (b) If a person indicted, complained or informed against for an alleged criminal offense, an attorney or guardian acting in his or her behalf, or the State, at any time before final judgment, raises before the court before which such person is tried or is to be tried, the issue of whether such person is incompetent to stand trial, or if the court has reason to believe that such person may not be competent to stand trial, a hearing shall be held before such court at which evidence shall be received and a finding made regarding his or her competency to stand trial. However, in cases where the court has reason to believe that such person may be incompetent to stand trial due to a mental disease or mental defect, such hearing shall not be held until an examination has been made and a report submitted by an examining psychiatrist in accordance with sections 4814-4816 of this title. (c) A person who has been found incompetent to stand trial for an alleged offense may be tried for that offense if, upon subsequent hearing, such person is found by the court having jurisdiction of his or her trial for the offense to have become competent to stand trial.
Virginia	Va. Code Ann. § 19.2-169.1	19.2 – 169.1. Raising question of competency to stand trial or plead; evaluation and determination of competency A. Raising competency issue; appointment of evaluators --If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to §

		16.1-269.1 or adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist ...
Washington	Wash. Rev. Code § 10.77.010 to 10.77.092	10.77.010 Definitions (15) “Incompetency” means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.
West Virginia	W.Va.Code § 27-6A-1 to 5	27-6A-3. Competency of defendant to stand trial determination; preliminary finding; hearing; evidence; disposition The court of record pursuant to a preliminary finding or hearing on the issue of a defendant’s competency to stand trial and with due consideration of any forensic evaluation conducted pursuant to sections two and three of this article shall make a finding of fact upon a preponderance of the evidence as to the defendant’s competency to stand trial based on whether or not the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether he or she has a rational as well as factual understanding of the proceedings against him or her.
Wisconsin	Wis. Stat. § 971.13	971.13. Competency (1) No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures. (2) A defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency. (3) The fact that a defendant is not competent to proceed does not preclude any legal objection to the prosecution under s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant. (4) The fact that a defendant is not competent to proceed does not preclude a hearing under s. 968.38(4) or (5) unless the probable cause finding required to be made at the hearing cannot be fairly made without the personal participation of the defendant.
Wyoming	Wyo. Stat. Ann. § 7-11-301 to 303	7-11-302. Trial or Punishment of Person Lacking Mental Capacity (a) No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to: (i) Comprehend his position;

		(ii) Understand the nature and object of the proceedings against him; (iii) Conduct his defense in a rational manner; and (iv) Cooperate with his counsel to the end that any available defense may be interposed.
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