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> 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. . . . And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment of execution.[1]

It is a basic principle of due process that a defendant cannot be tried for a crime while he is mentally incompetent. This rule is derived from the common law prohibition against trials *in absentia*.[2] Though the mentally incompetent defendant is present in the courtroom, he is, in reality, afforded no opportunity to defend himself.

The mentally incompetent defendant is usually a person suffering from a "mental illness."[3] But mental incompetency may result from

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1. 1 HALE, HISTORIA PLACITORUM CORONAE 34-35 (1736) (citation omitted).

2. *See* Drope v. Missouri, 420 U.S. 162, 171-72 (1975).

3. "Turning to the medical profession to define 'mental illness' for us, we find no clear answer. A century ago, 'mental disease' was a fairly clear concept; all such disease was thought to be the product of lesions in the brain. Today, psychiatrists recognize that many mental disorders seem to be wholly functional; a postmortem examination shows no organic pathology of any kind. So long as organic pathology was assumed to be involved, it was possible to regard the mentally ill as clearly distinct from those who were 'sane.' But since the recognition of functional disorders, and especially since Freud, the view that there is a clear, qualitive division between the sane and the mentally ill has largely been abandoned in favor of the quantitative view, that there is no such clear line between the two; there is rather an unbroken continuum from normal to abnormal. But if there is no longer merely black and white, but a continuous shading from one to the other, it becomes apparent that asking the medical expert where he draws the line between two shades of gray is not quite like asking him whether a bone is or is not fractured." Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1, 4 (1960).

other kinds of mental impairments. A criminal defendant who suffers from mental disabilities such as mental retardation,[4] mental disorders caused by physical disease or trauma,[5] or "nervous breakdown"[6] may also be found mentally incompetent to proceed. Additionally, it is well recognized that a defendant may be rendered mentally incompetent because of drug use or its discontinuance during the criminal proceeding.[7]

The law presumes that all persons are mentally competent.[8] Therefore, competency hearings are not required as a matter of course, and before a court will inquire into the issue, a "bona fide doubt" as to the defendant's competency must be raised. In *Pate v. Robinson*,[9] the United States Supreme Court held that a trial judge has a sua sponte duty to suspend the proceedings and conduct a competency hearing if, during the pendency of the action, facts are brought to his attention,

4. *See* Jackson v. Indiana, 406 U.S. 715, 717-19 (1972); United States v. Masthers, 539 F.2d 721, 724 (D.C. Cir. 1976).

5. *See* Pate v. Robinson, 383 U.S. 375 (1966). It is also possible that a physical disability by itself could result in physical incompetence to proceed. *See* Felts v. Murphy, 201 U.S. 123, 129 (1906); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967) [hereinafter cited as *Incompetency to Stand Trial*]. Courts, however, have ordinarily found the defendant's physical disability insufficiently severe to warrant a continuance or postponement of the criminal proceeding. *See, e.g.*, United States v. Knohl, 379 F.2d 427, 436-38 (2d Cir. 1967); United States v. Landsman, 366 F. Supp. 1027 (S.D.N.Y. 1973); Albritton v. Collier, 349 F. Supp. 994 (N.D. Miss. 1972); Wojculewicz v. Cummings, 145 Conn. 11, 20-21, 138 A.2d 512, 516-18 (1958); Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 85 n.78 (1972) [hereinafter cited as *A Proposal*].

6. *See* People v. Berling, 115 Cal. App. 2d 255, 251 P.2d 1017 (1953); People v. Swallow, 60 Misc. 2d 171, 301 N.Y.S.2d 798 (1969).

7. *See* Sanders v. United States, 373 U.S. 1, 18-20 (1963). *See also* United States v. Williams, 468 F.2d 819 (5th Cir. 1972); United States *ex rel.* Fitzgerald v. La Vallee, 461 F.2d 601 (2d Cir. 1972); Grennett v. United States, 403 F.2d 928 (D.C. Cir. 1968); Hansford v. United States, 365 F.2d 920, 921-24 (D.C. Cir. 1966); United States v. Morris, 406 F. Supp. 582 (N.D. Ill. 1975). On the other hand, many courts have held that an otherwise incompetent defendant may go forward if he can be made competent only by the use of drugs. *See* Government of the Virgin Islands v. Crowe, 391 F. Supp. 987, 989, (D.V.I.), *aff'd*, 529 F.2d 511 (3d Cir. 1975); People v. Dalfonso, 24 Ill. App. 3d 748, 750-51, 321 N.E.2d 379, 381 (1974); State v. Hampton, 253 La. 399, 402-03, 218 So. 2d 311 (1969); People v. Parsons, 82 Misc. 2d 1090, 1092-93, 371 N.Y.S.2d 840, 842 (1975); State v. Potter, 285 N.C. 238, 247-49, 204 S.E.2d 649, 655-56 (1974); State v. Hancock, 247 Or. 21, 28-29, 426 P.2d 872, 875 (1967). Nevertheless, a defendant may not be forced against his will to take drugs in order to attain competence. *See* State v. Maryott, 6 Wash. App. 96, 98-101, 492 P.2d 239, 241-42 (1971). *See generally* Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. FORENSIC SCI. 568 (1972).

8. *See, e.g.*, CAL. PEN. CODE § 1369(f) (West Supp. 1976). *See also* Magenton v. State, 76 S.D. 512, 518, 81 N.W.2d 894, 897 (1957); Weiland v. State, 58 Okla. Crim. 108, 112, 50 P.2d 741, 743 (1935).

9. 383 U.S. 375 (1966).

either from his own observation or suggestion of counsel, which raise a "bona fide doubt" as to the defendant's competency.[10] Furthermore, a trial judge may not avoid his responsibility to make proper inquiry regarding the defendant's mental competency by relying solely upon a pretrial decision or pretrial psychiatric reports where, during the trial or prior to sentencing, he is presented with a substantial change of circumstances or with new evidence which casts serious doubt upon the validity of the pretrial finding of competency.[11] A defendant who may be incompetent cannot waive his right to an evidentiary hearing on the question of his competency to stand trial.[12]

If a question concerning the defendant's mental competency arises, the trial judge will appoint a psychiatrist or psychiatrists to examine the defendant.[13] After the defendant has been examined, a hearing will be held to determine if he is mentally competent.[14] The trial court may decide the question of mental competency; the defendant does not have a federal constitutional right to have the question decided by a jury.[15] It will be presumed that the defendant is mentally

10. *Id.* at 385. The Ninth Circuit has held that a competency hearing is constitutionally required "at any time that there is 'substantial evidence' that the defendant may be mentally incompetent." Evidence, the court explained, is "substantial" if it raises a reasonable doubt as to the defendant's competency. Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972). *See also* People v. Pennington, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967). The California Supreme Court has explained that in determining the issue, the court must examine all the pertinent evidence. *See* People v. Laudermilk, 67 Cal. 2d 272, 431 P.2d 228, 61 Cal. Rptr. 644 (1967). Additionally, *Laudermilk* said that "more is required to raise a doubt than mere bizarre actions . . . or bizarre statements . . . or statements of defense counsel that defendant is incapable of cooperating in his defense . . . or psychiatric testimony that the defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense." *Id.* at 285, 431 P.2d at 237, 61 Cal. Rptr. at 653 (citations omitted). *See also* de Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976); People v. Hays, 54 Cal. App. 3d 755, 126 Cal. Rptr. 770 (1976).

11. *See* Drope v. Missouri, 420 U.S. 162, 181 (1975); *cf.* People v. Melissakis, 56 Cal. App. 3d 52, 62, 128 Cal. Rptr. 122, 127-28 (1976). *See also* 18 U.S.C. § 4244 (1970); United States v. Marshall, 458 F.2d 446 (2d Cir. 1972); United States *ex rel.* Evans v. LaVallee, 446 F.2d 782 (2d Cir. 1971), *cert. denied,* 404 U.S. 1020 (1972).

12. *See* Pate v. Robinson, 383 U.S. 375, 384 (1966); Tillery v. Eyman, 492 F.2d 1056, 1059 (9th Cir. 1974). *But see* Drope v. Missouri, 420 U.S. 162, 176 (1975) (holding that *Pate* merely cast doubt on the validity of such a waiver).

13. *See* 18 U.S.C. § 4244 (1970). Under California law, the court may appoint a licensed psychologist. *See* CAL. PEN. CODE § 1369(a) (West Supp. 1976).

14. *Id.*

15. *See* United States v. Holmes, 452 F.2d 249, 267 (7th Cir. 1971), *cert. denied,* 405 U.S. 1016 (1972); Hall v. United States, 410 F.2d 653 (4th Cir. 1969), *cert. denied,* 396 U.S. 970 (1969); United States v. Huff, 409 F.2d 1225 (5th Cir. 1969); United States v. Davis, 365 F.2d 251 (6th Cir. 1966); State *ex rel.* Matalik v. Schubert, 57 Wis. 2d 315, 204 N.W.2d 13 (1973). In California, a defendant may request that his

competent until it is shown by a preponderance of the evidence that he is mentally incompetent.[16]

A defendant may seek to raise the issue of his mental competency in postconviction proceedings. In *Drope v. Missouri*,[17] the court recognized that there are many difficulties inherent in a retrospective determination of mental competency. These difficulties are not, however, unmanageable. The question to be determined in each case is whether the circumstances surrounding the case permit a fair retrospective determination of the defendant's competency at the time of trial.[18]

At one time, the defendant found mentally incompetent was committed to a mental hospital or treatment facility until it was determined that he had attained the capacity to proceed. If he never attained the requisite capacity, his commitment operated as a life sentence.[19] In 1972, the Supreme Court in *Jackson v. Indiana*,[20] put an end to this scheme for the commitment of incompetent criminal defendants. In a unanimous opinion by Justice Blackmun, the Court held that the indefinite commitment of a mentally incompetent defendant offended constitutional principles of equal protection and due process.[21] The Court said in *Jackson* that a criminal defendant who is committed because of his incompetency to proceed to trial cannot be held more than the period needed to determine whether there is "a substantial probability that he will attain the capacity in the foreseeable future."[22] If it is determined that there is a probability the defendant will soon be able to proceed, his continued commitment must be justified by progress toward that goal. If, on the other hand, it is determined that the defendant cannot be expected to become sufficiently competent to pro-

competency be determined by a jury. *See* CAL. PEN. CODE § 1369 (West Supp. 1976); People v. Superior Ct., 51 Cal. App. 3d 459, 124 Cal. Rptr. 158 (1975).

16. *See* United States v. Marbley, 410 F.2d 294 (5th Cir. 1969); Grennett v. United States, 403 F.2d 928, 930 (D.C. Cir. 1968); United States *ex rel.* Bornholdt v. Ternillo, 402 F. Supp. 374, 377 (S.D.N.Y. 1975). *See also* CAL PEN. CODE § 1369(f) (West Supp. 1976); People v. Superior Ct., 51 Cal. App. 3d 459, 124 Cal. Rptr. 158 (1975).

17. 420 U.S. 162, 183 (1975); *see* Pate v. Robinson, 383 U.S. 375, 387 (1966).

18. de Kaplany v. Enomoto, 540 F.2d 975, 986 n.11 (9th Cir. 1976). *See also* Nathaniel v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974).

19. *See* Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial*, 6 PAC. L.J. 484, 485 (1975); *Incompetency to Stand Trial*, *supra* note 5.

20. 406 U.S. 715 (1972).

21. *Id.* at 723-39. *See also In re* Davis, 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973).

22. 406 U.S. at 738.

ceed, civil commitment proceedings must be instituted or the defendant will be released.[23]

Jackson did set the stage for further reform of the law governing mental competency. The Supreme Court noted that the Model Penal Code would permit the attorney for a mentally incompetent defendant to contest any issue "susceptible of fair determination prior to trial and without the personal participation of the defendant."[24] The Court said its previous decisions should not be read to preclude the states from allowing an incompetent defendant to raise certain defenses such as insufficiency of the indictment or to make pretrial motions through counsel.[25] *Jackson* also referred approvingly to the procedures in some jurisdictions which allow the incompetent defendant a trial at which he may establish his innocence without permitting a conviction.[26] And in *Drope v. Missouri*,[27] the Court indicated that in certain cases it might be constitutionally permissible to defer a defendant's competency hearing until the criminal proceeding has been completed. *Drope* said that such a procedure may have advantages where the defendant is present at trial and "the appropriate inquiry is made with dispatch."[28] Such a procedure would void a conviction where the defendant is later found incompetent.[29]

The standard for determining whether a defendant is mentally competent is the cutting edge of the law. Application of this standard separates the mentally competent defendant from the defendant who is mentally incompetent. The first section of this article focuses upon the general standard of mental competency enunciated by the Supreme Court in *Dusky v. United States*.[30] The second section examines the

23. *Id.* *See also* McNeil v. Director, Patuxent Inst'n, 407 U.S. 245 (1972) (indefinite commitment "for observation" of convicted felon held invalid). It has been suggested that the law should go even further to permit the defendant to force the prosecution to go forward even if the defendant is incompetent. *See A Proposal, supra* note 5. Comment, *An End to Incompetency to Stand Trial*, 13 SANTA CLARA LAW. 560 (1973). *See also* People *ex rel.* Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970). It is argued that even the incompetent defendant should have the opportunity to litigate the issue of his guilt and that special procedural rules could be used to compensate for his incapacities. *See A Proposal, supra* note 5, at 75-76. Nevertheless, there is some doubt that even these safeguards would be sufficient to satisfy the requirements of due process if the defendant is without some ability to relate to the proceedings.

24. 406 U.S. at 740-41.

25. *Id.*

26. *Id.*

27. 420 U.S. 162, 182 (1975).

28. *Id.*

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

30. 362 U.S. 402 (1960) (per curiam).

standard under *Westbrook v. Arizona*[31] for mental competency applicable to the criminal defendant who waives counsel and chooses to represent himself. Finally, the third section deals with the standard of mental competency applicable if the defendant pleads guilty.

Competency Standard

General Test of Mental Competency

In *Dusky v. United States*,[32] the defendant was charged by indictment in federal court with transporting in interstate commerce a girl who had been kidnapped.[33] At arraignment, the court granted the defense motion that Dusky be examined at the federal medical center in Springfield, Missouri, to determine his competency to stand trial. Following the examination, a psychiatric report was filed with the court and a hearing was held to determine Dusky's competency to stand trial.[34] At this hearing, the chief of the psychiatric service at the medical center testified that Dusky could not, because of delusions and distorted thinking, testify in a factual manner or interpret facts so that he was able to "add two and two, figuratively speaking, and come up with a proper conclusion."[35]

Despite this evidence, the district court concluded that Dusky was mentally competent to stand trial. The trial judge said that he was of the opinion that the evidence showed Dusky was oriented as to time and place and person, understood the nature of the charge pending against him, and was able to recite facts so that his attorney could develop them in preparing the defense.[36] Dusky was found guilty, and his conviction was affirmed by the United States Court of Appeals for the Eighth Circuit. He then filed a petition for writ of certiorari in the United States Supreme Court.

In granting the petition, the Supreme Court held that the record did not provide sufficient evidence from which a finding of competence

31. 384 U.S. 150, 150-51 (1966).

32. 362 U.S. at 402.

33. 18 U.S.C. § 1201 (Supp. V, 1975).

34. Dusky v. United States, 271 F.2d 385, 387 (8th Cir. 1959), *rev'd*, 362 U.S. 402 (1960).

35. *See* A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 104 (1970) [hereinafter cited as MATTHEWS]. This work reprints a transcript of the competency hearing in the *Dusky* case, as does Haddox, Gross & Pollack, *Mental Competency to Stand Trial While Under the Influence of Drugs*, 7 LOYOLA L. REV. (LOS ANGELES) 425 (1974).

36. 271 F.2d at 389-90.

could be made.[37] The conviction was therefore reversed and remanded to the district court for a new hearing. In remanding the Court stated that the

> test [for competency] must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.[38]

The *Dusky* test was derived from the common law "understand and assist" standard of mental competency. This test had been used in the federal courts as early as 1899, when the Sixth Circuit in *Youtsey v. United States*[39] reversed the conviction of a defendant because the trial court had failed to make inquiry into whether epileptic seizures had rendered him "incapable of understanding the proceedings, and intelligently advising with his counsel as to his defense. . . ."[40] In 1906, a federal district court in *United States v. Chisolm*[41] held that a defendant may stand trial in a criminal case "if he rightly comprehends his own condition with reference to the proceedings" and is able to "testify intelligently and give his counsel all the material facts" in the case.[42]

The *Dusky* standard was thus established as the minimum test for federal cases.[43] Several federal courts, however, have held that *Dusky* also establishes the minimum standard under the Constitution and therefore is applicable in reviewing state convictions in federal habeas corpus proceedings.[44] In any event, most states have adopted equivalent tests either by statute or case law.[45]

Application of Dusky

Two fundamental points must be understood in applying the test of mental competency set out in *Dusky* and its predecessors. First, the *Dusky* test must be distinguished from the rules used to determine criminal responsibility, the best known of which are the tests stated in

37. 362 U.S. at 402.
38. *Id.*
39. 97 F. 937 (6th Cir. 1899).
40. *Id.* at 946.
41. 149 F. 284 (S.D. Ala. 1906).
42. *Id.* at 287.
43. *See* Drope v. Missouri, 420 U.S. 162, 172 (1975). *Drope*, however, does not explain by what authority this test has been made the rule for federal cases.
44. *See* United States *ex rel.* Curtis v. Zelker, 466 F.2d 1092, 1095 n.5 (2d Cir. 1972); Noble v. Sigler, 351 F.2d 673, 676-77 (8th Cir. 1965). *See also* Mackey v. Craven, 537 F.2d 322 (9th Cir. 1976); Note, *Competence to Plead Guilty: A New Standard*, 1974 DUKE L.J. 149, 153 n.18 [hereinafter cited as *A New Standard*].
45. *See A New Standard, supra* note 44, at 153-54.

M'Naghten's Case[46] and the American Law Institute's Model Penal Code.[47] These rules were not devised to test a defendant's competency to go forward in a criminal proceeding but, rather, to determine whether the defendant, at the time of the offense, had the mental capacity to be responsible for his criminal act. The inapplicability of *M'Naghten* and the Model Penal Code tests to the issue of present mental competency is almost too obvious to state, yet in *Bruce v. Estelle*,[48] the Fifth Circuit was compelled in a federal habeas corpus proceeding to remand a case for a new competency determination where the test of mental competency used by the state trial court was whether the defendant during trial knew the difference between "right and wrong" under *M'Naghten*.

Second, the narrow purpose of the *Dusky* test is to determine the effect, if any, that a defendant's mental impairment can be expected to have on his ability to function adequately during trial. The problem addressed by *Dusky* is not resolved by a determination of whether the defendant is "mentally ill." A finding of mental impairment is not necessarily a determination that the defendant is unable "to consult with his lawyer with a reasonable degree of rational understanding." Nor does such a determination compel the conclusion that the defendant will be incapable of a "rational as well as factual understanding of the proceedings against him."[49]

Understanding the Proceeding

To be competent to go forward in a criminal prosecution, the defendant must be able to follow the proceedings, evaluate the evidence, and understand the significance of what is transpiring in the courtroom. Describing the degree of understanding that a defendant must have, the Court in *Dusky* said that it is not enough that the defendant be oriented in time and place. Rather, the defendant must have a *rational* as well as factual understanding of the proceedings against him.[50] In

46. 8 Eng. Rep. 718 (1843).

47. MODEL PEN. CODE § 4.01(1) (Proposed Official Draft 1962).

48. 483 F.2d 1031, 1041-43 (5th Cir. 1973).

49. 362 U.S. 402 (1960) (per curiam); *see* United States v. Chisolm, 149 F. 284 (S.D. Ala. 1906); People v. Laudermilk, 67 Cal. 2d 272, 285, 431 P.2d 228, 237, 61 Cal. Rptr. 644, 653 (1967); State *ex rel.* Haskins v. County Ct. 62 Wis. 2d 250, 265-66, 214 N.W.2d 575, 583 (1974). *See generally* MATTHEWS, *supra* note 35, at 86; Haddox, Gross & Pollack, *Mental Competency to Stand Trial While Under the Influence of Drugs*, 7 LOYOLA L. REV. (LOS ANGELES) 425, (1974); Slough & Wilson, *Mental Capacity to Stand Trial*, 21 U. PITT. L. REV. 593, 595 (1960); *Incompetency to Stand Trial, supra* note 5, at 460.

50. 362 U.S. at 402.

People v. Swallow, a New York trial court explained that "[t]he word understanding requires some depth of understanding, not merely surface knowledge of the proceedings."[51]

In addition to the ability to understand what is taking place in the courtroom, the defendant must also be able to understand the *nature* of the proceedings against him. The defendant going to trial must be able to understand the charge brought against him, that he will be in a court of law where the truth of that charge will be determined, that there will be a judge in charge of the proceedings, a prosecuting attorney and a defense counsel to present evidence and argue the case, and a jury, if the defendant desires one, to determine questions of fact. Finally, the defendant must understand that if he is found guilty of the crime with which he is charged, he will be subject to punishment.[52]

A defendant whose mental ability is so impaired by a mental disorder that he is not able to understand what is occurring at trial would necessarily be suffering from the most severe kind of mental disorder or impairment. *Jackson v. Indiana*[53] presents such a case. There the defendant, a mentally defective deaf mute with the mental ability of a preschool child, was found incompetent to stand trial for two robberies involving four dollars on one occasion and five dollars on another. One psychiatrist testified that the defendant's mental defect was so severe that there was little chance that he could learn sign language so that he could participate in his trial. Another psychiatrist testified that even if the defendant were able to develop such skills, he would still be unable to comprehend the proceedings.[54] Similarly, in *People v. Berling*,[55] the California Court of Appeal reversed a first degree

51. 60 Misc. 2d 171, 175, 301 N.Y.S.2d 798, 803 (1969).

52. See the testimony for the competency hearing in *Dusky*, reprinted in MATTHEWS, *supra* note 35. In a more recent case, a physician at the facility where Dusky was examined testified as to the criteria used to determine a defendant's understanding of the proceeding. The physician said, "First, we try to assess whether he has awareness of the charges pending against him . . . whether he knows that he will be in a courtroom and the type of courtroom, that is, is it a federal, state or county, civil, so forth, criminal . . . . Then we try to assess whether he knows who will be in the courtroom, the principals of the court and their various functions, including the judge, prosecuting attorney, defense counsel, members of a jury . . . and so forth. We try to assess whether he has a knowledge of the types of punishments that could be levied by the court . . . also whether he has a knowledge of what pleas may be entered before the court and the implications of various pleas and whether he is educable to these facts. . . ." United States *ex rel.* Konigsberg v. Vincent, 388 F. Supp. 221, 227 n.3 (S.D.N.Y. 1975).

53. 406 U.S. 715 (1972).

54. *Id.* at 725. *See also* People v. Lang, 26 Ill. App. 648, 325 N.E.2d 305 (1975), *appeal dismissed*, 96 S. Ct. 851 (1976).

55. 115 Cal. App. 2d 255, 251 P.2d 1017 (1953).

murder conviction where the defendant throughout the trial suffered fainting spells and dizziness caused by emotional strain. The record showed that the defendant fainted numerous times during the trial and collapsed into unconsciousness several times while on the witness stand. Although the trial court did not stop the proceedings, at one point the court said to the defendant, "When your voice drops as it does and your eyes partially close and open slowly, the appearance is that you are not in a condition to observe what is going on."[56]

A final example is *Hansford v. United States*,[57] a case from the District of Columbia Circuit involving the trial of a narcotics addict. There it was shown that the defendant used narcotics during most of the trial and was abruptly forced to discontinue their use near the end of trial. The majority opinion by Judge Bazelon held that the district court had the duty to hold a competency hearing to determine whether "an acute brain syndrome" from the use of narcotics and possible withdrawal reactions from their discontinuance affected the defendant's competency under the *Dusky* test.[58] On the effect of drug withdrawal symptoms, the court said a defendant may be incapable of following the evidence and so preoccupied with his real or imagined suffering that he loses all interest in his case and desires that it end as quickly as possible.[59]

Assisting in the Defense

Ability to Communicate. For a defendant to assist adequately in his defense, he must have sufficient communicative skill to confer intelligently with his attorney and testify coherently on his own behalf.[60] *Jackson v. Indiana*[61] presents the clear case of a defendant who lacked sufficient communicative ability to assist adequately in his defense.[62]

Memory. The courts have taken a strict view where the defendant has asserted that he has suffered loss of memory caused by a mental

56. *Id.* at 269, 251 P.2d at 1024.

57. 365 F.2d 920 (D.C. Cir. 1966).

58. *Id.* at 922-23.

59. *Id.* at 924.

60. *See* United States v. Chisolm, 149 F. 284, 287 (S.D. Ala. 1906); United States v. Horwitz, 360 F. Supp. 772, 777 (E.D. Pa. 1973); United States v. Sermon, 228 F. Supp. 972, 977 (W.D. Mo. 1964); *Incompetency to Stand Trial, supra* note 5, at 457 (1967); Note, *Illinois Fitness for Trial*, 6 LOYOLA U.L. REV. (CHICAGO) 678, 684-85 (1975).

61. 406 U.S. 715 (1972).

62. *See also* People v. Lang, 26 Ill. App. 2d 648, 325 N.E.2d 305 (1975), *appeal dismissed*, 96 S. Ct. 851 (1976).

disorder which prevents him from remembering the events of the alleged crime. In *United States v. Sermon*,[63] a panel of psychiatrists who had evaluated the defendant were in unanimous agreement that because of a "chronic brain syndrome secondary to cerebral arteriosclerosis" the defendant suffered memory loss and was not able adequately to assist his counsel.[64] Nevertheless, the court held that he was competent to go to trial since he was sufficiently alert to advise his counsel whether the "broad outline of the evidence" to be presented by the government was or was not fabricated.[65]

Similar results have been reached by the courts in cases where the defendant claims to be suffering from amnesia.[66] The courts have rejected the argument that a defendant's alleged loss of memory is sufficient to render him incapable of standing trial. Some decisions have expressed the fear that if memory loss alone were enough for a finding of incompetency, fraudulent allegations of memory loss could easily be made in order to avoid a criminal prosecution.[67] The Pennsylvania Supreme Court has noted that cases abound where the defendant claims, "I don't remember anything," "My mind went blank," "I blacked out," or "I panicked and don't remember what I did or anything that happened."[68] In addition, it has been observed that there is little difference between a claim of amnesia and the disadvantages suffered by many defendants whose memories fade or to whom important facts are unavailable for other reasons such as the death of a material witness.[69] One court has pointed out that barring the prosecution of an amnesiac would effectively free him since there would be no basis for committing to a mental institution a person whose only impairment was loss of memory.[70]

Though the courts have generally shown little sympathy for the defendant claiming loss of memory, the District of Columbia Circuit

63. 228 F. Supp. 972 (W.D. Mo. 1964).

64. *Id.* at 977.

65. *Id.* at 980.

66. Amnesia is simply a failure of memory concerning facts or events to which a person has been exposed. There are two broadly recognized causes of amnesia—psychic trauma and physical trauma. *See* Comment, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109 (1961); Annot., 46 A.L.R.3d 544, 550 (1972).

67. *See* Fajeriak v. State, 520 P.2d 795, 802 (Alaska Sup. Ct.) (1974); United States v. Borum, 464 F.2d 896, 900 & n.3 (10th Cir. 1972).

68. *See* Commonwealth v. Price, 421 Pa. 396, 401, 218 A.2d 758, 760 (1966). *See also* United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1071 (D. Del. 1972).

69. *See* United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1071 (D. Del. 1972); Reagon v. State, 253 Ind. 143, 147, 251 N.E.2d 829, 831 (1969).

70. *See* People v. Soto, 68 Misc. 2d 629, 632-33, 327 N.Y.S.2d 669, 672-73 (1972).

held that in an established case of amnesia, due process may require posttrial findings to insure that the defendant was afforded a fair trial. In the leading case of *United States v. Wilson*,[71] the government conceded that the defendant suffered from permanent retrograde amnesia following a head injury sustained in a high speed chase after a robbery. Judge J. Skelly Wright, speaking for the majority, ruled that the district court, in making its posttrial findings, should consider: (1) the extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer; (2) the extent to which the amnesia affected the defendant's ability to testify in his own behalf; (3) the extent to which the evidence could be extrinsically reconstructed in view of the amnesia; (4) the extent to which the government assisted the defendant and his counsel in that reconstruction; (5) the strength of the prosecution's case; and (6) any other facts and circumstances to indicate whether or not the defendant had a fair trial.[72]

Reasoning ability. In *Dusky*, the trial judge erroneously believed that a defendant needed only to be able to *identify* facts and that he was competent to stand trial even if he had no ability to make a rational interpretation of the facts. Thus, if the defendant could recognize "2" as "2" the court felt it was not necessary that he be able to add "2 + 2" and arrive at a total of "4." *Dusky* states that the defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of *rational understanding*."[73] It is apparent that to assist properly in his defense, the defendant must have some capacity to reason from a simple premise to a simple conclusion.[74]

A defendant in a criminal proceeding must also have the corresponding ability to make decisions during the course of the proceeding in response to alternatives explained to him by his attorney.[75] At trial,

71. 391 F.2d 460 (D.C. Cir. 1968).

72. *Id.* at 463-64. In *Drope*, Chief Justice Burger said a posttrial determination of competency "may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch." Drope v. Missouri, 420 U.S. 162, 180 (1975). *See also* Hansford v. United States, 384 F.2d 311 (D.C. Cir. 1966); Wilson v. United States, 391 F.2d 460, 464 (D.C. Cir. 1968) (Leventhal, J., concurring).

73. Dusky v. United States 362 U.S. 402 (1960) (per curiam) (emphasis added).

74. *See* Haddox, Gross & Pollack, *Mental Competency to Stand Trial While Under the Influence of Drugs*, 7 LOYOLA L. REV. (LOS ANGELES) 425, 435-36 (1974).

75. *See* People v. Heral, 62 Ill. 2d 329, 334, 342 N.E.2d 34, 37 (1976); People *ex rel.* Bernstein v. McNeill, 48 N.Y.S.2d 764, 766 (Sup. Ct. 1944); H. SILVING, ESSAYS IN MENTAL CAPACITY AND CRIMINAL CONDUCT 165 (1967); Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCHIATRY 616, 619 (1965); *A New Standard, supra* note 44, at 169; *Incompetency to Stand Trial, supra* note 5, at 458.

the defendant must be able to decide with the advice of counsel what defenses to raise and whether to testify and thus waive his fifth amendment right. He must also be capable of exercising some degree of supervision over the strategy decisions of his attorney and be able to consider dismissing counsel who conducts the defense inadequately.[76] In this process it is not enough that the defendant be capable of giving only "passive assistance" in the conduct of the defense. It is the defendant who is on trial, and it is he who will personally suffer the consequences if the defense fails.

Mental Competency To Waive Counsel and Conduct a Defense

In *State v. Westbrook*,[77] an Arizona case, the defendant was charged with murder. Prior to trial, three psychiatrists were appointed by the trial court to examine him. At the conclusion of their examination it was their unanimous opinion that he understood the nature of the charges against him and could assist in his own defense. Subsequently, the trial court made a determination that the defendant was able to understand the nature of the charges against him and could assist in his own defense, and "that he was neither mentally defective nor insane and could proceed to trial."[78] Defendant, insisting upon representing himself, was tried by a jury and convicted of first degree murder with the penalty set at death.

On appeal, he argued that he was mentally incompetent to represent himself at trial.[79] In response, the Arizona Supreme Court held that the trial court was not required "to set a hearing to determine whether the defendant through insanity or mental deficiency was not able to conduct his own defense."[80] Defendant then petitioned to the United States Supreme Court for a writ of certiorari. The Court granted his petition and held in a very brief per curiam opinion:

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or in-

76. *See A New Standard, supra* note 44, at 169; *Incompetency to Stand Trial, supra* note 5, at 458. *See also* Pate v. Robinson, 383 U.S. 375, 388 (1966) (Harlan, J., dissenting); People v. Heral, 62 Ill. 2d 329, 334, 342 N.E.2d 34, 37 (1976).

77. 99 Ariz. 30, 406 P.2d 388 (1965), *vacated & remanded*, 384 U.S. 150 (1966).

78. *Id.* at 34, 406 P.2d at 390.

79. Ironically, Westbrook was charged with killing an attorney. They had been arguing over the adequacy of the representation provided by the victim's law firm in a civil case in which Westbrook was involved. *See id.*

80. *Id.* at 34, 406 P.2d at 391.

> quiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."
>
> From an independent examination of the record, we conclude that the question whether this 'protecting duty' was fulfilled should be re-examined in light of our decision this Term in *Pate v. Robinson*. Accordingly, the judgment of the Supreme Court of Arizona is vacated and the case is remanded to that court for proceedings not inconsistent herewith.[81]

In *Westbrook v. Arizona*, the Court recognized for the first time a distinction between a defendant's competency to stand trial and his competency to waive counsel and represent himself.[82] Hence, if a defendant desires to proceed *pro se*, the trial court must first determine whether he is competent to stand trial. If he is, the trial court must then determine whether he is competent to waive counsel and represent himself.[83]

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81. Westbrook v. Arizona, 384 U.S. 150 (1966) (citations omitted). For the proposition that the trial judge must determine whether the accused was competent to waive his right to counsel, the Court cited Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Carnley v. Cochran, 369 U.S. 506 (1962). In *Pate v. Robinson*, Justice Clark stated that the per curiam reversal in Bishop v. United States, 350 U.S. 961 (1956), meant that "the conviction of an accused person while he is legally incompetent violates due process and that state procedures must be adequate to protect this right." Pate v. Robinson, 383 U.S. 375, 378 (1966). Justice Harlan, in dissent, thought that "the constitutional violation alleged [was] the failure to make an inquiry." *Id.* at 388 n.1.

82. *See* United States *ex rel.* Martinez v. Thomas, 526 F.2d 750, 754 (2d Cir. 1975); Government of Virgin Islands v. Niles, 295 F. Supp. 266 (D.V.I. 1969); State v. Kolocotronis, 73 Wash. 2d 92, 436 P.2d 774 (1968).

In *Kolocotronis*, the Washington Supreme Court stated: "[Westbrook v. Arizona] holds unequivocally, that an adjudication by the trial court that an accused is capable of going to trial and aiding his counsel, is not a determination of his competency to act as his own counsel.

"When the accused demands his constitutional right to act as his own counsel, the trial court is faced with the necessity of making a factual determination of the competency of the accused to: (1) intelligently waive the services of counsel, and (2) act as his own counsel." 73 Wash. 2d at 101, 436 P.2d at 781 (1968).

In *Government of Virgin Islands v. Niles*, the court conducted a hearing to determine the defendant's competency to stand trial. During the course of the hearing, defendant expressed the desire to defend himself if the court found him competent under the *Dusky* test but incompetent under the *Westbrook* test. The court held, "As for defendant's competency to waive counsel, the court is of the opinion that one who may be suffering from paranoid delusions should not be entrusted with the sole conduct of his defense." 295 F. Supp. at 266.

83. A defendant who is mentally incompetent to stand trial is also mentally incompetent to represent himself. On the other hand, the defendant found mentally

Westbrook was an affirmation of the principle that the United States Supreme Court had earlier stated in *Massey v. Moore*.[84] The Court in *Massey* said that a defendant "might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without the benefit of counsel."[85] The case was remanded to the district court for a hearing to determine the petitioner's ability to represent himself without counsel.[86]

The *Westbrook* principle that there should be a higher level of mental competency required before a defendant can defend himself implies the kind of standard to be applied in self-representation cases. A defendant must be free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary. Furthermore, for his waiver of counsel to be intelligent, he must have the mental capacity to understand that the unskilled defendant is normally at a disadvantage if he proceeds without counsel.[87] However, there is nothing that is conceptually more difficult to comprehend than that which every defendant must be able to understand in order to be found competent to stand trial. Moreover, the defendant will be aided by the trial judge who has a sua sponte duty to explain fully the sig-

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competent to stand trial may be found mentally incompetent to waive counsel and represent himself. *See* Government of Virgin Islands v. Niles, 295 F. Supp. 266 (D.V.I. 1969); *cf.* Faretta v. California, 422 U.S. 806 (1974).

84. 348 U.S. 105 (1954).

85. *Id.* at 108.

86. It might be well to describe the context in which the statement in *Massey v. Moore* was made. *Massey* was decided on the law as it stood prior to Gideon v. Wainwright, 372 U.S. 335 (1963). Before *Gideon*, an indigent was entitled to appointed counsel only in cases where some particular factor limiting the effectiveness of an unrepresented defendant or otherwise calling for the appointment of counsel (*e.g.*, capital cases) was present. *See* Powell v. Alabama, 287 U.S. 45 (1932). This was the "special circumstances" rule of Betts v. Brady, 316 U.S. 455 (1942). In *Massey*, the defendant, on trial for robbery, was too poor to hire a lawyer. He was convicted without assistance of counsel in spite of signs of insanity and mental incompetency. 348 U.S. 105, 106 (1954). He later filed a petition for writ of habeas corpus in federal court, where a district court judge refused to find him incompetent. The court of appeals affirmed. The Supreme Court, however, reversed and remanded for appropriate findings on the ground that while the defendant may have been competent to stand trial, it was not clear whether he was competent to stand trial without the assistance of counsel.

Thus, although *Massey* and *Westbrook* evolved from entirely different contexts, both stand for the proposition that the conviction of a defendant without the assistance of counsel cannot stand unless the defendant meets a test of mental competency which is higher than the test of mental competency to stand trial.

87. *See* Faretta v. California, 422 U.S. 806, 835 (1975); Hodge v. United States, 414 F.2d 1040, 1042-43 (9th Cir. 1969); United States *ex rel.* Konigsberg v. Vincent, 388 F. Supp. 221, 228 (S.D.N.Y. 1975), *aff'd*, 526 F.2d 131 (2d Cir. 1975); People v. Holcomb, 395 Mich. 326, 235 N.W.2d 343 (1975).

nificance and consequences of the decision to waive counsel. The court may also designate counsel to aid the defendant in making this decision, as the defendant is entitled to counsel until his waiver is accepted by the court.

The higher standard of competency in *Westbrook* applies not because of the defendant's decision to waive counsel, but because the waiver of counsel necessarily embraces an assessment of the defendant's mental competency to conduct his own defense.[88] The defendant who waives counsel will be alone when it becomes necessary to decide whether to testify or to decide matters involving trial procedure and strategy. He must therefore be able to determine the alternatives available to him during the proceeding, to evaluate these choices, and to decide for himself what action to take. He will not have guidance from an attorney and cannot depend upon the court to provide the assistance he would receive if he had counsel. In this situation, it is clear that the defendant must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney. Thus, the higher standard of *Westbrook* necessarily involves an assessment of the defendant's ability to conduct his own defense. The inquiry required by *Westbrook* must focus on the differences in the roles played by represented and unrepresented defendants.

In *United States ex rel. Konigsberg v. Vincent*,[89] the higher test of competency to waive counsel and conduct a defense was applied in a federal habeas corpus proceeding. Konigsberg was found competent to stand trial in a New York court on the charges of extortion and conspiracy to extort. After twelve days of trial and damaging testimony from a codefendant who had turned state's evidence, Konigsberg decided to dismiss counsel and represent himself; the court accepted his decision but directed Konigsberg's attorney to continue to sit at the counsel table and assist him. Following his conviction and sentence to state prison, Konigsberg claimed in a petition for a writ of habeas corpus, filed in the federal court, that although he was found competent to stand trial, he did not have the capacity to proceed without the benefit of counsel.[90]

The state trial record did not conclusively indicate whether the trial judge made inquiry into Konigsberg's mental competency to repre-

88. *See* People v. Powers, 256 Cal. App. 2d 904, 915, 64 Cal. Rptr. 450, 458 (1967). *See A New Standard, supra* note 44, at 166-67; *cf.* Massey v. Moore, 348 U.S. 105, 108 (1954); State v. Kolocotronis, 73 Wash. 2d 92, 102, 436 P.2d 774, 781 (1968).

89. 388 F. Supp. 221 (S.D.N.Y. 1975), *aff'd*, 526 F.2d 131 (2d Cir. 1975).

90. 526 F.2d at 133.

sent himself under *Westbrook*. Therefore, an evidentiary hearing was held in the district court to determine if the state trial judge made a sufficient inquiry into Konigsberg's mental competency to waive counsel.[91] It was determined at that hearing that the state trial judge had never specifically made inquiry into Konigsberg's mental competency to represent himself and in fact framed the issue in terms of assisting counsel.[92] Nevertheless, the state trial judge testified in the federal hearing that he was able to determine from the state proceedings that Konigsberg "knew the procedure . . . and [was] fully competent and capable of handling himself." He further testified that implicit in his finding was a determination that Konigsberg was competent to know that he was depriving himself of the services of a lawyer and that he was "deliberately assuming the risks of representing himself."[93] On appeal from the denial of the writ, the judgment was affirmed by the Second Circuit with the observation that the district court correctly recognized that the standard of competency for making the decision to represent oneself was "vaguely higher than the standard for competence to stand trial."[94]

Other courts, however, have refused to acknowledge the distinction between mental competency to stand trial and mental competency to waive counsel and conduct a criminal defense. In *People v. Reason*,[95] the New York Court of Appeals, in a four to three decision, held that the trial court was not required to make a finding as to the defendant's mental competency to waive counsel and proceed *pro se*. The court said a finding that Reason was mentally competent to stand trial together with a record showing the defendant's awareness of the risks and consequences of self-representation was sufficient to show that the trial court properly allowed the defendant to waive counsel and conduct his own defense.[96] *Westbrook* was distinguished on the ground that it was concerned with the intelligence of the waiver and the court

91. United States *ex rel.* Konigsberg v. Vincent, 388 F. Supp. 221, 226 (S.D.N.Y. 1975), *aff'd*, 526 F.2d 131 (2d Cir. 1975).

92. 388 F. Supp. at 226-27.

93. *Id.* at 227. In her concurring opinion in *United States v. Odom*, Judge Hufstedler also indicated that a reviewing court may determine from the record that the higher standard of competency was met even if the trial court erroneously applied the general test of competency in *Dusky*. United States v. Odom, 423 F.2d 875, 877 (9th Cir. 1970) (Hufstedler, J., concurring).

94. United States *ex rel.* Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975); *see* United States v. Dougherty, 473 F.2d 1113, 1123 n.13 (D.C. Cir. 1972).

95. 37 N.Y.2d 351, 334 N.E.2d 572 (1975).

96. *Id* at 356, 334 N.E.2d at 575.

stated that a higher standard of competence to waive counsel would infringe upon the defendant's right to appear and defend in person.[97]

Similarly, in *United States v. Odom*,[98] the Ninth Circuit held that after a finding by the trial court that the defendant is mentally competent to stand trial, the court may grant the defendant's motion to represent himself without making a determination that he is mentally competent to waive counsel and conduct a defense. The court reasoned that if the self-representation motion had been denied it would have placed the trial court in "the anomalous position of finding a defendant incompetent for asserting a constitutional right."[99]

It should be clear that *Reason* and *Odom* are incorrect in failing to recognize the higher level of mental competency required for a defendant to waive counsel and conduct his defense. Even if *Reason* were correct in its interpretation of *Westbrook*, there can be no mistaking what the court meant in *Massey* when it said that a defendant might be "incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel."[100] But apart from their clear conflict with *Westbrook* and *Massey*, both cases were decided on the basis of the mistaken view that a higher level of competence for a defendant to waive counsel and proceed *pro se* would infringe upon the defendant's right of self-representation, a right conclusively established in *Faretta v. California*.[101]

In *Faretta*, the Supreme Court held that a criminal defendant has a constitutional right to self-representation. Though the court acknowledged that in most criminal prosecutions the accused could better defend with counsel's guidance than by his own unskilled efforts, the court said, "Personal liberties are not rooted in the law of averages."[102] The Court in *Faretta* stated that although the defendant who proceeds *pro se* may conduct his own defense ultimately to his detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[103]

A higher competency standard for defendants seeking to represent themselves is not inconsistent with the *Faretta* decision. The Court in *Faretta* was concerned with whether the constitutional right

97. *Id.* at 355, 334 N.E.2d at 574-75.
98. 423 F.2d 875 (9th Cir. 1970).
99. *Id.* at 877.
100. 348 U.S. 105, 108 (1954).
101. 422 U.S. 806 (1975).
102. *Id.* at 834.
103. *Id., quoting* Illinois v. Allen, 397 U.S. 337, 350-51 (Brennan, J., concurring).

of self-representation existed and it did not provide a detailed treatment of the circumstances under which a request for self-representation must be granted. It was made clear, however, that the accused's legal skills are *not* relevant in this determination.[104] The higher standard enunciated in *Westbrook* is not concerned with the lack of legal skills per se. *Westbrook* contemplates a defendant who suffers from some type of mental impairment which, while not interfering with his ability to assist counsel or understand the proceedings, does restrict his ability to defend himself. *Westbrook* recognized that "mental competency" may mean different things in different contexts; nothing in *Faretta* contradicts this concept. The Court in determining that Faretta should have been allowed to represent himself, noted in passing that he was "competent."[105] Although this casual reference probably has no bearing on whether a *pro se* defendant must meet a higher standard of mental competency, it does show that an incompetent defendant does not have the right to self-representation.[106]

Thus, where the defendant is found mentally competent to proceed under *Dusky* but not competent under *Westbrook* to waive counsel and conduct his own defense, the defendant would still go forward in the proceedings with counsel.[107] Though the defendant would have preferred self-representation, the trial court should explain its decision and urge the defendant to cooperate with counsel in order to assure the most effective defense.

A problem can arise if the defendant who is unwilling to accept the court's determination refuses to cooperate with his attorney. This situation, however, is closely analogous to the case in which the defendant chooses not to participate in his defense by voluntarily absenting himself from the courtroom. In such a case, the courts have treated the absence as a waiver by the defendant of his right to be present during the proceedings against him.[108] Similarly, a refusal by a de-

104. 422 U.S. at 836.

105. *Id.* at 835.

106. In *Faretta*, the issue of whether a higher standard is required was not raised since there was no evidence raising a doubt as to the defendant's mental competency.

107. *See* People v. Tracy, 12 Cal. App. 3d 94, 103, 90 Cal. Rptr. 375, 380 (1970). *See generally* Faretta v. California, 422 U.S. 806, 835 n.46 (1975); People v. Powers, 256 Cal. App. 2d 904, 915, 64 Cal. Rptr. 450, 458 (1967); State v. Nix, 327 So. 2d 301 (La. Sup. Ct.), *cert. denied*, 96 S. Ct. 218 (1975); People v. Reason, 37 N.Y.2d 351, 334 N.E.2d 572 (1975) (Jasen, J., dissenting).

108. *See* Diaz v. United States, 223 U.S. 442 (1912); People v. White, 18 Cal. App. 3d 44, 95 Cal. Rptr. 576 (1971). *See also* Drope v. Missouri, 420 U.S. 162, 182 (1975); Illinois v. Allen, 397 U.S. 337 (1970); People v. Guillory, 178 Cal. App. 2d 854, 3 Cal. Rptr. 415 (1960); People v. Rogers, 150 Cal. App. 2d 403, 309 P.2d 949 (1957).

fendant to cooperate with his attorney should be viewed as a relinquishment of the right to assist in his defense, and the proceeding should continue. So long as a defendant is mentally able to assist in his defense, the criminal proceeding should not be prevented from going forward because the defendant voluntarily chooses not to do so.

Competency To Plead Guilty

It has generally been held that the test for mental competency to stand trial and plead guilty is the same.[109] In *People v. Heral*,[110] for example, the Illinois Supreme Court held:

> [A] finding of competency to stand trial necessarily involves a finding that, with the advice and assistance of counsel, defendant is capable of waiving some or all of his constitutional rights, whether by a plea of guilty or during the course of his trial.[111]

In *Sieling v. Eyman*,[112] the Ninth Circuit held that a higher level of competency is required to enter a plea of guilty.[113] In *Sieling*, the defendant, who was represented by counsel, was found competent under the *Dusky* test. Prior to trial, he entered a plea of guilty to three counts of an eight count indictment pursuant to a negotiated plea. Following his conviction and sentence to state prison, he filed a petition for a writ of habeas corpus in the federal district court attacking the validity of his guilty plea. His petition was dismissed by the district court and he appealed. On appeal, the Ninth Circuit, relying on *Westbrook v. Arizona*,[114] held that a higher level of competency is required before a defendant can plead guilty. The court, reading *Westbrook* as a case concerned only with the validity of a waiver of counsel rather than competency to conduct a defense, compared the constitutional right to counsel with the constitutional right to remain silent, the constitutional right to trial by jury, and the constitutional right to confront

109. *See* United States *ex rel.* McGough v. Hewitt, 528 F.2d 339, 342 n.2 (3d Cir. 1975); Malinauskas v. United States, 505 F.2d 649, 654 (5th Cir. 1974); United States v. Harlan, 480 F.2d 515, 517 (6th Cir. 1973); Wolf v. United States, 430 F.2d 443, 444 (10th Cir. 1970); Grennett v. United States, 403 F.2d 928, 930 (D.C. Cir. 1968); Baker v. United States, 334 F.2d 444, 448 (8th Cir. 1964); Clayton v. United States, 302 F.2d 30, 35 (8th Cir. 1962); United States v. Valentino, 283 F.2d 634, 635 (2d Cir. 1960); State v. Contreras, 112 Ariz. 358, 542 P.2d 17 (1975); People v. Heral, 62 Ill. 2d 329, 342 N.E.2d 34 (1976); Commonwealth v. Miller, 454 Pa. 67, 309 A.2d 705 (1973).

110. 62 Ill. 2d 329, 342 N.E.2d 34 (1976).

111. *Id.* at 335, 342 N.E.2d at 37. *See also* Commonwealth v. Leate, 327 N.E.2d 866 (Mass. Sup. Jud. Ct. 1975).

112. 478 F.2d 211 (9th Cir. 1973).

113. *Id.* at 214-15.

114. 384 U.S. 150 (1966).

one's accusers, and concluded that for a defendant to waive a fundamental constitutional right, a higher level of competency is required.[115]

Sieling is open to serious question. A defendant must have the same ability to understand and reason whether he is pleading guilty or standing trial. Although a defendant in pleading guilty necessarily waives the right to remain silent, the right to a trial by jury, and the right to confront his accusers,[116] this does not, in and of itself, require a higher level of mental competency. As noted in *People v. Heral*,[117] a defendant who stands trial will be called upon to make similar waivers. At some point, the defendant who stands trial must decide whether he should testify in his own behalf. In making this decision, the defendant must, after considering the explanation and advice of his lawyer, weigh the advantages of the privilege against self-incrimination against the advantage of personally putting forward his version of the facts and his credibility as a witness.[118] The defendant may also be called upon to decide whether to waive a jury trial and be tried by the court. And finally the defendant may have to decide which of the prosecution's witnesses will or will not be cross-examined.[119]

Furthermore, *Sieling*'s reliance on *Westbrook* is misplaced. The higher standard of competency required by *Westbrook* comes into play *only* because the defendant seeks to waive counsel *and* represent himself. In *Westbrook*, the Court said that an additional inquiry was required because the defendant waived his right to counsel "and proceed[ed], as he did, to conduct his own defense."[120] The higher standard of mental competency is not required not because of the waiver decision itself but because the trial court's acceptance of the defendant's

115. 478 F.2d at 214-15. The court held, "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature and consequences of his plea.' " Sieling v. Eyman, 478 F.2d 211, 215 (9th Cir. 1973), *quoting* Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir. 1970) (Hufstedler, J., dissenting). The decision in *Sieling* was approved en banc by a majority of the court in de Kaplany v. Enomoto, 540 F.2d 975, 985 (9th Cir. 1976). *See also* United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976). *But see* Grennett v. United States, 403 F.2d 928, 930 (D.C. Cir. 1968).

116. *See* Boykin v. Alabama, 395 U.S. 238 (1969).

117. 62 Ill. 2d 329, 335, 342 N.E.2d 34, 37 (1976); *see* Commonwealth v. Leate, 327 N.E.2d 866, 870 (Mass. Sup. Jud. Ct. 1975).

118. *See* Brown v. United States, 356 U.S. 148, 155-56 (1957); People v. Heral, 62 Ill. 2d 329, 335, 342 N.E.2d 34, 37 (1976).

119. *See* People v. Heral, 62 Ill. 2d 329, 335, 342 N.E.2d 34, 37 (1976).

120. 384 U.S. 150 (1966).

waiver of counsel must include the finding that the defendant is competent to act as his own counsel.[121]

Additionally, *Sieling* has been criticized as creating a class of "semi-competent" defendants[122]—defendants who are competent to stand trial, but who are incompetent to plead guilty. *Sieling* effectively denies the "semi-competent" defendant the chance to engage in plea negotiations and the possibility of a lesser penalty.

The *Westbrook* test, however, should apply to the defendant who wishes to waive counsel and plead guilty.[123] Although a plea of guilty does not involve all of the complexities of a trial, the defendant who chooses to waive counsel and plead guilty must have the mental capacity to assess the strengths and weaknesses of the prosecution's case, to make pretrial motions, to conduct plea negotiations with the prosecution, to offer evidence in mitigation of punishment, and, if it becomes necessary to do so, to withdraw his plea of guilty. Therefore, where a defendant desires to plead guilty without counsel, the higher standard of competency in *Westbrook* should apply.

Conclusion

Dusky v. United States sets forth the mental competency test for standing trial and pleading guilty where the defendant is represented by counsel. Under the *Dusky* test, the trial court must determine whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

The mental competency test established in *Westbrook v. Arizona* applies where the defendant desires to plead guilty or stand trial without the assistance of counsel. Under the *Westbrook* test, the trial court must first determine whether the defendant is mentally competent to stand trial under the *Dusky* test. If he is, the trial court must then determine whether he is competent to waive counsel and represent himself.

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121. See notes 77-108 *supra.*

122. *See* de Kaplany v. Enomoto, 540 F.2d 975, 987-88 (9th Cir. 1976) (Wallace, J., concurring); People v. Heral, 62 Ill. 2d 329, 335, 342 N.E.2d 34, 37 (1976); *see A New Standard, supra* note 5, at 170-71; *cf.* Commonwealth v. Leate, 327 N.E.2d 866, 870 Mass. Sup. Jud. Ct. 1975).

123. *See In re* Williams, 165 F. Supp. 879 (D.D.C. 1958); *cf.* People v. Heral, 62 Ill. 2d 329, 342 N.E.2d 34 (1976).