CLE SEMINAR

Ethical Considerations Relating to the Representation of Criminal Defendants with Potential Mental Disabilities

Presented by:
Federal Public Defender's Office

Speaker:
AFPD Mark Weintraub

Portland, Oregon
December 16, 2015
12:00pm to 1:00pm

Medford, Oregon
Live via video-conferencing
December 16, 2015
12:00pm to 1:00pm

Eugene, Oregon
December 17, 2015
12:00pm to 1:00pm
Ethical Considerations Relating to the Representation of Criminal Defendants with Potential Mental Disabilities
Mark Bennett Weintraub, Assistant Federal Public Defender
December 10, 2015

I. INTRODUCTION

In defending federal criminal cases, it is a sad reality that most of our clients come into the federal criminal justice system affected by some kind of mental health issue. Defense counsel has an ethical obligation to recognize and address mental health conditions that may affect the client’s decision-making or bear on the potential consequences of the criminal charges. On the one hand, the Oregon Supreme Court has said that a lawyer should start with the presumption that the client is mentally competent. On the other, experience teaches that we should probably presume that our clients, while competent, bring other psychological baggage with them. The relevant ethical standards governing the attorney-client relationship in both instances are discussed below.

Four specific Oregon Rules of Professional Conduct (ORPC) are discussed below: competence (ORPC 1.1), control of the case (ORPC 1.2), communication (ORPC 1.4), and confidentiality (ORPC 1.6). One other provision, Rule 1.14, expressly addresses representation of clients with diminished mental capacity and informs the other ethical rules involved in the representation of criminal defendants with potential mental health impairment. In addition, while not specifically discussed further here, the duty of “candor to the tribunal” (ORPC 3.3) has the potential to conflict with the other ethical duties discussed here, but, importantly, it does not require an attorney to disclose information protected as confidential under the attorney-client privilege.

Mental health concerns create complexity in each of these areas, and the questions they raise overlap. The lawyer must have competence with specific procedural rules that may apply and must know how to recognize and investigate potential impairments and work with experts in addressing them. Mental illness or impairment also complicates the allocation of decision-making authority between attorney and client. In some situations, the ORPC allow -- but may not require -- the lawyer to substitute his or her judgment for the client’s in defining the client’s interests and determining whether to disclose client confidences. The duty to communicate with a client becomes more difficult when a client has an impaired ability to understand or make rational decisions about the case. Finally, attorney-client confidentiality may be challenged by the special needs involved in investigating and evaluating a client’s mental state and presenting information about it in negotiation or litigation. Particularly on the issue of client competency, the duty to provide effective assistance of counsel may in some circumstances require disclosure of the attorney's concerns about the client's mental health.

Several high-profile cases provide food for thought in this area and are discussed below. United States v. Kaczynski, 239 F.3d 1108, 1123 (9th Cir. 2001); Godinez v. Moran, 509 U.S. 389 (1993); State v. Haugen, 351 Or. 325 (2011).

1 Attorney Justin Withem assisted with research for this presentation.
Some commentators have suggested alternative ethical frameworks to address ethical issues in defending mental ill clients, see, e.g., John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U.L. Rev. 207 (2008) [hereinafter “King”], and several scholars and legal organizations have offered suggested rules or summarized existing rules that differ from the ORPC, see, e.g., Restatement (Third) of the Law Governing Lawyers (2000). An appendix is attached of several worthwhile sources for further reading. This article focuses primarily on federal practice under the rules binding upon Oregon lawyers.

II. COMPETENT AND ZEALOUS REPRESENTATION – ORPC 1.1

A lawyer’s first obligations in representing clients who may suffer from diminished mental capacity are, as in any other case, the duties of competence and zeal. ORPC Rule 1.1 provides that:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Although the world “zeal” appears only in the Preamble to the ORPC (and nowhere in the binding rules), it has long been held that, “[a]s a general proposition, attorneys owe their clients a duty of zealous representation as well as a duty to preserve client confidences and secrets.” These duties are “nearly absolute.” Oregon Formal Ethics Opinion (hereafter “Ethics Opinion”) No. 1991-41; see also Christensen v. Stevedoring Services of America, 430 F.3d 1032 (9th Cir. 2005) (counsel’s “chief duty is to advocate zealously on behalf of their clients”).

A lawyer “is expected to devote energy, intelligence, skill and personal commitment to the single goal of furthering the client’s interests as those are ultimately defined by the client.” C. Wolfram, *Modern Legal Ethics* 578 (1986).

---

2 The duty to provide competent representation is relevant but not identical to a criminal defendant’s right to the effective assistance of counsel under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (effective assistance of counsel depends in part on whether counsel's performance fell below an objective standard of reasonableness). Although “breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel,” *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), “[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable....” *Strickland*, 466 U.S. at 688. See also *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (evidence that counsel's performance breached general ethical standards established first prong of *Strickland* test); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (counsel may render ineffective assistance “where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so”).
A. Recognition of Mental Health Issues.

The duty to investigate and, where indicated, obtain a mental health evaluation extends to legal defenses, including but not limited to insanity, and to evidence supporting mitigation at sentencing. “[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition ... without a supporting strategic reason, constitutes deficient performance.” Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995). See also Doe v. Ayers, 782 F.3d 425 (9th Cir. 2015) (“the fact that the limited investigation [attorneys] did conduct put them on notice that further investigation was warranted … [and that] they failed to perform it … constitutes deficient performance”); Hoffman v. Arave, 455 F.3d 926, 932 (9th Cir. 2006) judgment vacated in unrelated part by 552 U.S. 117 (2008) (“We do not expect counsel to be trained in psychology or mental health. In this case, however, Wellman and Coulter's interactions with Hoffman provided them significant clues that would put a reasonable lawyer on notice that Hoffman's capacity to form the intent to commit first-degree murder was at issue.”).

See also Bemore v. Chappell, 788 F.3d 1151, 1162-63 (9th Cir. 2015) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”) (citing Strickland, 466 U.S. at 691. “The duty to investigate is flexible, and not ‘limitless.’” Id. (citing Hendricks, 70 F.3d at 1039 (quoting United States v. Tucker, 716 F.2d 576, 584 (9th cir.1983)). “Also, a tactical decision may constitute constitutionally adequate representation even if, in hindsight, a different defense might have fared better.” Id. (citing Reynoso v. Giurbino, 462 F.3d 1099, 1113 (9th Cir.2006)). “Although a defendant’s proclamation of innocence ... may affect the advice counsel gives,” it “does not relieve counsel of his normal responsibilities under Strickland.” Id. at 1165. “Moreover, and notably, a potentially ‘viable alternative defense’—a mental health defense—was quite possibly available, yet [counsel] did not investigate that defense, either. . . . Medical expert reports and statements by Bemore’s family and friends, all known or readily available to [counsel] at the time, evinced a possibility that Bemore was so mentally impaired as to be unable to form the requisite intent to commit the crimes.” Id.

1. Competent Representation Requires Recognizing and Investigating Client Incompetence.

The most extreme manifestation of a client mental health issue may be client incompetence. The federal standard for competence of a criminal defendant is longstanding but has also undergone significant changes. To be competent, a defendant must have “a rational as well as a factual understanding of the proceedings against him” and a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” Dusky v. United States, 362 U.S. 402, 402 (1960). A person is competent to stand trial if he understands the proceedings and is able to assist counsel in his defense. Dusky, 362 U.S. at 402. Competency requires “the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping to prepare an effective defense.” Odle v. Woodford, 238 F.3d 1084, 1089 (9th Cir. 2001) (citing Dusky, 362 U.S. at 402).
In *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court held that the standard of competency for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial. In *Indiana v. Edwards*, 554 U.S. 164, 170 (2008), the Court held that the United States Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. *See also United States v. Ferguson*, 560 F.3d 1060 (9th Cir. 2009) (remanding for district court to determine whether decision in *Edwards* would have affected court’s decision to permit defendant to represent himself).

The Oregon Supreme Court has held that a lawyer should start with the assumption that the client is competent. *Cloud v. U.S. Bank*, 280 Or. 83 (1977); *see also Edwards*, 554 U.S. at 174 (“We assume that a criminal defendant has sufficient mental competence to stand trial”). An attorney who reasonably believes that a client may be suffering from some kind of mental impairment affecting competency, however, is not only allowed to raise the issue of competency but likely has a professional duty to do so. *See United States v. Boigegrain* 155 F.3d 1181, 1187 (10th Cir. 1998) (“the defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance of the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate”). On the other hand, the Ninth Circuit has affirmed a district court’s denial of a defense counsel’s motion to discharge his attorneys and change his pleas to guilty. He also “refused the court's offer of standby counsel, and announced that he wanted no mitigating evidence presented on his behalf.” *Moran v. Godinez*, 972 F.2d 263, 264 (9th Cir. 1992) rev'd, 509 U.S. 389 (1993). On the day he discharged counsel and changed his pleas, he was taking four different kinds of medications. “When the state judge asked Moran if he was taking drugs, he replied that he was on medication. The state judge inquired no further on this issue. The court accepted Moran's waiver of counsel and pleas of guilty, which Moran communicated in a series of monosyllabic responses to leading questions from the court about his legal rights and the charged offenses. *Id.* In January 1985, a three-judge sentencing panel of the state court sentenced Moran to death.” *Moran v. Godinez*, 972 F.2d at 264. After he sought habeas relief, the Ninth Circuit ruled that he was not competent and issued a writ of habeas corpus. *Id.* The Supreme Court reversed, partly on the grounds that both evaluating psychiatrists had found that he was competent to stand trial. “Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.” *Godinez v. Moran*, 509 U.S. at 391, 399. Moran was executed by lethal injection in Nevada on March 30, 1996. See “Nevada Executes Man Who Killed 3 People,” New York Times (March 31, 1996), http://www.nytimes.com/1996/03/31/us/nevada-executes-man-who-killed-3-people.html. *See also* Christopher Slobogin & Amy Mashburn, *the Criminal Defense Lawyer’s Fiduciary Duty to Clients With Mental Disability*, 68 Fordham L. Rev. 1581, 1607 (2000) (discussing *Godinez*).
As to the issue of whether the attorney “knew or should have known” of a client’s competency issue, the ABA Model Rules commentary suggests a list of factors, and allows for consultation of a mental health professional:

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Model Rule 1.14 cmt. [6].

When counsel has reason to question his client's competence to plead guilty, failure to investigate further may constitute ineffective assistance of counsel. United States v. Howard, 381 F.3d 873 (9th Cir. 2004) (defendant was entitled to evidentiary hearing regarding whether his counsel was ineffective in allowing him to enter guilty plea at time he was under influence of powerful prescription painkiller); Newman v. Harrington, 726 F.3d 921 (7th Cir. 2013) (failure to investigate petitioner's fitness for trial and request hearing was ineffective); Andrews v. United States, 403 F.2d 341, 344 (9th Cir. 1968) (counsel found ineffective, after he made no pretrial inquiry into defendant's competency or mental capacity to commit the offense, “although the necessity for such inquiry was obvious.”).

Not only does an attorney have the professional duty to address the issue of diminished capacity when it is reasonably certain to be an issue, but the client has a constitutional right to have it addressed and resolved before a trial. In Medina v. California, the Court held that “if a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him.” 505 U.S. 437, 448 (1992).

There will inevitably be instances where the client disagrees that he is suffering from any kind of mental disorder. Despite a client’s denial that a psychological evaluation is necessary, the lawyer is permitted (and may be ethically required) to try to obtain one anyway. A lawyer who has reason to believe that a client may not be mentally competent to stand trial does not render ineffective assistance of counsel by making that concern known to the court. Boigegrain 155 F.3d at 1181.

---

4 The Bar Bulletin publishes occasional discussions on mental-health-related ethical issues. See, e.g., Janine Robben, I'm OK, You're ...?, Oregon State Bar Bulletin (August/September 2011) (discussing duty to investigate); and notes 8 and 10 below). Additional Bar ethics materials can be found at http://www.osbar.org/ethics/.
Defense counsel must investigate and analyze the competency issue if the defendant's appearance, action or statements suggest incompetence. *Proffitt v. United States*, 582 F.2d 854, 857 (4th Cir. 1978) (But when it appears to counsel that the accused is mentally ill and that he cannot afford to consult a psychiatrist, it is counsel’s duty to inform the court of this situation and move for a psychiatric examination.”); *Brennan v. Blankenship*, 472 F. Supp. 149, 156-57 (W.D. Va. 1979) (where defense counsel totally failed to develop only conceivable defense, failed to properly advise petitioner as to his legal alternatives, and allowed themselves to be “blindly guided” by petitioner's aversion to successful insanity plea when in fact such aversion arose in part from lack of information which should have been supplied by counsel, petitioner was deprived of effective assistance of counsel), *aff'd* 624 F.2d 1093 (4th Cir. 1980). The ABA Standards for Criminal Justice provide that:

Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

Standard 7-4.2(c).

Standard 7-4.2(f)-(d) suggests specific guidelines for counsel in raising issues of client incompetence:

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt that the defendant is competent to stand trial and that it is not filed for purposes of delay. The motion should also set forth the specific facts that have formed the basis for the motion.

(e) In the absence of good faith doubt that the defendant is competent to stand trial it is improper for either party to move for evaluation. It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation, or to delay the proceedings against the defendant.

(f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.5

5 Should it become necessary to obtain an evaluation of the client's competency, Standard 7-3.6 of the
2. Competent Representation Also Extends to Evaluating a Potential Insanity Defense.

The lawyer has a duty to investigate and evaluate a potential defense based on insanity, but whether a lawyer could force an unwilling but competent defendant to assert an insanity defense is questionable. (See below at 16.)

The federal standard for insanity is set forth in 18 U.S.C. § 17. It is an affirmative defense “that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.” The defendant has the burden of proof by clear and convincing evidence. Id.6

Whether failure to advance an insanity defense may constitute ineffective assistance of counsel will be governed by the standards set forth in Strickland. Sandgathe v. Maass, 314 F.3d 371, 381 (9th Cir. 2002) (“counsel's failure to follow up with forensic psychiatrists as he was advised and to further explore the possibility of [petitioner's] general mental health defense constituted deficient lawyering,” but no prejudice shown). In many cases, “trial tactics could dictate an attorney's decision not to rely upon or advance an insanity defense.” United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974).

In Edwards, counsel was ineffective for having requested CJA funds for psychiatric help and then not exploring an insanity defense after an initial psychiatric report found defendant schizophrenic and sociopathic but competent to stand trial. See also Alvord v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984) (lawyer who honored defendant's decision not to raise insanity defense not ineffective despite defendant's mental illness because judge found defendant competent and only psychiatrist to examine him regarding insanity considered the defendant sane); Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983) (lawyer wanted to present second degree murder defense based on depraved mind but defendant refused to allow defense; court held that defense lawyer bound to follow wishes of competent client even though detrimental); Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), aff'd, 624 F.2d 1093 (4th Cir. 1980) (lawyer found ineffective for failing to develop only possible defense in case because client indicated he was not interested in raising insanity); State v. Felton, 110 Wis. 2d 485, 329 N.W.2d 161 (1983) (defense lawyer found ineffective for failing to investigate an insanity defense).

ABA Standards for Criminal Justice Mental Health suggest the various duties an attorney has regarding the procedures for conducting those evaluations.

6 Under Oregon state law, “[a] person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.” Or. Rev. Stat. § 161.295 (2012). Notice and report prerequisites are set forth in Ore. Rev. Stat. § 161.309.
3. **Investigation of potential diminished capacity should be considered with respect to trial defenses as well as sentencing.**

Diminished capacity is available as a defense at trial only to negate the intent element of a specific intent crime. See, e.g., *United States v. Burdeau*, 168 F.3d 352, 356 (9th Cir. 1999) (defense based on voluntary intoxication is available only for a specific intent crime); *United States v. Oliver*, 60 F.3d 547, 551 (9th Cir. 1995) (defense not available on carjacking charge). *United States v. Twine*, 853 F.2d 676, 681 (9th Cir. 1988) (defendant entitled to consideration of mental defect evidence on issue of whether he possessed the mental capacity to form the specific intent to threaten under 18 U.S.C. § § 875).

More commonly, diminished capacity issues are fertile ground for sentencing mitigation. Under the advisory sentencing guidelines, a downward departure is available for diminished capacity, which is defined in the guidelines as whether the defendant, although convicted, has a significantly impaired ability to understand the wrongfulness of the conduct comprising his offense or exercise the power of reason, or control behavior that he knows is wrongful. U.S.S.G. § 5K2.13, *Application Note 1*. While this definition is non-exclusive, it is a common legal standard that the court could be expected to consider.

The potential types of impairment are illustrated by cases deciding whether failure to investigate diminished capacity constituted ineffective assistance. *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006) (defense counsel's failure to investigate defendant's extensive drug history, early childhood head trauma, mental impairments and organic brain damage, and child abuse, was deficient and prejudicial); *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (holding that counsel was ineffective for failing to investigate defendant's mental impairments caused by childhood exposure to toxic chemicals); *Wallace v. Stewart*, 184 F.3d 1112, 1115 (9th Cir. 1999) (concluding that counsel was ineffective where counsel failed to investigate dysfunctional family background, drug history, and evidence of organic brain damage); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) (holding that counsel's performance was deficient for failing to investigate readily available evidence of mental impairment). The Supreme Court has recognized that the failure to pursue avenues of readily available information—such as school records, juvenile court and probation reports, and hospital records—may constitute deficient performance. *Rompilla v. Beard*, 545 U.S. 374, 382 (2005); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (holding that counsel failed to “fulfill their obligation to conduct a thorough investigation of the defendant's background” for purposes of sentencing and thus failed to uncover voluminous evidence of a “nightmarish childhood” in juvenile court records); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (counsel's failure to prepare a social history report fell below professional standards where counsel was on notice of severe family dysfunction).

In addition, one commentator on legal ethics provides the following laundry list of potential diagnoses:

- Psychoses (e.g., schizophrenia, manifested by hallucinations and delusions);
- Dementias (involving a significant loss of consciousness and memory);
• Mood disorders (e.g., the bipolar disorders, manifested by swings between severe depression and mania);
• Dissociative disorders (including dissociative identity disorder, formerly known as multiple personality disorder);
• Mental retardation;
• Anxiety disorders (including post-traumatic stress disorder);
• Personality disorders (a large category that is meant to encompass "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture" and that includes paranoid personality disorder; schizoid personality disorder (detachment from social relationships and a restricted range of emotional expression); schizotypal personality disorder (odd beliefs or magical thinking; unusual perceptual experiences including bodily illusions; excessive social anxiety); antisocial personality disorder (disregard for and violation of the rights of others); borderline personality disorder (impulsivity; inappropriate, intense anger or difficulty controlling anger); histrionic personality disorder (excessive emotionality and attention seeking); narcissistic personality disorder (grandiosity, need for admiration, and lack of empathy); avoidant personality disorder (feelings of inadequacy and hypersensitivity to negative evaluation); dependent personality disorder (submitive and clinging behavior related to an excessive need to be taken care of); and obsessive-compulsive personality disorder (preoccupation with orderliness, perfectionism, and control));
• Sexual disorders (including pedophilia) and impulse disorders (including pyromania and kleptomania);
• Eating and sleeping disorders and disorders that feature exaggerated symptoms (somatoform and factitious disorders);
• Substance abuse disorders that do not result in dementia, including not just alcohol and drug-related disorders but caffeine and nicotine-related disorders.

John Wesley Hall, Recognizing Mental Disorders, Prof. Resp. Crim. Def. Prac. 3d § 11:8.
B. Procedural Issues.

Procedural questions come into play in the investigation and presentation of information about a client’s mental health, and counsel needs to be aware of them to avoid waiver of defenses and to avoid unnecessarily exposing clients to additional custody.

1. Competency Determinations

Determination of mental competency to stand trial in federal court is governed by 18 U.S.C. § 4241. Subsection (a) of the statute provides:

(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.

18 U.S.C. § 4241(a). “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.” 18 U.S.C. § 4241(d). The statute sets forth other procedural mechanisms for hospitalization, treatment, and discharge. Id. Counsel needs to be aware also that the Government may involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial. Sell v. United States, 539 U.S. 166 (2003). That authority is not unlimited. Treatment must be "medically appropriate, ... substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, ... necessary significantly to further important governmental trial-related interests.” Sell, 539 U.S. at 179. The Court in Sell emphasized that instances allowing such treatment “may be rare,” because “a court must find that important governmental interests are at stake,” that “involuntary medication will significantly further” those interests, “that administration of the drugs is substantially likely to render the defendant competent,” that “administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair,” and that “involuntary medication is necessary to further those interests.” Sell, 539 U.S. at 181 (emphasis in original). See also John Blume, Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination (2001), http://dpa.state.ky.us/library/manuals/mental/Ch03.html#III.
2. **Insanity Determinations.**

In contrast to competency determinations, insanity is an issue of fact to be determined by the jury. *United States v. Handy*, 454 F.2d 885 (9th Cir. 1971). The defendant has the burden of proof by clear and convincing evidence. 18 U.S.C. § 17(a).

3. **Rule 12.2**

Counsel must be aware of the notice requirements set forth in Federal Rule of Criminal Procedure 12.2 for both assertion of an insanity defense and intention to introduce expert evidence relating to a mental disease or defect or other mental health issue at the risk of waiver of the opportunity to present a defense on one of these issues. These are separate issues with subtle but important distinctions.

In the instance of insanity, Rule 12.2(a) provides:

**Notice of an Insanity Defense.** A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

Rule 12.2(b) provides:

**Notice of Expert Evidence of a Mental Condition.** If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

The differences between these two provisions have caused considerable confusion. See *United States v. Kaczynski*, 239 F.3d 1108, 1123 (9th Cir. 2001) (Reinhardt, J., dissenting). 7

---

7Theodore Kaczynski, the so-called “Unabomber,” was arrested April 3, 1996 and indicted in federal court in California and New Jersey for mailing or placing sixteen bombs that killed three people, and injured nine others. 239 F.3d at 1110. The government gave notice of its intent to seek the death penalty in both cases. The California Indictment was assigned to the calendar of the Hon. Garland E. Burrell, Jr., and Quin Denvir, the Federal Public Defender for the Eastern District of California, and Judy Clarke, the Federal Public Defender for Eastern Washington and Idaho, were appointed to represent Kaczynski. *Id.* at
First, Rule 12.2(a), with respect to insanity, requires notice of intent to “assert a defense.” In contrast, Rule 12.2(b) only requires notice of intent “to introduce expert evidence.” In theory at least, evidence of diminished capacity could be offered through lay witnesses without having to provide the notice that Rule 12.2 requires. This is precisely the course Theodore Kaczynski’s attorneys attempted to take, resulting in the defendant’s attempt to fire them and causing the trial judge mistakenly to believe that, “when counsel … withdrew the 12.2(b) defense, that all such defenses would be withdrawn.” *Id.*

Second, Rule 12.2 allows the court to order a mental examination under 18 U.S.C. § 4241.
et seq. at the request of the government. This can result in the client’s in-custody examination for at least 45 days and up to 75 days under 18 U.S.C. § 4247. Ordering such an examination is discretionary in instances of potential incompetency or after notice of expert testimony under Rule 12.2(b). However, it is mandatory, on government motion, if notice has been given under Rule 12.2(a).

Finally, a defendant’s statements made during such an examination are inadmissible unless the defendant offers evidence on an issue regarding mental condition as provided in the Rule:

No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant: (A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or (B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).


4. Experts: Court-ordered vs. court-authorized

Recognizing, evaluating, and presenting information about clients’ mental states typically involves hiring and working with experts. There is a distinction between obtaining a confidential psychological evaluation protected by the attorney-client privilege and getting an evaluation ordered by the court. Under 18 U.S.C. § 3006A(e)(1), CJA funds are available for employment of experts necessary for adequate representation. Application for such funds should be requested ex parte. Id. The expert’s report is protected by the attorney-client privilege. United States v. Grammer, 513 F.2d 673, 675 (9th Cir. 1975). In most cases, it is preferable first to obtain a confidential evaluation privately or through CJA procedures, while taking steps to avoid waiver under Rule 12.2.

Caution needs to be exercised not to waive the privilege inadvertently. In Grammer, counsel waived the privilege by voluntarily furnishing a copy of the report to the government and failing to object specifically to testimony eliciting the fact that the defense had hired a fingerprint expert that it did not call, allowing the government to argue that its own expert testimony was not contradicted. Id. at 675.

5. Evidence Rules.

Federal Rule of Evidence 704 governs the admissibility of expert testimony regarding a defendant’s mental state. “An opinion is not objectionable just because it embraces an ultimate issue.” However,

In a criminal case, an expert witness must not state an opinion about whether the
defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Fed. R. Evid. 704(b).

Decisions applying this rule to expert testimony about insanity or diminished capacity vary as to what conclusions an expert is allowed to state. See United States v. West, 962 F.2d 1243 (7th Cir. 1992) (psychiatrist's opinion that defendant knew what he was doing and knew that it was wrong was inadmissible in bank robbery prosecution in which defendant claimed insanity defense); but see United States v. Edwards, 819 F.2d 262 (11th Cir. 1987) (psychiatrist's explanation of why behavior of defendant charged with unarmed bank robbery who pled not guilty by reason of insanity did not necessarily indicate active manic state was admissible).


The rules of evidence (except for those on privilege) do not apply in sentencing hearings, Fed. R. Evid. 1101(d)(3), and counsel should be aware of the different ways in which information about mental state can be submitted and how, in particular, this may have an impact on the confidentiality of information about the client, and in particular, may result in disclosure of information “which would be embarrassing or would be likely to be detrimental to the client.” ORPC 1.0(f).

Public exposure of such information can usually be avoided. Expert reports and supporting materials do not need to be and, arguably, should not be included in publicly filed pleadings. Reports can be provided to the prosecutor with an agreement not to copy or disseminate them. Materials can be provided to the Presentence Report writer and will then, typically, go the court as an attachment to the PSR, so that they are not publicly available. Alternatively, they can be appended to a sentencing letter rather than a publicly filed memorandum.
III. CONTROL OF THE CASE -- ORPC 1.2.

The Supreme Court has held that the Sixth Amendment guarantees the accused “personally the right to make his defense.” *Faretta v. California*, 422 U.S. 806, 819 (1975). However, *Faretta* dealt specifically with a client’s right to reject the assistance of counsel entirely and to conduct his or her own defense without counsel. On one hand, the Court admonishes that an attorney, “however expert, is still an assistant.” 422 U.S. at 820. Although the defendant “may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

On the other hand, the Sixth Amendment does not require that a lawyer allow a client to dictate means and strategy. “It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.” *Faretta*, 422 U.S. at 821. It can be argued that, in the case of mental health issues, the duty to provide competent representation does not merely allow, but requires, that a lawyer make key decisions that a client may find objectionable:

Should the defendant's irrational choices be respected, or may counsel make choices based on her assessment of the client's best interest? Does a client’s mental impairment alter the responsibilities or role of defense counsel? Is there a point at which the defendant's mental disability ought to change the lawyer's role from that of advocate to that of guardian or friend of the court?

*Uphoff*, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65, 67 (1988).8

The governing Oregon rule is ORPC 1.2, which provides in relevant part that:

…[A] lawyer shall abide by a client's decisions concerning the objectives of representation and … shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. **In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**9

ORPC 1.2(a) (emphasis added). The last provision of ORPC 1.2(a) clarifies the scope of decision-making controlled by the represented defendant that the previous rules left unstated. *See also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (fundamental decisions reserved for the criminal defendant are the plea to be entered, whether to waive a jury trial, whether the client will testify and whether

8 *See also* Amber Hollister, *Responding To Suicidal Clients, Menacing Parties And Threatening Behavior*, Oregon State Bar Bulletin (October, 2015).
9 *See also* *North Carolina v. Alford*, 400 U.S. 25 (1970) (defendant may plead guilty despite his continued assertion of his innocence).
to appeal); Restatement (Third) of Law Governing Lawyers: A Client with Diminished Capacity § 24 (2000). “A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.” Model Rule 1.2(a).

The commentary to the ABA Model Rule upon which ORPC 1.2 is based provides additional clarification as to the apparent intent of the rule:

Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives … [while] lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Model Rule 1.2 cmt. [2]. However, “[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, [the Model] Rule does not prescribe how such disagreements are to be resolved. Id.

The ABA Standards for Criminal Justice are advisory only, but they provide additional detail about the division of decision-making authority between client and lawyer:

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

(b) The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include:

(i) whether to proceed without counsel;
(ii) what pleas to enter;
(iii) whether to accept a plea offer;
(iv) whether to cooperate with or provide substantial assistance to the government;
(v) whether to waive jury trial;
(vi) whether to testify in his or her own behalf;
(vii) whether to speak at sentencing;
(viii) whether to appeal; and
(ix) any other decision that has been determined in the jurisdiction to belong to the client.

(c) 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, within the protection of confidentiality and privilege rules if applicable.

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced.

(e) If a disagreement on a significant matter arises between defense counsel and the client, and counsel resolves it differently than the client prefers, defense counsel should consider memorializing the disagreement and its resolution, showing that record to the client, and preserving it in the file.

American Bar Association Standards for Criminal Justice, Defense Function [hereinafter “ABA Standards”], Standard 4-5.2 (4th ed. 2015) (emphasis added). In the world of everyday practice, and particularly where the defense of mentally ill clients is concerned, it is not as simple to adhere to these suggestions as the foregoing summary suggests.

One matter in which the question of who controls the case has caused controversy is the insanity defense. A defendant's right to decide what plea to enter has been held to include the right to decide not to plead insanity. United States v. Wattleton, 296 F.3d 1184, 1194 (11th Cir. 2002); United States v. Marble, 940 F.2d 1543, 1546-47 (D.C. Cir. 1991). The majority view is that a court must honor the choice of a competent defendant not to raise the insanity defense. If the defendant is not competent to make a clear choice, the court can exercise discretion to instruct the jury on insanity sua sponte. Id. See also State v. Peterson, 70 Or. App. 333, 689 P.2d 985 (1984) (trial court erred by imposing the defense of not responsible due to mental disease or defect over the objection of defendant, who was represented by counsel, had not raised that defense, and had been found competent to stand trial); Jacobs v. Commonwealth, 870 S.W.2d 412, 418 (Ky. 1994); Treece v. State, 547 A.2d 1054, 1062 (Md. 1988); and see David S. Cohn, Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection, 15 Hastings Const. L.Q. 295, 299-301 & n.31 (1988). But see Robert D. Miller et al., Forcing the Insanity Defense on Unwilling Defendants: Best Interests and the Dignity of the Law, 24 J. Psychol. & L. 487, 504 (1996) (reporting, based on a survey of state attorneys general, that the insanity defense can be raised over the defendant's objection or without the defendant's knowledge in 17 states); and Frendak v. United States, 408 A.2d 364, 380 (D.C. 1979) (“whenever the evidence suggests a substantial question of the defendant's sanity at the time of the crime, the trial judge must conduct an inquiry designed
to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the defense, and freely chooses to raise or waive the defense”.

IV. COMMUNICATION –ORPC 1.4

A client with impaired mental health presents any number of challenges to fulfilling this duty. The client may have an impaired ability to understand or remember the lawyer’s advice or instructions. Some clients may appear to understand when they really don’t. Failure to communicate with a client can result in ineffective assistance. See, e.g., Brennan, 472 F. Supp. at 156-57 (petitioner was deprived of effective assistance of counsel when his aversion to insanity plea arose in part from lack of information which should have been supplied by counsel).

The governing Oregon rule is ORPC 1.4, which provides that:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The official comment to Model Rule 1.14 (discussed below at page 20) explains:

[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being … The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a lawyer reasonably believes that ... a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.
V. CONFIDENTIALITY - ORPC 1.6

Respect for the attorney-client privilege is widely understood to constitute one of a lawyer’s highest ethical duties. Ethics Opinion 1991-41. However, attorney-client confidentiality comes into potential conflict with the special needs involved in providing effective assistance of counsel, through investigation and evaluation of a client’s mental state and presentation of information about it in negotiation or litigation. Issues of client incompetence, potential insanity, and diminished capacity as a trial defense or in sentencing mitigation may all require disclosure of information about the client's mental health. Whenever possible, the conflict can be resolved through good communication and agreement with the client about the strategy.

The ORPC, when adopted, did away with the former Disciplinary Rules’ distinction between “confidences” and “secrets.” Instead, the duty of confidentiality extends to all “information relating to the representation of the client,” which is defined very broadly:

Information relating to the representation of a client denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ORPC 1.0(f).

ORPC 1.6 limits the scope of an attorney’s authority to make unilateral decisions to disclose “information.” However, as compared to the former Disciplinary Rules, the ORPC arguably gives attorneys broader license to make disclosures with regard to clients with diminished capacity. Rule 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;
(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; [or]

(5) to comply with other law, court order, or as permitted by these Rules[.]

ORPC 1.6.

In addition, as discussed below, the Rule concerning clients with diminished capacity contains a specific, but narrow, exception to the general rule set forth in ORPC 1.6(a), allowing a lawyer to reveal confidential information as a means of “protective action” if a client’s “capacity to make adequately considered decisions in connection with a representation is diminished” and the client is consequently “at risk of substantial physical, financial or other harm.” ORPC 1.14.

ORPC 1.14 thus appears to authorize the disclosure of “information about the client” with diminished capacity, even including confidential attorney-client communications that would have been considered inviolate “confidences” under the prior Disciplinary Rules. Such revelations, however, are permitted “only to the extent reasonably necessary to protect the client's interests.” ORPC 1.14(c).

Precisely when such revelations – particularly revelations about the client’s mental illness, which may lead to lengthy hospitalization and evaluation – are “reasonably necessary” is a matter of debate, and the Rules offer no meaningful guidance. See, e.g., King, 58 Am. U.L. at 234-35. The commentary to the corresponding ABA Model Rule notes only that:

Disclosure of the client's diminished capacity could adversely affect the client's interests. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action [due to diminished capacity and a consequent risk of harm] the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, [Rule 1.14] limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Model Rule 1.14 cmt. [8].
VI. PROTECTING A CLIENT'S BEST INTERESTS - ORPC 1.14

ORPC 1.14 is the rule that sometimes allows an attorney to substitute the attorney’s own judgment for a client with diminished capacity, including a decision to disclose confidential information. The Rule provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

ORPC 1.14.10

This limited authority to substitute his or her own judgment for that of the client is similar to the prior Disciplinary Rule that ORPC 1.14 replaced. See DR 7-101 (repealed 2005) (allowing substitution of judgment when the attorney reasonably believed “the client cannot adequately act in the client’s own interest, whether because of minority, mental disability, or for some other

10 Ore. Rev Stat. § 125.300, governing the general guidelines for protective proceedings and guardianship, may be applicable if the client is found incompetent and in need of a guardian. ORS 125.300 says:

1) A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations.

(2) An adult protected person for whom a guardian has been appointed is not presumed to be incompetent.

(3) A protected person retains all legal and civil rights provided by law except those that have been expressly limited by court order or specifically granted to the guardian by the court. Rights retained by the person include but are not limited to the right to contact and retain counsel and to have access to personal records.

See also Helen Hierschbiel, Impaired Clients: Challenging and Unique Ethical Considerations. Or. St. B. Bull. 21 (2004).
Thus, protective action must be limited to what is reasonably necessary. The attorney must "reasonably be satisfied that there is a need for protective action[.]" Ethics Opinion No. 2005-41. Second, the attorney must then take “the least restrictive form of action to address the situation.” Ethics Opinion No. 1991-41. See also Ethics Opinion No. 2005-41 (lawyer may take “only such action as is reasonably necessary under the circumstances”).

The requirement that a lawyer “must reasonably believe that there is a need for protective action and then may take only such action as is reasonably necessary under the circumstances” limits the scope of an attorney’s authority. “If, for example, Lawyer expects that Client’s questionable behavior can be addressed by Lawyer raising the issue with Client’s spouse or child, a more extreme course of action, such as seeking the appointment of a guardian, would be inappropriate.” Ethics Opinion No. 2005-41. As discussed in the context of confidentiality, the ABA comment to Model Rule 1.14 advises taking only that action that is reasonably necessary and (consistent with ORPC 1.14) continuing to treat the client-attorney relationship as normally as possible.

Counsel must weigh the potential consequences for a client of publicly raising an issue of diminished capacity. For example, under 18 U.S.C. § 4241(d), the court may commit a defendant who is mentally incompetent to the custody of the Attorney General for hospitalization for up to four months, to determine whether there is a substantial probability that the defendant will become competent in the foreseeable future, and for an additional reasonable period of time if the court finds that there is such a substantial probability. At the end of the specified period, if the defendant is found to still be incompetent, the government may continue to hold the defendant in custody until such time as his release would not create a substantial risk of bodily injury to another person or serious damage to property of another. 18 U.S.C. § 4246(d).

Similarly, in the case of defendants who give notice of intent to assert a defense based upon mental condition, the court may commit the defendant for evaluation under the provisions of § 4241. Fed. R. Crim. P. 12.2(c). A person found not guilty only by reason of insanity is also subject to continued confinement for evaluation and treatment until such time as his release would not create a substantial risk of bodily injury to another person or serious damage to property of another “due to a present mental disease or defect.” 18 U.S.C. § 4243(d). Similar provisions provide for continued involuntary hospitalization of a convicted person due for release but suffering from mental disease or defect. 18 U.S.C. § 4246.
VII. WHEN IT’S NECESSARY TO RESIGN FROM REPRESENTATION

Clients frequently understand that a “diminished capacity defense” may lead to a shorter sentence, but others may object to a defense strategy that portrays them as “damaged” or contemplates disclosure of private and embarrassing information about them. Or, their impaired mental health may cause distrust, hostility, or wholesale rejection of counsel’s assistance.

A difference of opinion between a lawyer and a competent client may result in the lawyer being required to seek to withdraw. “On the duty of a trial court to appoint substitute counsel in the face of irreconcilable conflict or complete breakdown in communication between counsel and client, there is near-unanimity among the circuits.” Plumlee v. Del Pappa, 465 F.3d 910, 920 (9th Cir. 2006) (justifiable distrust of his attorney became so acute that defendant was denied his clearly established Sixth Amendment right to counsel). The court, not client or counsel, has the authority to decide whether counsel of record may withdraw. United States v. Sou, 216 Fed. Appx. 704, 2007 WL 43673 (9th Cir. 2007); Glavin v. United States, 396 F.2d 725 (9th Cir. 1968). When the difference of opinion is with a client whom the lawyer has reason to believe is not competent, things can get very complicated. See State v. Haugen, 351 Or. 325 (2011) (Haugen II).11

11 Gary Haugen was sentenced to death for aggravated murder. The conviction and sentence were affirmed on direct review. State v. Haugen, 349 Or. 174, 243 P.3d 31 (2010) (Hugen I). Judge Guimond, who had been the trial judge, then held a hearing on whether to issue the death warrant. Haugen was represented at the hearing by two lawyers, Simrin and Goody. Haugen sought to waive all future challenges to his conviction and sentence. Simrin and Goody, however, believed that Haugen was not competent to be executed and filed a motion to declare Haugen incompetent, supported by Goody’s declaration that Haugen had been interviewed and evaluated by a neuropsychologist, Dr. Muriel Lezak, who had had concluded that Haugen was not competent to be put to death. Haugen II, 351 Or. at 71. The Lezak affidavit specifically stated “that Haugen suffers from a delusional disorder that “prevents him from comprehending the reasons for his death sentence or its implication[,”] rendering him incompetent to be executed under Panetti v. Quarterman, 551 U.S. 930 (2007), Ford v. Wainwright, 477 U.S. 399 (1986), and Ore. Rev. Stat. 137.463(6)(a). 351 Or. at 79-80 n. 1 (Walters, J., dissenting). Before considering Simrin and Goody’s motion, Judge Guimond received a letter from Haugen, asking him to remove Simrin and Goody as his lawyers and to permit him to proceed pro se. Simrin and Goody objected and asked for a Faretta hearing. Judge Guimond disagreed on the necessity of an evidentiary hearing, and, after questioning Haugen, decided that Haugen was competent and knowingly choosing to proceed pro se. Simrin and Goody were discharged but ordered to serve as “stand by” counsel. After questioning Haugen further, Judge Guimond found a valid waiver of his rights to further challenge his conviction and sentence and issued a death warrant. Id. The Oregon Capital Resource Center (OCRC) then filed a petition for a writ of mandamus contending that the trial court had not conducted a sufficient inquiry into Haugen’s competence. Simrin and Goody submitted a letter supporting the petition. The Oregon Supreme Court issued an alternative writ of mandamus directed to Judge Guimond, directing him, in part, to “order that the Oregon Health Authority or its designee perform an assessment of the defendant’s mental capacity to engage in reasoned choices of legal strategies and options” and to “permit Simrin and Goody to offer evidence pertinent to defendant Haugen’s mental capacity to make a competent, knowing, and voluntary waiver of his rights and to the question of whether defendant is competent for the purposes of being executed.” Id. at 72. Haugen objected to having Simrin and Goody reinstated as his attorneys, asserting that they had a conflict of interest; he objected to any use or disclosure of Lezak’s evaluation on the grounds that it his interview with Lezak was confidential; and Haugen asked the Supreme Court to appoint independent counsel to represent him “if it
Withdrawal from representation is governed by ORPC 1.16, which provides:

(a) ... [A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

1. the representation will result in violation of the Rules of Professional Conduct or other law;
2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
3. the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

---

determined that Haugen did not have a right to object to the release of information about Lezak’s examination.” In the meantime, Judge Guimond reinstated Simrin and Goody as Haugen’s counsel, directed the Oregon Health Authority to assess Haugen’s competence, and scheduled an evidentiary hearing on competence to be held after that evaluation was completed. Id. at 73. Haugen then notified Judge Guimond that he wanted Simrin and Goody to be removed as his counsel but, instead of asking to proceed pro se, he requested substitute counsel, claiming in part that Simrin and Goody had violated the confidentiality of his examination by Lezak without his consent and had “acted unethically and illegally.” Judge Rhoades, rather than Judge Guimond, presided at the next hearing, ruled that a conflict of interest existed between Haugen and his counsel, based on an irremediable breakdown in their attorney-client relationship, and removed Simrin and Goody and ordered a substitution of counsel. Different lawyers—Scholl and Gorham—were appointed to represent Haugen. Id. Dr. Hulteng performed an evaluation on behalf of the Oregon Health Authority and concluded that Haugen was competent. Judge Guimond then held a hearing at which the lawyers for the parties were permitted to offer further evidence on Haugen’s competence. Scholl, Haugen’s lead counsel, did not offer Lezak’s affidavit or other evidence of Lezak’s opinion of Haugen’s competency. Instead, the only expert evidence presented at that hearing was Hulteng’s evaluation. Hulteng’s written report was placed in evidence, and Hulteng testified at the hearing. Counsel for both sides questioned Hulteng about his assessment. Judge Guimond ruled that Haugen was competent to waive any further challenges to his conviction and sentence and to be executed. 351 Or. at 73. In a subsequent appeal, the Oregon Supreme Court ruled that the writ of mandamus “did not require Simrin and Goody to offer . . . any particular evidence, including the Lezak affidavit.” Id. at 75-76. The Court stated, “Scholl, as Haugen’s lead counsel, independently assessed the evidence on Haugen’s competency, the legal issues involved, and his own ethical obligations to his client. Scholl properly did not consider himself bound to pursue whatever legal strategies and positions Simrin and Goody had pursued, as opposed to assessing those matters anew. Scholl decided to rely on Hulteng’s evaluation, which was the expert evaluation contemplated by the statutory procedure that our writ ordered Judge Guimond to follow. Scholl specifically decided not to submit the Lezak affidavit at the evidentiary hearing.” Id. at 77. For his part, Scholl submitted an affidavit stating that he did not find Lezak’s “affidavit” (as opposed to her full report) credible; that he believed Hulteng to be “credible and unbiased,” and that “[i]n the end, Dr. Hulteng’s opinion about defendant’s competency was very similar to my own view and that of defendant himself.” Id. at 77 n. 9.
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

ORPC 1.16 (emphasis added).
The rule seems to require at least an attempt to withdraw from representation if the client demands it. ORPC 1.16(a)(3). Because filing a motion to withdraw may lead to a hearing at which a mentally impaired client is likely to make self-damaging statements, alternatives should be considered before going public. These could include:

- Communication with the client to correct any misunderstandings and try to reach agreement.
- Appointment of second-opinion counsel to consult with the client about the disagreement.
- An ex parte motion and affidavit and in camera hearing to bring the matter to the court’s attention without divulging private information to the prosecution and the public.

In keeping with the duty of confidentiality, a hearing in open court should be a last resort.

Continuing to represent a client with whom a lawyer disagrees after denial of a motion to withdraw will not constitute an ethical violation. *In re Lathen*, 294 Or. 157 (1982).
Appendix: Resources for Further Research


John Blume, Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination (2001), http://dpa.state.ky.us/library/manuals/mental/Ch03.html#III

Richard Dudley, Jr., and Pamela Blume Leonard, Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment, 36 Hofstra L. Rev. 963 (2007-2008)

John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice 3d

Hazard, Hodes, & Jarvis, The Law of Lawyering (4th ed. 2015)


John T. Philipsborn, Updating Approaches to Client Competence: Understanding the Pertinent Law and Standards of Practice, Champion (January/February, 2005)

Christopher Slobogin & Amy Mashburn, the Criminal Defense Lawyer’s Fiduciary Duty to Clients With Mental Disability, 68 Fordham L. Rev. 1581, 1607 (2000)

Rodney J. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?, 1988 Wis. L. Rev. 65, 67 (1988)

C. Wolfram, Modern Legal Ethics 578 (1986)


Judith Herman, Trauma and Recovery (2015 Edition)
113 S.Ct. 2680, 125 L.Ed.2d 321, 61 USLW 4749

Defendant’s convictions for murder were affirmed by the Nevada Supreme Court, 103 Nev. 138, 734 P.2d 712, and his appeal from denial of postconviction relief was dismissed, 105 Nev. 1041, 810 P.2d 335. Defendant then sought habeas corpus. The United States District Court for the District of Nevada, denied relief, and defendant appealed. The Court of Appeals for the Ninth Circuit reversed, 972 F.2d 263. On certiorari, the Supreme Court, Justice Thomas, held that the standard of competency for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justice Scalia joined.

Justice Blackmun filed a dissenting opinion in which Justice Stevens joined.

West Headnotes (6)

[1] Criminal Law
   - Right to Plead Guilty; Mental Competence
   - Mental Health

   Criminal defendant may not be tried unless he is competent and may not waive his right to counsel or plead guilty unless he does so competently and intelligently.

   584 Cases that cite this headnote

[2] Criminal Law
   - Right to Plead Guilty; Mental Competence

   Competency standard for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial, and is not a higher standard.

   418 Cases that cite this headnote

[3] Criminal Law
   - Waiver of Defenses and Objections
   - Waiver of Right


   33 Cases that cite this headnote

[4] Criminal Law
   - Mental Competence in General

   Competency required of defendant seeking to waive right to counsel is the competence to waive the right, not the competence to represent himself.

   329 Cases that cite this headnote
Finding that defendant is competent to stand trial is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel, as trial court must satisfy itself that the waiver of the constitutional rights is knowing and voluntary; although that is a heightened standard for pleading guilty and waiving the right to counsel, it is not a heightened standard of competency.

Held: The competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial: whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him,” Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (per curiam). There is no reason for the competency standard for either of those decisions to be higher than that for standing trial. The decision to plead guilty, though profound, **2682 is no more complicated than the sum total of decisions that a defendant may have to make during the course of a trial, such as *390 whether to testify, whether to waive a jury trial, and whether to cross-examine witnesses for the prosecution. Nor does the decision to waive counsel require an appreciably higher level of mental functioning than the decision to waive other constitutional rights. A higher standard is not necessary in order to ensure that a defendant is competent to represent himself, because the ability to do so has no bearing upon his competence to choose self-representation, Faretta v. California, 422 U.S. 806, 836, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562. When, in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (per curiam), this Court vacated a lower court ruling because there had been no “hearing or inquiry

796 Cases that cite this headnote

Focus of competency inquiry is defendant’s mental capacity, i.e., the question whether he has the ability to understand the proceedings, whereas purpose of “knowing and voluntary inquiry” is to determine whether defendant does actually understand the significance and consequences of the particular decision and whether that decision is uncoerced.

570 Cases that cite this headnote

**2681 Syllabus**

*389 After respondent Moran pleaded not guilty to three counts of first-degree murder and two psychiatrists concluded that he was competent to stand trial, he informed the Nevada trial court that he wished to discharge his attorneys and change his pleas to guilty. The court found that Moran understood “the nature of the criminal charges against him” and was “able to assist in his defense”; that he was “knowingly and intelligently” waiving his right to the assistance of counsel; and that his guilty pleas were “freely and voluntarily” given. He was ultimately sentenced to death. When Moran subsequently sought state postconviction relief, the trial court held an evidentiary hearing before rejecting his claim that he was mentally incompetent to represent himself, and the State Supreme Court dismissed his appeal. A Federal District Court denied his petition for a writ of habeas corpus, but the Court of Appeals reversed. It concluded that due process required the trial court to hold a hearing to evaluate and determine Moran’s competency before it accepted his decisions to waive counsel and plead guilty. It also found that the postconviction hearing did not cure the error, holding that the trial court’s ruling was premised on the wrong legal standard because competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial. The court reasoned that, while a defendant is competent to stand trial if he has a rational and factual understanding of the proceedings and is capable of assisting his counsel, he is competent to waive counsel or plead guilty only if he has the capacity for reasoned choice among the available alternatives.
into the issue of [the petitioner’s] competence to waive his constitutional right to the assistance of counsel,” it did not mean to suggest that the Dusky formulation is not a high enough standard in cases in which the defendant seeks to waive counsel. Rather, the “competence to waive” language was simply a shorthand for the “intelligent and competent waiver” requirement of Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 1024, 82 L.Ed. 1461. Thus, Westbrook stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted. While States are free to adopt competency standards that are more elaborate than the Dusky formulation, the Due Process Clause does not impose them. Pp. 2685–2688.

972 F.2d 263 (CA9 1992), reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O’CONNOR, and SOUTER, JJ., joined, and in Parts I, II–B, and III of which SCALIA and KENNEDY, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined, post, p. 2688. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, post, p. 2691.

Attorneys and Law Firms

David F. Sarnowski, Carson City, NV, for petitioner.

Amy L. Wax, Washington, DC, for U.S. as amicus curiae, by special leave of the Court.

*391 Cal J. Potter, III, Las Vegas, NV, for respondent.

Opinion

Justice THOMAS delivered the opinion of the Court.

This case presents the question whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. We hold that it is not.

I

On August 2, 1984, in the early hours of the morning, respondent entered the Red Pearl Saloon in Las Vegas, Nevada, and shot the bartender and a patron four times each with an automatic pistol. He then walked behind the bar and removed the cash register. Nine days later, respondent arrived at the apartment of his former wife and opened fire on her; five of his seven shots hit their target. Respondent then shot himself in the abdomen and attempted, without success, to slit his wrists. Of the four victims of respondent’s gunshots, only respondent himself survived. On August 13, respondent summoned police to his hospital bed and confessed to the killings.

After respondent pleaded not guilty to three counts of first-degree murder, the trial court ordered that he be examined by a pair of psychiatrists, both of whom concluded that he was competent to stand trial. The State thereafter announced *392 its intention to seek **2683 the death penalty. On November 28, 1984, 2½ months after the psychiatric evaluations, respondent again appeared before the trial court. At this time respondent informed the court that he wished to discharge his attorneys and change his pleas to guilty. The reason for the request, according to respondent, was to prevent the presentation of mitigating evidence at his sentencing.

On the basis of the psychiatric reports, the trial court found that respondent

“is competent in that he knew the nature and quality of his acts, had the capacity to determine right from wrong; that he understands the nature of the criminal charges against him and is able to assist in his defense of such charges, or against the pronouncement of the judgment thereafter; that he knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney.” App. 21.

The court advised respondent that he had a right both to the assistance of counsel and to self-representation, warned him of the “dangers and disadvantages” of self-representation, id., at 22, inquired into his understanding of the proceedings and his awareness of his rights, and asked why he had chosen to represent himself. It then accepted respondent’s waiver of counsel. The court also accepted respondent’s guilty pleas, but not before it had determined that respondent was not pleading guilty in response to threats or promises, that he understood the nature of the charges against him and the consequences of pleading guilty, that he was aware of the *393 rights he was giving up, and that there was a factual basis for the pleas. The trial court explicitly found that respondent was “knowingly and intelligently” waiving his right to the assistance of counsel, ibid., and that his guilty pleas were “freely and voluntarily” given, ibid., at 64.

On January 21, 1985, a three-judge court sentenced
respondent to death for each of the murders. The Supreme Court of Nevada affirmed respondent’s sentences for the Red Pearl Saloon murders, but reversed his sentence for the murder of his ex-wife and remanded for imposition of a life sentence without the possibility of parole. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987).

On July 30, 1987, respondent filed a petition for post-conviction relief in state court. Following an evidentiary hearing, the trial court rejected respondent’s claim that he was “mentally incompetent to represent himself,” concluding that “the record clearly shows that he was examined by two psychiatrists both of whom declared [him] competent.” App. to Pet. for Cert. D–8. The Supreme Court of Nevada dismissed respondent’s appeal, Moran v. Warden, 105 Nev. 1041, 810 P.2d 335, and we denied certiorari, 493 U.S. 874, 110 S.Ct. 207, 107 L.Ed.2d 160 (1989).

Respondent then filed a habeas petition in the United States District Court for the District of Nevada. The District Court denied the petition, but the Ninth Circuit reversed, 972 F.2d 263 (1992). The Court of Appeals concluded that the “record in this case” should have led the trial court to “entertai[n] a good faith doubt about [respondent’s] competency to make a voluntary, knowing, and intelligent waiver of constitutional rights,” id., at 265; and that the Due Process Clause therefore “required the court to hold a hearing to evaluate and determine [respondent’s] competency ... before it accepted his decision to discharge counsel and change his pleas,” ibid. Rejecting petitioner’s argument that the trial court’s error was “cured by the postconviction hearing,” ibid., and that the competency determination that followed the hearing was entitled to deference under 28 U.S.C. § 2254(d), the Court of Appeals held that “the state court’s postconviction ruling was premised on the wrong legal standard of competency,” 972 F.2d, at 266. “Competency to waive constitutional rights,” according to the Court of Appeals, “requires a higher level of mental functioning than that required to stand trial”; while a defendant is competent to stand trial if he has “a rational and factual understanding of the proceedings and is capable of assisting his counsel,” a defendant is competent to waive counsel or plead guilty only if he has “the capacity for ‘reasoned choice’ among the alternatives available to him.” Ibid. The Court of Appeals determined that the trial court had “erroneously applied the standard for evaluating competency to stand trial, instead of the correct ‘reasoned choice’ standard,” id., at 266–267, and further concluded that when examined “in light of the correct legal standard,” the record did not support a finding that respondent was “mentally capable of the reasoned choice required for a valid waiver of constitutional rights,” id., at 267. The Court of Appeals accordingly instructed *395 the District Court to issue the writ of habeas corpus within 60 days, “unless the state court allows [respondent] to withdraw his guilty pleas, enter new pleas, and proceed to trial with the assistance of counsel.” Id., at 268.

Whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial is a question that has divided the Federal Courts of Appeals and state courts of last resort. *396 We granted certiorari to resolve the conflict. 506 U.S. 1033, 113 S.Ct. 810, 121 L.Ed.2d 683 (1992).

II

[1] A criminal defendant may not be tried unless he is competent. Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966), and he may not waive his right to counsel or plead guilty unless he does so “competently and intelligently,” Johnson v. Zerbst, 304 U.S. 458, 468, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461 (1938); accord, Brady v. United States, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474, 25 L.Ed.2d 747 (1970). In Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam ), we held that the standard for competency 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 factual understanding of the proceedings against him.” Ibid., (internal quotation marks omitted). Accord, Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975) (“[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”). While we have described the standard for competence to stand trial, however, we have never expressly articulated a standard for competence to plead guilty or to waive the right to the assistance of counsel.

[2] Relying in large part upon our decision in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) (per curiam), the Ninth Circuit adheres to the view that the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. See Sieling v. Eyman, 478 F.2d 211, 214–215 (1973) (first Ninth Circuit *397 decision applying heightened standard). In Westbrook, a two-paragraph per curiam opinion, we
vacated the lower court’s judgment affirming the petitioner’s conviction, because there had been “a hearing on the issue of [the petitioner’s] competence to stand trial,” but “no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel.”

The Ninth Circuit has reasoned that the “clear implication” of Westbrook is that the Dusky formulation is not “a high enough standard” for determining whether a defendant is competent to waive a constitutional right. Sieling, 478 F.2d, at 214. We think the Ninth Circuit has read too much into Westbrook, and we think it errs in applying two different competency standards.8

**2686 A

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for “reasoned choice” among the alternatives available to him. How this standard is different from (much less higher than) the Dusky standard—whether the defendant has a “rational understanding” of the proceedings—is not readily apparent to us. In fact, respondent himself opposed certiorari on the ground that the difference between the two standards is merely one of “terminology,” Brief in Opposition 4, and he devotes little space in his brief on the merits to a defense of the Ninth Circuit’s standard, see, e.g., Brief for *398 Respondent 17–18, 27, 32; see also Tr. of Oral Arg. 33 (“Due process does not require [a] higher standard, [it] requires a separate inquiry”).9 But even assuming that there is some meaningful distinction between the capacity for “reasoned choice” and a “rational understanding” of the proceedings, we reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard.

We begin with the guilty plea. A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his “privilege against compulsory self-incrimination,” Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), by taking the witness stand; if the option is available, he may have to decide whether to waive his “right to trial by jury,” ibid.; and, in consultation with counsel, he may have to decide whether to waive his “right to confront [his] accusers,” ibid., by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses. In sum, all criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.) This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the Dusky standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.

8 Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. Respondent suggests that a higher competency standard is necessary because a defendant who represents himself “must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.” Brief for Respondent 26 (quoting Silten & Tullis, Mental Competency in Criminal Proceedings, 28 Hastings L.J. 1053, 1068 (1977)). Accord, Brief for National **2687 Association of Criminal Defense Lawyers as Amicus Curiae 10–12. But this argument has a flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), we *400 held that a defendant choosing self-representation must do so “competently and intelligently,” id., at 835, 95 S.Ct., at 2541, but we made it clear that the defendant’s “technical legal knowledge” is “not relevant” to the determination whether he is competent to waive his right to counsel, id., at 836, 95 S.Ct., at 2541, and we emphasized that although the defendant “may conduct his own defense ultimately to his own detriment, his choice must be honored,” id., at 834, 95 S.Ct., at 2541. Thus, while “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,” ibid., a criminal defendant’s ability to represent himself has no bearing upon his competence to choose self-representation.11
This two-part inquiry is what we had in mind in *Godinez v. Moran*, 509 U.S. 389 (1993) to stand trial and “competence to waive” as a shorthand for the “intelligent and competent waiver” requirement of *Johnson v. Zerbst*. **2688**

This much is clear from the fact that we quoted that very language from *Zerbst* immediately after noting that the trial court had not determined whether the petitioner was competent to waive his right to counsel. See 384 U.S., at 150, 86 S.Ct., at 1320 (“ ‘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’ ”) (quoting *Johnson v. Zerbst*, 304 U.S., at 465, 58 S.Ct., at 1023). Thus, *Westbrook* stands only for the unremarkable proposition that when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.

**III**

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements. Cf. *Medina v. California*, 505 U.S. 437, 446–453, 112 S.Ct. 2572, ———, 120 L.Ed.2d 353 (1992). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

Justice KENNEDY, with whom Justice SCALIA joins, concurring in part and concurring in the judgment.

I am in full agreement with the Court’s decision that the competency standard for pleading guilty and waiving the right to counsel is the same as the test of competency to stand trial. As I have some reservations about one part of the Court’s opinion and take a somewhat different path to reach my conclusion, it is appropriate to make some further observations.

The Court compares the types of decisions made by one who goes to trial with the decisions required to plead guilty and waive the right to counsel. This comparison seems to suggest that there may have been a heightened standard of competency required by the Due Process Clause if the decisions were not equivalent. I have serious doubts about that proposition. In discussing the standard for a criminal defendant’s competency to make decisions affecting his case, we should not confuse the content of the standard with the occasions for its application.

We must leave aside in this case any question whether a defendant is absolved of criminal responsibility due to his mental state at the time he committed criminal acts and any later question about whether the defendant has the minimum competence necessary to undergo his sentence. What is at issue here is whether the defendant has sufficient competence to take part in a criminal proceeding and to make the decisions throughout its course. This is not to imply that mental competence is the only aspect of a defendant’s state of mind that is relevant during criminal proceedings. Whether the defendant has made a knowing, intelligent, and voluntary decision to make certain fundamental choices during the course of criminal proceedings is another subject of judicial inquiry. That both questions might be implicated at any given point, however, does not mean that the inquiries cease to be discrete. And as it comes to us, this case involves only the standard for determining competency.

This Court set forth the standard for competency to stand trial in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam): “[T]he ‘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 has a rational as well as factual understanding of the proceedings against...”
so rooted in the traditions and conscience of our people as
L.Ed.2d 281 (1977)).

proceedings:
effect of a defendant’s incompetence on criminal
law. Writing in the 18th century, Blackstone described the
Nevada’s single standard has its roots in English common
The historical treatment of competency that supports
Nevada’s single standard was applied during the course of
an English case arising in the Crown Court in
1865 indicates that a single standard was applied to assess
competency at the time of arraignment, the time of
pleading, and throughout the course of trial. See Regina v.

The Due Process Clause does not mandate different
standards of competency at various stages of or for
different decisions made during the criminal proceedings.
That was never the rule at common law, and it would take
some extraordinary showing of the inadequacy of a single
standard of competency for us to require States to employ
heightened standards. See Medina v. California, 505 U.S.
437, 446–447, 112 S.Ct. 2572, ———, 120 L.Ed.2d 353
(1992). Indeed, we should only overturn Nevada’s use of
a single standard if it “‘offends some principle of justice
so rooted in the traditions and conscience of our people as
to be ranked as fundamental.’” Ibid. (quoting Patterson v.
New York, 432 U.S. 197, 202, 97 S.Ct. 2319, 2322, 53
L.Ed.2d 281 (1977)).

The historical treatment of competency that supports
Nevada’s single standard has its roots in English common
law. Writing in the 18th century, Blackstone described the
effect of a defendant’s incompetence on criminal
proceedings:

“[I]f a man in his sound memory commits a capital
offence, and before arraignment for it, he becomes
mad, he ought not to be arraigned for it; because he is
not able to plead to it with that advice and caution that
he ought. And if, after he has pleaded, the prisoner
becomes mad, he shall not be tried; for how can he
make his defence?” 4 W. Blackstone, Commentaries
*24; accord, 1 M. Hale, Pleas of the Crown *34–*35.

Blackstone drew no distinction between madness for
purposes of pleading and madness for purposes of going
to trial. An English case arising in the Crown Court in
1865 indicates that a single standard was applied to assess
competency at the time of arraignment, the time of
pleading, and throughout the course of trial. See Regina v.

A number of 19th-century American cases also referred to
insanity in a manner that suggested there was a single
standard by which competency was to be assessed
throughout legal proceedings. See, e.g., Underwood v.
People, 32 Mich. 1, 3 (1875) (“[I]nsanity, when
discovered, was held at common law to bar any further
steps against a prisoner, at whatever stage of the
proceedings”); Crocker v. State, 60 Wis. 553, 556, 19
N.W. 435, 436 (1884) (“At common law, if a person, after
committing a crime, became insane, he was not arraigned
during his insanity, but was remitted to prison until such
incapacity was removed. The same was true where he
became insane after his plea of not guilty and before
trial”); State v. Reed, 41 La.Ann. 581, 582, 7 So. 132
(1889) (“It is elementary that a man cannot plead, or be
tried, or convicted, or sentenced, while in a state of
insanity”). See also 2 J. Bishop, Commentaries on Law of
Criminal Procedure §§ 664, 667 (2d ed. 1872) (“[A]
prisoner cannot be tried, sentenced, or punished” unless
he is “mentally competent to make a rational defense”).

*406 Other American cases describe the standard by
which competency is to be measured in a way that
supports the idea that a single standard, parallel to that
articulated in Dusky, is applied no matter what point
during legal proceedings a competency question should
arise. For example, in Freeman v. People, 4 Denio 2
(N.Y.1847), it was held: “If ... a person arraigned for a
crime, is capable of understanding the nature and object
of the proceedings going on against him; if he rightly
comprehends his own condition in reference to such
proceedings, and can conduct his defence in a rational
manner, he is, for the purpose of being tried, to be deemed
sane.” Id., at 24–25. Because the competency question
was posed in Freeman at the time the defendant was to be
arraigned, id., at 19, the Freeman court’s conception of
competency to stand trial was that of a single standard to
be applied throughout.

An even more explicit recitation of this common-law
principle is found in Hunt v. State, 248 Ala. 217, 27 So.2d...
In the course of the opinion in that case, there was a discussion of the common-law rule regarding a defendant’s competency to take part in legal proceedings:

“The rule at common law ... is that if at any time while criminal proceedings are pending against a person accused of a crime, the trial court either from observation or upon suggestion of counsel has facts brought to his attention which raise a doubt of the sanity of defendant, the question should be settled before further steps are taken.... The broad question to be determined then is whether the defendant is capable of understanding the proceedings and of making his defense, and whether he may have a full, fair and impartial trial.” * Id., 27 So.2d, at 191 (citation omitted).

At common law, therefore, no attempt was made to apply different competency standards to different stages of criminal proceedings or to the variety of decisions that a defendant must make during the course of those proceedings. See * Commonwealth v. Woelfel, 121 Ky. 48, 88 S.W. 1061, 1062 (1905); Jordan v. State, 124 Tenn. 81, 135 S.W. 327, 328–329 (1911); State v. Seminary, 165 La. 67, 115 So. 370, 371–372 (1927); State ex rel. Townsend v. Bushong, 146 Ohio St. 271, 272, 32 O.O. 289, 289, 65 N.E.2d 407, 408 (1946) (per curiam ); Moss v. Hunter, 167 F.2d 683, 684–685 (CA10 1948). Commentators have agreed that the common-law standard of competency to stand trial, which parallels the * Dusky standard, has been applied throughout criminal proceedings, not just to the formal trial. See H. Weihofen, Mental Disorder as a Criminal Defense 428–429, 431 (1954) (“It has long been the rule of the common law that a person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense”); S. Brakel, J. Perry, and A. Weiner, The Mentally Disabled and the Law 695–696 (3d ed. 1985) (“It has traditionally been presumed that competency to stand trial means competency to participate in all phases of the trial process, including such pretrial activities as deciding how to plead, participating in plea bargaining, and deciding whether to assert or waive the right to counsel”).

That the common law did not adopt heightened competency standards is readily understood when one considers the difficulties that would be associated with more than one standard. The standard applicable at a given point in a trial could be difficult to ascertain. For instance, if a defendant decides to change his plea to guilty after a trial has commenced, one court might apply the competency standard for undergoing trial while another court might use the standard for pleading guilty. In addition, the subtle nuances among different standards are likely to be difficult to differentiate, as evidenced by the lack of any clear distinction between a “rational understanding” and a “reasoned choice” in this case. See * ante, at 2686.

*408 It is true, of course, that if a defendant stands trial instead of pleading guilty, there will be more occasions for the trial court to observe the condition of the defendant to determine his mental competence. Trial courts have the obligation of conducting a hearing whenever there is sufficient doubt concerning a defendant’s competence. See * Drope v. Missouri, 420 U.S. 162, 180–181, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975). The standard by which competency is assessed, however, does not change. Respondent’s counsel conceded as much during oral argument, making no attempt to defend the contrary position of the Court of Appeals. See, e.g., Tr. of Oral Arg. 22 (“This is not a case of heightened standards”); id., at 31 (“We didn’t argue a heightened standard. We did not argue a heightened standard to the Ninth Circuit, nor did we necessarily argue a heightened standard at any juncture in this case”); id., at 33 (“Due process does not require this higher standard, but requires a separate inquiry”).

A single standard of competency to be applied throughout criminal proceedings does not offend any “‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ ” * Medina, 505 U.S., at 446, 112 S.Ct., at 2573. Nothing in our case law compels a contrary conclusion, and adoption of a rule setting out varying competency standards for each decision and stage of a criminal proceeding would disrupt the orderly course of trial and, from the standpoint of all parties, prove unworkable both at trial and on appellate review.

I would avoid the difficult comparisons engaged in by the Court. In my view, due process does not preclude Nevada’s use of a single competency standard for all aspects of the criminal proceeding. Respondent’s decision to plead guilty and his decision to waive counsel were grave choices for him to make, but as the Court demonstrates in Part II–B, there is a heightened standard, albeit not one concerned with competence, that must be met before a defendant is allowed to make those decisions.

*409 With these observations, I concur in the judgment and in Parts I, II–B, and III of the Court’s opinion.

Justice BLACKMUN, with whom Justice STEVENS
joins, dissenting.

Today, the majority holds that a standard of competence designed to measure a defendant’s ability to consult with counsel and to assist in preparing his defense is constitutionally adequate to assess a defendant’s competence to waive the right to counsel and represent himself. In so doing, the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness. I believe the majority’s analysis is contrary to both common sense and longstanding case law. Therefore, I dissent.

I

As a preliminary matter, the circumstances under which respondent Richard Allan Moran waived his right to an attorney and pleaded guilty to capital murder bear elaboration. For, although the majority’s exposition of the events is accurate, the most significant facts are omitted or relegated to footnotes.

In August 1984, after killing three people and wounding himself in an attempt to commit suicide, Moran was charged in a Nevada state court with three counts of capital murder. He pleaded not guilty to all charges, and the trial court ordered a psychiatric evaluation. At this stage, Moran’s competence to represent himself was not at issue.

The two psychiatrists who examined him therefore focused solely upon his capacity to stand trial with the assistance of counsel. Dr. Jack A. Jurasky found Moran to be “in full control of his faculties insofar as his ability to consult with counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so.” App. 8. Dr. Jurasky, however, did express some reservations, observing: “Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense.” Ibid. Nevertheless, under the circumstances, Dr. Jurasky felt that Moran’s depressed state of mind was not “necessarily a major consideration.” Ibid. Dr. William D. O’Gorman also characterized Moran as “very depressed,” remarking that he “showed much tearing in talking about the episodes that led up to his present incarceration, particularly in talking about his ex-wife.” Id., at 15–16. But Dr. O’Gorman ultimately concluded that Moran “is knowledgeable of the charges being made against him” and “can assist his attorney, in his own defense, if he so desires.” Id., at 17.

In November 1984, just three months after his suicide attempt, Moran appeared in court seeking to discharge his public defender, waive his right to counsel, and plead guilty to all three charges of capital murder. When asked to explain the dramatic change in his chosen course of action, Moran responded that he wished to represent himself because he opposed all efforts to mount a defense. His purpose, specifically, was to prevent the presentation of any mitigating evidence on his behalf at the sentencing phase of the proceeding. The trial judge inquired whether Moran was “presently under the influence of any drug or alcohol,” and Moran replied: “Just what they give me in, you know, medications.” Id., at 33. Despite Moran’s affirmative answer, the trial judge failed to question him further regarding the type, dosage, or effect of the “medications” to which he referred. Had the trial judge done so, he would have discovered that Moran was being administered simultaneously four different prescription drugs—phenobarbital, dilantin, inderal, and vistaril. Moran later testified to the numbing effect of these drugs, stating: “I guess I really didn’t care about anything.... I wasn’t very concerned about anything that was going on ... as far as the proceedings and everything were going.” Id., at 92.1

Disregarding the mounting evidence of Moran’s disturbed mental state, the trial judge accepted Moran’s waiver of counsel and guilty pleas after posing a series of routine questions regarding his understanding of his legal rights and the offenses, to which Moran gave largely monosyllabic answers. In a string of affirmative responses, Moran purported to acknowledge that he knew the import of waiving his constitutional rights, that he understood the charges against him, and that he was, in fact, guilty of those charges. One part of this exchange, however, highlights the mechanical character of Moran’s answers to the questions. When the trial judge asked him whether he killed his ex-wife “deliberately, with premeditation and malice aforethought,” Moran unexpectedly responded: “No. I didn’t do it—I mean, I wasn’t looking to kill her, but she ended up dead.” Id., at 58. Instead of probing further, the trial judge simply repeated the question, inquiring again whether Moran had acted deliberately. Once again, Moran replied: “I don’t know. I mean, I don’t know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn’t plan on doing it; you know what I mean?” Id., at 59. Ignoring the ambiguity of Moran’s responses, the trial judge reframed the question to elicit an affirmative answer, stating: “Well, I’ve previously explained to you what is meant by deliberation and premeditation.
Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration *412 for and against the proposed action. Did you do that?” This time, Moran responded: “Yes.” Ibid.

It was only after prodding Moran through the plea colloquy in this manner that the trial judge concluded that he was competent to stand trial and that he voluntarily and intelligently had waived his right to counsel. Accordingly, Moran was allowed to plead guilty and appear without counsel at his sentencing hearing. Moran presented no defense, called no witness, and offered no mitigating evidence on his own behalf. Not surprisingly, he was sentenced to death.

II

It is axiomatic by now that criminal prosecution of an incompetent defendant offends the Due Process Clause of the Fourteenth Amendment. See Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); Riggins v. Nevada, 504 U.S. 127, 138, 112 S.Ct. 1810, 1817, 118 L.Ed.2d 479 (1992) (KENNEDY, J., concurring); Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966). The majority does not deny this principle, nor does it dispute the standard that has been set for competence to stand trial with the assistance of counsel: whether the accused possesses “the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” Drope, 420 U.S., at 171, 95 S.Ct., at 903. Accord, Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). My disagreement with the majority turns, then, upon another standard—the one for assessing a defendant’s competence to waive counsel and represent himself.

The majority “reject[s] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from)" the standard for competence to stand trial articulated in Dusky and Drope. Ante, at 2686. But the standard for competence to stand trial is specifically designed to measure a defendant’s ability to “consult with counsel” and to “assist in preparing his defense.” A finding that a defendant is *413 competent to stand trial establishes only **2694 that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist. The question is no longer whether the defendant can proceed with an attorney, but whether he can proceed alone and uncounseled. I do not believe we place an excessive burden upon a trial court by requiring it to conduct a specific inquiry into that question at the juncture when a defendant whose competency already has been questioned seeks to waive counsel and represent himself.

The majority concludes that there is no need for such a hearing because a defendant who is found competent to stand trial with the assistance of counsel is, *ipso facto*, competent to discharge counsel and represent himself. But the majority cannot isolate the term “competent” and apply it in a vacuum, divorced from its specific context. A person who is “competent” to play basketball is not thereby “competent” to play the violin. The majority’s monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose. See Bonnie, The Competence of Criminal Defendants: A Theoretical Reformulation, 10 Behav.Science & L. 291, 299 (1992); R. Roesch & S. Golding, Competency to Stand Trial 10–13 (1980). Consistent with this commonsense notion, our cases always have recognized that “a defendant’s mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies.” Drope, 420 U.S., at 176, 95 S.Ct., at 906. See Jackson v. Indiana, 406 U.S. 715, 739, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972). To this end, this Court has required competency evaluations to be specifically tailored to the context and purpose of a proceeding. See Rees v. Peyton, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966) (directing court “to determine [petitioner’s] mental competence in the present posture of things”).

*414 In Massey v. Moore, 348 U.S. 105, 108, 75 S.Ct. 145, 147, 99 L.Ed. 135 (1954), for example, the Court ruled that a defendant who had been found competent to stand trial with the assistance of counsel should have been given a hearing as to his competency to represent himself because “[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel.” And in Westbrook v. Arizona, 384 U.S. 150, 151, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966), the Court reiterated the requirement that the determination of a defendant’s competency be tailored to the particular capacity in question, observing: “Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry 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.” See
also Medina, 505 U.S., at 446–448, 112 S.Ct., at ——— (distinguishing between a claim of incompetence and a plea of not guilty by reason of insanity); Riggins, 504 U.S., at 140–144, 112 S.Ct., at 1817–1820 (KENNEDY, J., concurring) (distinguishing between functional competence and competence to stand trial).

Although the Court never has articulated explicitly the standard for determining competency to represent oneself, it has hinted at its contours. In Rees v. Peyton, supra, it required an evaluation of competence that was designed to measure the abilities necessary for a defendant to make a decision under analogous circumstances. In that case, a capital defendant who had filed a petition for certiorari ordered his attorney to withdraw the petition and forgo further legal proceedings. The petitioner’s counsel advised the Court that he could not conscientiously do so without a psychiatric examination of his client because there was some doubt as to whether the defendant possessed the “capacity to measure the abilities necessary for a defendant to make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.” 384 U.S., at 314, 86 S.Ct., at 1506 (emphasis added). Certainly the competency required for a capital defendant to proceed without the advice of counsel at trial or in plea negotiations should be no less than the competency required for a capital defendant to proceed against the advice of counsel to withdraw a petition for certiorari. The standard applied by the Ninth Circuit in this case—the “reasoned choice” standard—closely approximates the “rational choice” standard set forth in Rees.1

Disregarding the plain language of Westbrook and Massey, the majority in effect overrules those cases sub silentio.2 From the constitutional right of self-representation established in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the majority extrapolates that “a criminal defendant’s ability to represent himself has no bearing upon his competence to choose self-representation.” Ante, at 2687. But Faretta does not confer upon an incompetent defendant a constitutional right to conduct his own defense. Indeed, Faretta himself was “literate, competent, and understanding,” and the record showed that “he was voluntarily exercising his informed free will.” 422 U.S., at 835, 95 S.Ct., at 2541. “Although a defendant need not himself have the skill and experience of a lawyer,” Faretta’s right of self-representation is confined to those who are able to choose it “competently and intelligently.”

Ibid. The Faretta Court was careful to emphasize that the record must establish that the defendant “ ‘knows what he is doing and his choice is made with eyes open.’ ” Ibid., quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942).

The majority asserts that “the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself.” Ante, at 2686. But this assertion is simply incorrect. The majority’s attempt to extricate the competence to waive the right to counsel from the competence to represent oneself is unavailing, because the former decision necessarily entails the latter. It is obvious that a defendant who waives counsel must represent himself. Even Moran, who pleaded guilty, was required to defend himself during the penalty phase of the proceedings. And a defendant who is utterly incapable of conducting his own defense cannot be considered “competent” to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered “competent” to make such a choice.

**2696 The record in this case gives rise to grave doubts regarding respondent Moran’s ability to discharge counsel and represent himself. Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf. The psychiatrists’ reports supplied one explanation for Moran’s self-destructive behavior: his deep depression. And Moran’s own testimony suggested another: the fact that he was being administered simultaneously four different prescription medications. It has been recognized that such drugs often possess side effects that may “compromise the right of a medicated criminal defendant to receive a fair trial ... by rendering him unable or unwilling to assist counsel.” Riggins, 504 U.S., at 142, 112 S.Ct., at 1818–1819 (KENNEDY, J., concurring). Moran’s plea colloquy only augments the manifold causes for concern by suggesting that his waivers and his assent to the charges against him were not rendered in a truly voluntary and intelligent fashion. Upon this evidence, there can be no doubt that the trial judge should have conducted another competency evaluation to determine Moran’s capacity to waive the right to counsel and represent himself, instead of relying upon the psychiatrists’ reports that he was able to stand trial with the assistance of counsel.3

To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness...
and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive “choice” of a person who was so deeply medicated and who might well have been severely mentally ill. I dissent.

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 One of the psychiatrists stated that there was “not the slightest doubt” that respondent was “in full control of his faculties” insofar as he had the “ability to aid counsel, assist in his own defense, recall evidence and ... give testimony if called upon to do so.” App. 8. The other psychiatrist believed that respondent was “knowledgeable of the charges being made against him”; that he had the ability to “assist his attorney, in his own defense, if he so desire[d]”; and that he was “fully cognizant of the penalties if convicted.” Id., at 17.

2 During the course of this lengthy exchange, the trial court asked respondent whether he was under the influence of drugs or alcohol, and respondent answered as follows: “Just what they give me in, you know, medications.” Id., at 33. The court made no further inquiry. The “medications” to which respondent referred had been prescribed to control his seizures, which were a byproduct of his cocaine use. See App. to Pet. for Cert. D–4.

3 The specific features of the record upon which the Court of Appeals relied were respondent’s suicide attempt; his desire to discharge his attorneys so as to prevent the presentation of mitigating evidence at sentencing; his “monosyllabic” responses to the trial court’s questions; and the fact that he was on medication at the time he sought to waive his right to counsel and plead guilty. 972 F.2d, at 265.

4 In holding that respondent was not competent to waive his constitutional rights, the court placed heavy emphasis on the fact that respondent was on medication at the time he sought to discharge his attorneys and plead guilty. See id., at 268.

5 While the Ninth Circuit and the District of Columbia Circuit, see United States v. Masthers, 176 U.S.App.D.C. 242, 247, 539 F.2d 721, 726 (1976), have employed the “reasoned choice” standard for guilty pleas, every other Circuit that has considered the issue has determined that the competency standard for pleading guilty is identical to the competency standard for standing trial. See Allard v. Helgemoe, 572 F.2d 1, 3–6 (CA1), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978); United States v. Valentino, 283 F.2d 634, 635 (CA2 1960) (per curiam); United States ex rel. McGough v. Hewitt, 528 F.2d 339, 342, n. 2 (CA3 1975); Shaw v. Martin, 733 F.2d 304, 314 (CA4), cert. denied, 469 U.S. 873, 105 S.Ct. 230, 83 L.Ed.2d 159 (1984); Malinauskas v. United States, 505 F.2d 649, 654 (CA5 1974); United States v. Harlan, 480 F.2d 515, 517 (CA6), cert. denied, 414 U.S. 1006, 94 S.Ct. 364, 38 L.Ed.2d 242 (1973); United States ex rel. Heral v. Franzen, 667 F.2d 633, 638 (CA7 1981); White Hawk v. Solem, 693 F.2d 825, 829–830, n. 7 (CA8 1982), cert. denied, 460 U.S. 1054, 103 S.Ct. 1505, 75 L.Ed.2d 934 (1983); Wolf v. United States, 430 F.2d 443, 444 (CA10 1970); United States v. Simmons, 961 F.2d 183, 187 (CA11 1992), cert. denied, 507 U.S. 989, 113 S.Ct. 1591, 123 L.Ed.2d 156 (1993). Three of those same Circuits, however, have indicated that the competency standard for waiving the right to counsel is “vaguely higher” than the competency standard for standing trial, see United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (CA2 1975), cert. denied, 426 U.S. 937, 96 S.Ct. 2652, 49 L.Ed.2d 388 (1976); United States v. McDowell, 814 F.2d 245, 250 (CA6), cert. denied, 484 U.S. 980, 108 S.Ct. 492 (1987); Blackmon v. Armontrout, 875 F.2d 164, 166 (CA8), cert. denied, 493 U.S. 939, 110 S.Ct. 337, 107 L.Ed.2d 236 (1989), and one of them has stated that the two standards “may not always be coterminous,” United States v. Campbell, 874 F.2d 838, 846 (CA1 1989). Only the Ninth Circuit applies the “reasoned choice” standard to waivers of counsel, and only the Seventh Circuit, see United States v. Clark, 943 F.2d 775, 782 (CA7 1991), cert. pending, No. 92–2643, has held that the competency standard for waiving counsel is identical to the competency standard for standing trial. The Fourth Circuit has expressed the view that the two standards are “closely linked.” United States v. McGinnis, 384 F.2d 875, 877 (CA4 1967) (per curiam), cert. denied, 390 U.S. 990, 88 S.Ct. 1187, 19 L.Ed.2d 1296 (1968).


Although this case comes to us by way of federal habeas corpus, we do not dispose of it on the ground that the heightened competency standard is a “new rule” for purposes of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), because petitioner did not raise a Teague defense in the lower courts or in his petition for certiorari. See Parke v. Raley, 506 U.S. 20, 26, 113 S.Ct. 517, 521, 121 L.Ed.2d 391 (1992); Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990).

We have used the phrase “rational choice” in describing the competence necessary to withdraw a certiorari petition, Rees v. Peyton, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506, 16 L.Ed.2d 583 (1966) (per curiam), but there is no indication in that opinion that the phrase means something different from “rational understanding.”

It is for this reason that the dissent’s reliance on Massey v. Moore, 348 U.S. 105, 75 S.Ct. 145, 99 L.Ed. 135 (1954), is misplaced. When we said in Massey that “[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel,” id., at 108, 75 S.Ct., at 147, we were answering a question that is quite different from the question presented in this case. Prior to our decision in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 799 L.Ed.2d 279 (1963), the appointment of counsel was required only in those state prosecutions in which “special circumstances” were present, see id., at 350–351, 83 S.Ct., at 800–801 (Harlan, J., concurring), and the question in Massey was whether a finding that a defendant is competent to stand trial compels a conclusion that there are no “special circumstances” justifying the appointment of counsel. The question here is not whether a defendant who is competent to stand trial has no right to have counsel appointed; it is whether such a defendant is competent to waive the right to counsel that (after Gideon) he under all circumstances has.

We note also that the prohibition against the trial of incompetent defendants dates back at least to the time of Blackstone, see Medina v. California, 505 U.S. 437, 446, 112 S.Ct. 2572, ———, 120 L.Ed.2d 353 (1992); Drope v. Missouri, 420 U.S. 162, 171–172, 95 S.Ct. 896, 903–904, 43 L.Ed.2d 103 (1975); Youtsey v. United States, 97 F. 937, 940 (CA6 1899) (collecting “common law authorities”); and that “[b]y the common law of that time, it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime.” Faretta v. California, 422 U.S. 806, 823, 95 S.Ct. 2525, 2535, 45 L.Ed.2d 562 (1975); accord, id., at 850, 95 S.Ct., at 2548 (BLACKMUN, J., dissenting) (“self-representation was common, if not required, in 18th century English and American prosecutions”). It would therefore be “difficult to say that a standard which was designed to determine whether a defendant was capable of defending himself is ‘inadequate when he chooses to conduct his own defense.’” People v. Reason, 37 N.Y.2d, at 354, 334 N.E.2d, at 574.

The focus of a competency inquiry is the defendant’s mental capacity; the question is whether he has the ability to understand the proceedings. See Drope v. Missouri, supra, 420 U.S., at 171, 95 S.Ct., at 903 (defendant is incompetent if he “lacks the capacity to understand the nature and object of the proceedings against him”) (emphasis added). The purpose of the “knowing and voluntary” inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced. See Faretta v. California, supra, 422 U.S., at 835, 95 S.Ct., at 2541 (defendant waiving counsel must be “made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open’”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)); Boykin v. Alabama, 395 U.S., at 244, 89 S.Ct., at 1712 (defendant pleading guilty must have “a full understanding of what the plea connotes and of its consequences”).

We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant’s competence. See Drope v. Missouri, supra, 420 U.S., at 180–181, 95 S.Ct., at 908; Pate v. Robinson, 383 U.S. 375, 385, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966).

In this case the trial court explicitly found both that respondent was competent and that his waivers were knowing and voluntary. See supra, at 2683.

Moran’s medical records, read in conjunction with the Physician’s Desk Reference (46 ed. 1992), corroborate his testimony concerning the medications he received and their impact upon him. The records show that Moran was
administered dilantin, an antiepileptic medication that may cause confusion; inderal, a beta-blocker antiarrhythmic that may cause light-headedness, mental depression, hallucinations, disorientation, and short-term memory loss; and vistaril, a depressant that may cause drowsiness, tremors, and convulsions. App. 97–98.

The majority’s attempt to distinguish Massey as a pre-Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), case, ante, at 2687, n. 10, is simply irrelevant. For, as the majority itself concedes, Massey stands only for the proposition that the two inquiries are different—competency to stand trial with the assistance of counsel is not equivalent to competency to proceed alone.

According to the majority, “there is no indication ... that the phrase ‘rational choice’ means something different from ‘rational understanding.’” Ante, at ———, n. 9. What the majority fails to recognize is that, in the distinction between a defendant who possesses a “rational understanding” of the proceedings and one who is able to make a “rational choice,” lies the difference between the capacity for passive and active involvement in the proceedings.

According to the majority, “Westbrook stands only for the unremarkable proposition” that a determination of competence to stand trial is not sufficient to waive the right to counsel; “the waiver must also be intelligent and voluntary before it can be accepted.” Ante, at 2688. But the majority’s attempt to transform a case about the competency to waive counsel into a case about the voluntariness of a waiver needlessly complicates this area of the law. Perhaps competence to waive rights is incorporated into a voluntariness inquiry, but there is no necessary link between the two concepts.

Whether this same evidence implies that Moran’s waiver of counsel and guilty pleas were also involuntary remains to be seen. Cf. Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (voluntariness is a mixed question of law and fact entitled to independent federal review).


Defendant, who plead guilty to several crimes involving death of three individuals in 16 bombing attempts under agreement in which government waived right to seek death penalty and defendant waived right to appeal, moved to vacate conviction on ground that his plea was not voluntary. The United States District Court for the Eastern District of California, Garland E. Burrell, Jr., J., summarily denied motion, and defendant appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) any procedural default in not directly appealing on basis of voluntariness issue was excused; (2) plea was not rendered involuntary by denial of Faretta self-representation request that was presented primarily for purpose of delay; and (3) plea was not rendered involuntary by defendant’s disagreement with defense counsel regarding presentation of evidence regarding defendant’s mental state.

Affirmed.

Reinhardt, Circuit Judge, filed dissenting opinion.

West Headnotes (13)

[1] **Criminal Law**
- **Post-conviction relief**

Government did not waive its right to raise defendant’s procedural default on appeal by failing to raise issue in district court, where district court summarily denied motion to vacate conviction without giving government opportunity to be heard. 28 U.S.C.A. § 2255.

1 Cases that cite this headnote

[2] **Criminal Law**
- **Effect of guilty or nolo contendere plea**

On motion to vacate conviction pursuant to guilty plea on ground that plea was not voluntary, defendant could not raise as independent claim denial of his Faretta request to represent himself, as it related to alleged deprivation of constitutional rights that occurred prior to entry of plea. 28 U.S.C.A. § 2255.

11 Cases that cite this headnote

[3] **Criminal Law**
- **Post-conviction relief**
- **Criminal Law**
- **Ineffectiveness as reason for failure to raise claim previously**

Any procedural default on claim that plea was not voluntary, arising when defendant did not take direct appeal from his conviction, even if not excused by fact that his plea was entered pursuant to plea agreement that waived right to direct appeal, would be treated as excused by claim that trial counsel was ineffective in not discussing possibility of direct appeal with defendant; counsel’s ineffectiveness could not be resolved without more developed record and motion to vacate conviction had been summarily dismissed below. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2255.

3 Cases that cite this headnote

[4] **Criminal Law**
- **Review De Novo**
- **Criminal Law**
Issue of whether plea was voluntary is reviewed de novo, and district court’s findings are reviewed for clear error.

Voluntariness of plea is determined from totality of the circumstances. U.S.C.A. Const.Amend. 5.

In determining whether plea was voluntary, substantial weight was to be given to defendant’s in-court statements during plea colloquy. U.S.C.A. Const.Amend. 5.

District court’s findings regarding voluntariness of plea are to be accepted unless Court of Appeals is firmly convinced that they are wrong. U.S.C.A. Const.Amend. 5.

Guilty plea of defendant who was clearly advised of consequences of his plea and who entered plea in exchange for government’s agreement not to seek death penalty was not rendered involuntary by hard choice that defendant had to make between going to trial and risking death penalty or pleading, where defendant did not claim coercion and defendant acknowledged during plea colloquy that he was pleading voluntarily. U.S.C.A. Const.Amend. 5.

Erroneous denial of a Faretta self-representation request renders a guilty plea involuntary.

Criminal defendant’s assertion of his right to self-representation must be timely and not for purposes of delay; it must also be unequivocal, as well as voluntary and intelligent.

Faretta request for self-representation was tactically made for dilatory purposes and thus properly denied, despite defendant’s claim that he was seeking self-representation to avoid his attorneys’ plan to introduce evidence of defendant’s mental state against his wishes,
where defendant knew of this plan at least six weeks before trial and stated several times, in reaching agreement to allow such evidence in penalty phase, that he did not wish to represent himself; interest in self-representation was not asserted until after court refused defendant’s request for substitution of counsel on day scheduled for opening statements because of delay that would ensue.

15 Cases that cite this headnote

[12] Criminal Law
Voluntary Character

Defendant’s guilty plea was not rendered involuntary by denial of his Faretta request for self-representation where request was rightfully rejected because defendant sought self-representation primarily as a delaying tactic after his eve-of-trial request for substitute counsel was denied.

6 Cases that cite this headnote

[13] Criminal Law
Voluntary Character

Guilty plea was not rendered involuntary by threat of mental state defense that defendant did not want presented, where defendant’s aversion to being portrayed as mentally ill was inconsistent with his willingness to allow his attorneys to introduce such evidence later during penalty phase. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

Opinion by Judge RYMER; Dissent by Judge REINHARDT.

RYMER, Circuit Judge:

Theodore John Kaczynski, a federal prisoner, appeals the district court’s denial of his motion under 28 U.S.C. § 2255 to vacate his conviction. In that motion, Kaczynski alleges that his guilty plea to indictments returned against him as the “Unabomber” in the Eastern District of California and in the District of New Jersey, in exchange for the United States renouncing its intention to seek the death penalty, was involuntary because his counsel insisted on presenting evidence of his mental condition, contrary to his wishes, and the court denied his Faretta request to represent himself. Having found that the Faretta request was untimely and not in good faith, that counsel could control the presentation of evidence, and that the plea was voluntary, the district court denied the § 2255 motion without calling for a response or holding a hearing.

This court issued a certificate of appealability. The government submits that Kaczynski is foreclosed from raising the voluntariness of his plea on collateral review because he did not do so on direct appeal, but we conclude on the merits that the district court did not err. Therefore, we affirm.

Attorneys and Law Firms

*1110 Theodore John Kaczynski, pro per, Florence, Colorado, defendant-appellant.

The facts underlying Kaczynski’s arrest (April 3, 1996) and indictment for mailing or placing sixteen bombs that killed three people, and injured nine others, are well
known and we do not repeat them here. Rather, we summarize the pre-trial proceedings that bear on the voluntariness of Kaczynski’s plea.

The California Indictment (returned June 18, 1996) charged Kaczynski with four counts of transporting an explosive in interstate commerce with intent to kill or injure in violation of 18 U.S.C. § 844(d); three counts of mailing an explosive device with intent to kill or injure, in violation of 18 U.S.C. § 1716; and three counts of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The New Jersey Indictment (returned October 1, 1996) charged one count of transporting an explosive device in interstate commerce with intent to kill or injure, in violation of 18 U.S.C. § 844(d); one count of mailing an explosive device with intent to kill or injure, in violation of 18 U.S.C. § 1716; and one count of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The government gave notice of its intent to seek the death penalty under both indictments on May 15, 1997.

On June 24, 1997, Kaczynski filed a notice under Fed.R.Crim.P. 12.2(b) of his intent to introduce expert testimony of his mental condition at trial. According to his § 2255 motion, Kaczynski consented to the notice reluctantly and only to allow evidence relating to his “mental condition”—not to a “mental disease or defect.” He also avers that the purpose of the notice was to allow psychologist Julie Kriegler, who did not think that he suffered from serious mental illness, to testify.

Jury selection began November 12. Six hundred veniremen were summoned, and 450 questionnaires were filled out. Voir dire of 182 prospective jurors took sixteen days over the course of six weeks.

Kaczynski alleges that he learned in the courtroom on November 25 that his attorneys intended to portray him as suffering from major mental illness (schizophrenia), but that he was deterred from bringing his conflict with counsel to the court’s attention as counsel were in plea negotiations with the government. Evidently by December 17 it had become clear that Kaczynski would not go for an unconditional plea and the government would not accept a conditional one. In the meantime, Kaczynski was giving thought to whether he wanted Tony Serra, a San Francisco lawyer whom he believed would not employ a mental state defense, to represent him. On December 16, he received a letter indicating that Serra would be available, but on December 17 Serra withdrew from consideration.

On December 18, Kaczynski’s counsel gave the district court three letters in which Kaczynski explained that he had a conflict with his attorneys over the presentation of a mental status defense. The next day the court held an ex parte, in camera conference with Kaczynski and counsel, as a result of which he and they undertook to confer over the weekend. On December 22, Clarke and Denvir advised the court that a compromise had been worked out: They agreed to withdraw the Rule 12.2(b) notice and not to present any expert mental health testimony at the guilt phase of the trial, while Kaczynski accepted their control over the presentation of evidence and witnesses to be called, including mental health expert witnesses and members of Kaczynski’s family, in order to put on a full case of mitigation at the penalty phase. Kaczynski told the court that he was willing to proceed with his attorneys on this basis, and that “the conflict at least is provisionally resolved.” In response to the court’s query, Kaczynski also said that he did not want to represent himself. Jury selection was then completed and (to allow for the holidays) opening statements were set to begin January 5, 1998.

On January 5, Kaczynski told the court that he wished to revisit the issue of his relations with his attorneys. He said that he had learned from a preview of the opening statement the evening before (January 4) that counsel intended to present non-expert evidence of his mental state in the guilt phase. Clarke and Denvir explained that they intended to introduce evidence of Kaczynski’s physical state, living conditions, lifestyle, and writings to show the deterioration of his mental state over the 25 years he lived in Montana. Kaczynski also raised for the first time with the court the possibility that he might want to have Serra replace Denvir and Clarke. The district court continued the trial to January 8, and appointed Keven Clymo as “conflicts” counsel for Kaczynski.

Another hearing was held January 7. Kaczynski withdrew his January 5 request for Serra to represent him because Clymo had convinced him it would not be in his best interests; however, later the same day, Serra “faxed” a letter indicating that if Kaczynski’s present lawyers were recused, he was willing to substitute in. Kaczynski told the court that he would like to be represented by Serra,
but said: “As to the question of when he would be able to start, he stated that, of course, he will not be able to start trial tomorrow. He would need a considerable time to prepare.” The court refused to allow Serra to take over because of the delay it would cause. After discussing Kaczynski’s continuing differences with counsel over mental status evidence, the court also ruled that counsel could control the defense and present evidence of his mental condition over Kaczynski’s objection. Again in response to a question from the court, Kaczynski said that he did not want to represent himself. He explained that “if this had happened a year and a half ago, I would probably have elected to represent myself. Now, after a year and a half with this, I’m too tired, and I really don’t want to take on such a difficult task. So far I don’t feel I’m up to taking that challenge at the moment, so I’m not going to elect to represent myself.”

However, the next day (January 8), Kaczynski’s counsel informed the court that Kaczynski wanted to proceed as his own counsel. Clarke explained that Kaczynski believed he had no choice, given presentation of a mental illness defense which he “cannot endure.” Clarke also indicated that Kaczynski had advised her that he was prepared to proceed pro se that day, without delay. Both sides thought that a competency examination should be conducted, given defense counsels’ view that his mental condition was Kaczynski’s only viable defense. The court also noted that it had learned from the U.S. Marshals office that Kaczynski might have attempted suicide the night before. Accordingly, it ordered a competency examination, to be completed before ruling on the Faretta request. The trial was continued to January 22. A court-appointed psychiatrist examined Kaczynski and concluded that he was competent. All parties agreed on January 20 that this resolved the issue.

On January 21, Kaczynski again asked to represent himself. The court denied the request on January 22, finding that it was untimely because it came after meaningful trial proceedings had begun and the jury had been empaneled. The court also found that Kaczynski’s request to represent himself was a tactic to secure delay and that delay would have attended the granting of the motion given the complexity of the capital prosecution. Although Kaczynski did not request a continuance, the court found “it was impossible to conceive” that he could immediately assume his own defense without considerable delay for preparation of an adequate defense. This, in turn, would risk losing jurors and having again to go through the arduous process of selecting a new jury. The court also found that Kaczynski’s conduct was not consistent with a good faith assertion of his right to represent himself, as he had long known of his attorneys’ intention to present mental health evidence and had agreed on December 22 that they could do so at the penalty phase. Accordingly, the court concluded, Kaczynski’s conflict with counsel turned solely on the moment when mental evidence would be presented. Finally, the court declined to exercise its discretion to permit Kaczynski to represent himself in spite of the untimely request, noting that to do so would result in Kaczynski’s foregoing “the only defense that is likely to prevent his conviction and execution.”

Immediately after the Faretta request was denied from the bench, Denvir informed the court that Kaczynski would unconditionally plead guilty to both the California and New Jersey Indictments if the government would withdraw its notices of intent to seek the death penalty. (Kaczynski alleges that this condition was counsels’ idea, not his.) A written plea agreement was entered into shortly thereafter, and the plea was taken by the court the same day.

Kaczynski was sentenced May 4, 1998 to four consecutive life sentences, plus 30 years imprisonment. He was ordered to pay $15,026,000 in restitution to his victims. Pursuant to the terms of the plea agreement, Kaczynski did not appeal.

On April 23, 1999, he filed a motion under 28 U.S.C. § 2255 seeking to vacate his conviction. The district court denied the motion without calling for a response or holding a hearing. It also denied a certificate of appealability. This appeal followed. We certified three issues: (1) whether Kaczynski’s guilty plea was voluntary; (2) whether Kaczynski properly was denied the right to self-representation; and (3) whether a criminal defendant in a capital case has a constitutional right to prevent his appointed defense counsel from presenting evidence in support of an impaired mental state defense at trial.

II

[1] We must first consider whether Kaczynski is barred from raising these claims in a collateral attack under § 2255, for the government argues that he procedurally defaulted by failing to raise them on direct appeal. See Bousley v. United States, 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (“[E]ven the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.”) (internal quotations

[2] The court found “it was impossible to conceive” that Kaczynski could immediately assume his own defense without considerable delay for preparation of an adequate defense.
omitted). Kaczynski counters that the government waived its right to raise the issue of procedural default by having not done so in the district court. We disagree, because the district court summarily denied Kaczynski’s § 2255 motion without giving the government an opportunity to be heard. As the government had no chance to argue default, we allow it to do so now. Cf. United States v. Barron, 172 F.3d 1153 (9th Cir.1999) (en banc) (government’s failure to raise petitioner’s procedural default in district court waives the defense in the absence of extraordinary circumstances suggesting that the omission should be overlooked).

Kaczynski acknowledges that his § 2255 motion raises only one claim—that his guilty plea was involuntary. Therefore, it is unnecessary to consider default with respect to his Faretta request or control over the mental state defense. These issues are only points upon which Kaczynski relies to show that his guilty plea was involuntary; he does not now (nor, as he also recognizes, could he) raise these claims independently. See *1114 Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (criminal defendant who has admitted guilt in guilty plea may not thereafter raise independent claims relating to deprivation of constitutional rights that occurred prior to entry of plea).

Kaczynski argues that even if he did procedurally default his voluntariness claim, there were two causes to excuse it: first, that he waived the right to appeal in the plea agreement, and second, that his attorneys failed to consult with him about the possibility of direct appeal. The government maintains that the plea agreement waiver cannot justify bypassing direct review of his current claims, see United States v. Pipitone, 67 F.3d 34, 39 (2d Cir.1995) (so holding with respect to agreement not to appeal a sentence within the guideline range), but it fails to argue how we can resolve counsels’ possible ineffectiveness without a more fully developed record. Bousley, 523 U.S. at 621–22, 118 S.Ct. 1604; Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942) (per curiam) (coercion of plea appropriately raised on collateral review when facts relied on are dehors the record and not open to consideration and review on direct appeal). Accordingly, we cannot say that Kaczynski procedurally defaulted his involuntariness claim without cause.

III

On the merits, Kaczynski contends that his plea was involuntary because he was improperly denied his Faretta right, or because he had a constitutional right to prevent his counsel from presenting mental state evidence. Even if neither deprivation suffices, still the plea was involuntary in his view because it was induced by the threat of a mental state defense that Kaczynski would have found undurable.

It goes without saying that a plea must be voluntary to be constitutional. We review whether it was de novo, United States v. Littlejohn, 224 F.3d 960, 964 (9th Cir.2000), and the district court’s findings for clear error. United States v. Signori, 844 F.2d 635, 638 (9th Cir.1988).

The general principles are well settled. To determine voluntariness, we examine the totality of the circumstances. Iaea v. Sunn, 800 F.2d 861, 866 (9th Cir.1986). A plea is voluntary if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). “[A] plea of guilty entered by one fully aware of the direct consequences ... must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).” Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). In sum, “a guilty plea is void if it was ‘induced by promises or threats which deprive it of the character of a voluntary act.’ ” Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir.1995) (quoting Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962)).

A

Here, the plea was both written and oral. In the written agreement, Kaczynski admitted guilt on each of the offenses charged in both indictments and agreed to plead guilty “because he is in fact guilty”; waived his constitutional trial and appellate rights; acknowledged he understood that by pleading guilty he was waiving these rights, that his attorney had explained both the rights and the consequences of his waiver, and that he freely *1115 and voluntarily consented to the waiver; and agreed to waive all rights to appeal the plea and sentence including legal rulings made by the district court. In a separate, “approval” section of the plea agreement, Kaczynski affirms that he had reviewed the agreement with his...
attorneys, and that “I understand it, and I voluntarily agree to it and freely acknowledge that I am guilty of the crimes charged.” Also, that: “No other promises or inducements have been made to me, other than those contained in this agreement. In addition, no one has threatened or forced me in any way to enter into this Plea Agreement. Finally, except as otherwise reflected in the record, I am satisfied with the representation of my attorneys in this case.”

During the Rule 11 colloquy, Kaczynski stated under oath that he was “entering the plea of guilty voluntarily because it is what I want(ed) to do”; that he was satisfied with his attorneys’ representation, except for the mental defect defense as reflected in the record; and that no one had forced or threatened him to plead guilty. He stated that he was willing to proceed for sentencing with present counsel. The district court found that “the defendant is fully competent and capable of entering an informed plea and that his plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense.”

In its order denying the § 2255 motion, the court found that Kaczynski was aware of the basis on which his motion challenged the plea at the time of the plea colloquy, yet affirmatively answered the court’s inquiry about whether he was entering his guilty plea voluntarily and responded negatively when asked whether anyone had attempted to force or threaten him to plead guilty. The court noted that Kaczynski specifically referred to the disagreement with his attorneys about a mental status defense, but did not suggest in any way that he believed this disagreement affected the voluntariness of his plea. Further, the court found that Kaczynski showed no signs of anxiety or distress when he stated that he was voluntarily entering into the plea; that nothing about his demeanor indicated he endured any coercion; that he admitted the charges with no sign of reservation; and that his sworn plea statements were “lucid, articulate, and utterly inconsistent with his present claim that he did not voluntarily plead guilty.”

We give “substantial weight” to Kaczynski’s in-court statements, United States v. Mims, 928 F.2d 310, 313 (9th Cir.1991), and we accept the district court’s findings as we are not firmly convinced they are wrong. Kaczynski was clearly aware of the consequences of his plea (and does not contend otherwise). The decision to plead guilty in exchange for the government’s giving up its intent to seek the death penalty and to continue prosecuting him was rational given overwhelming evidence that he committed the Unabomb crimes and did so with substantial planning and premeditation, lack of remorse, and severe and irreparable harm. While Kaczynski does contend that his attorneys deceived him about their intentions to present a mental status defense, he knew what they planned to do before deciding to plead guilty, and he does not claim that he was persuaded to plead guilty by threats or misrepresentations of his attorneys, the government, or the court. Thus, there is no basis for concluding that his decision to plead guilty was influenced by improper threats, promises, or deceits, and no reason not fully to credit Kaczynski’s sworn statements in the plea agreement, as well as during the plea colloquy, that he was pleading voluntarily.

This would normally end the inquiry, for being forced to choose between *1116 unpleasant alternatives is not unconstitutional. See Brady, 397 U.S. at 750, 90 S.Ct. 1463. However, since the district court ruled on Kaczynski’s § 2255 motion, we held in United States v. Hernandez, 203 F.3d 614 (9th Cir.2000), that the erroneous denial of a Faretta request renders a guilty plea involuntary. We reasoned that wrongly denying a defendant’s request to represent himself forces him “to choose between pleading guilty and submitting to a trial the very structure of which would be unconstitutional.” Id. at 626. Because this deprives the defendant “of the choice between the only two constitutional alternatives—a plea and a fair trial,” we concluded that a district court’s improper Faretta ruling “imposed unreasonable constraints” on the defendant’s decision-making, thus making a guilty plea involuntary. Id. at 627. Therefore, we must consider whether Kaczynski’s plea was rendered involuntary on account of a wrongful refusal to grant his request for self-representation.

Following Faretta, our court has developed the rule that “[a] criminal defendant’s assertion of his right to self-representation must be timely and not for purposes of delay; it must also be unequivocal, as well as voluntary and intelligent.” Hernandez, 203 F.3d at 620 (summarizing prior law).

Kaczynski argues that there must be an affirmative showing that he intended to delay the trial by asking to represent himself, and that none was made here. See Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir.1982). Rather, he asserts, the facts show that his purpose was to avoid the mental state defense. Kaczynski also contends that his Faretta request was timely, which we assume (without deciding) that it was for purposes of appeal. This leaves
only the question whether he had bona fide reasons for not asserting his right of self-representation until he did. In making this determination, a court may consider the effect of delay as evidence of a defendant’s intent, along with events preceding the motion, “to determine whether they are consistent with a good faith assertion of the Faretta right and whether the defendant could reasonably be expected to have made the motion at an earlier time.” Id. at 784–85.

[11] We review the district court’s factual findings for clear error, but we have not yet clarified whether denial of a Faretta request is reviewed de novo or for abuse of discretion. See United States v. George, 56 F.3d 1078, 1084 (9th Cir.), cert. denied, 516 U.S. 937, 116 S.Ct. 351, 133 L.Ed.2d 247 (1995). We conclude that under either standard, the propriety of denying Kaczynski’s request necessarily follows from the district court’s finding that he asserted the right to represent himself as a tactic to delay trial proceedings and lacked bona fide reasons for failing to assert it before January 8, 1998.

The court found that Kaczynski “clearly and unambiguously permitted his lawyers to adduce mental status evidence at trial, and his complaints to the contrary, asserted on the day trial was set to commence, evidence his attempt to disrupt the trial *1117 process.” Further, the court found that although Kaczynski contended he made his January 8 request to represent himself only because he could not endure his attorneys’ strategy of presenting mental status evidence in his defense, the record belied this contention because Kaczynski had authorized its use. The court also found that Kaczynski was well aware before January 8 that evidence of his mental status would be adduced at trial. In addition to the December 22 accord, Kaczynski was present during all but one day of the seventeen days of voir dire, during which the court observed that he conferred amicably with his attorneys while they openly and obviously selected jurors appearing receptive to mental health evidence about him. Finally, the court found that Kaczynski could not have immediately assumed his own defense without considerable delay, given the large amount of technical evidence and more than 1300 exhibits that the government intended to offer.

These findings are well grounded in the record, and support the court’s conclusion that Kaczynski’s request for self-representation was tactically made for dilatory purposes. Kaczynski knew from at least November 25 that he and his attorneys disagreed about a mental status defense, but he agreed on December 22 to let Denvir and Clarke proceed with both expert and lay testimony on his mental condition in the penalty phase so long as they presented no such expert testimony in the guilt phase. Although he knew then that evidence of his mental condition would be presented, Kaczynski expressly said that he did not want to represent himself. As he agreed to evidence of his mental state, it cannot be for this reason that he later invoked the right; otherwise, he could have done so on December 22. Instead, on January 5, when opening statements were supposed to start, Kaczynski renewed complaints about the mental status evidence his counsel planned to present in the guilt phase and mentioned to the court for the first time his interest in being represented by Tony Serra. This caused the trial to be continued to January 8. On January 7 Kaczynski said that he would like Serra to represent him, knowing that it would take Serra months to get ready. When the court refused to substitute Serra because of the substantial continuance that would be required, and ruled that appointed counsel could control the timing of when mental status evidence was introduced, Kaczynski repeated that he did not want to represent himself. However, that evening he may have attempted suicide and the next day (when the continued trial was set to start), Kaczynski informed the court that given presentation of a mental illness defense which he could not endure, he wanted to go forward as his own counsel. This triggered a competency examination and another delay in the start of trial, until January 22.

Kaczynski contends that he could not have been influenced by delay, given that he was incarcerated for the long haul in any event. However, the district court found that he was simultaneously pursuing strategies to delay the trial, to project a desired image of himself, and to improve his settlement prospects with the government. Kaczynski also argues that it should not matter whether he agreed to let evidence of his mental state be presented in the penalty phase, because the trial might never have gotten that far. We disagree, for Kaczynski never did—and does not now suggest—that he is actually *1118 innocent or that there was any realistic chance that the jury would not unanimously find him guilty beyond a reasonable doubt.

[12] As the events preceding Kaczynski’s Faretta request show, he knew about and approved use of mental state evidence without invoking his right to represent himself. Accordingly, the court could well determine that Kaczynski’s avowed purpose of invoking the right in order to avoid a defense he could not endure was not “consistent with a good faith assertion of the Faretta right,” and that he “could reasonably be expected to have made the motion at an earlier time.” Fritz, 682 F.2d at 784–85. Having found that the request for self-representation was for tactical reasons and not for any
good faith reason other than delay, the court properly denied Kaczynski’s Faretta request. His Sixth Amendment rights were not violated. Thus, his guilty plea was not, on this account, rendered involuntary under Hernandez.

C

[13] For essentially the same reasons, neither was Kaczynski’s plea rendered involuntary on account of the threat of a mental state defense that he did not want presented. The government argues that Kaczynski’s guilty plea waived his right to challenge the district court’s ruling that his attorneys could put on mental state evidence at the guilt phase, and it unquestionably does. United States v. Reyes–Platero, 224 F.3d 1112, 1114 (9th Cir.2000) (conditional guilty plea “cures all antecedent constitutional defects”) (quoting United States v. Floyd, 108 F.3d 202, 204 (9th Cir.1997)). Kaczynski does not contend otherwise, but instead argues that he was coerced into pleading guilty by his counsel’s insistence on a mental state defense, that his counsel deceived him in order to gain his cooperation with some such defense, and that he was induced to plead guilty by a choice (being unable to represent himself or to proceed without the mental state defense) that was constitutionally offensive.

Even if Kaczynski were misled by his counsel about the degree to which evidence of his mental state would be adduced in the guilt phase, he learned for sure what their plans were on January 4 when he previewed their opening statement for him and he does not allege, nor does the record show, that they in any way threatened or misled him with respect to the plea or its consequences. Cf. La la, 800 F.2d at 867–68 (attorney’s threat to withdraw if defendant continued to refuse to plead guilty may, along with other factors, have coercive impact on voluntariness of plea). Kaczynski hypothesizes that counsel may have used mental state evidence as a threat to pressure him into an unconditional plea bargain as a means of saving him from the risk of a death sentence, but admits that this is speculative and that no proof for it is possible. Beyond this, he contends that the Hernandez rationale applies also to the right to proceed to trial without the presentation of mental state evidence. He points out that “the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal,” Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and argues that evidence about mental status is of the same order of magnitude. The government, on the other hand, submits that it is equally “clear that appointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense.” United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir.1987); New York v. Hill, 528 U.S. 110, 120 S.Ct. 659, 664, 145 L.Ed.2d 560 (2000) (“the lawyer has—and must have—full authority to manage the conduct of the trial”) (quoting Taylor v. Illinois, 484 U.S. 400, 417–18, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). We need not decide where along this spectrum control of a mental defense short of insanity lies, because Kaczynski agreed that his counsel could control presentation of evidence and witnesses to be called (including expert witnesses and members of his family who would testify that he was mentally *11 conditions ill) in order to put on a full case of mitigation at the penalty phase. Thus, as the district court found, Kaczynski’s claim that his plea was involuntary due to his aversion to being portrayed as mentally ill is inconsistent with his willingness to be so portrayed for purposes of avoiding the death penalty. This leaves only the pressure that Kaczynski personally felt on account of his wish to avoid the public disclosure of evidence about his mental state sooner rather than later. We agree with the district court that this does not transform his plea into an involuntary act. See Brady, 397 U.S. at 749–50, 90 S.Ct. 1463.

Accordingly, as Kaczynski’s guilty plea was voluntary and was not rendered involuntary on account of the wrongful denial of his Faretta request or because of anticipation of evidence about his mental condition, his habeas petition was properly denied.13

AFFIRMED.

REINHARDT, Circuit Judge, dissenting:

I disagree strongly with the majority’s decision and regretfully must dissent.

This case involves the right of a seriously disturbed individual to insist upon representing himself at trial, even when the end result is likely to be his execution. It presents a direct clash between the right of self-representation and the state’s obligation to provide a fair trial to criminal defendants, especially capital defendants. It raises the question whether we should execute emotionally disturbed people whose crimes may be the product of mental disease or defect and, if so, whether they should be allowed to forego defenses or appeals that might prevent their execution. In fact, it
raises, albeit indirectly, the question whether anyone should be permitted to waive his right to contest his execution by the state if that execution might be unlawful.

The case of Ted Kaczynski not only brings together a host of legal issues basic to our system of justice, it also presents a compelling individual problem: what should be the fate of a man, undoubtedly learned and brilliant, who determines, on the basis of a pattern of reasoning that can only be described as perverse, that in order to save society he must commit a series of horrendous crimes? What is the proper response of the legal system when such an individual demands that he be allowed to offer those perverse theories to a jury as his only defense in a capital case—a defense that obviously has no legal merit and certainly has no chance of success? What should the response be when he also insists on serving as his own lawyer, not for the purpose of pursuing a proper legal defense, but in order to ensure that no evidence will be presented that exposes the nature and extent of his mental problems? The district judge faced these questions and, understandably, blinked. He quite clearly did so out of compassion and humanitarian concerns. Nevertheless, in denying Kaczynski’s request to represent himself, the district court unquestionably failed to follow the law. Notwithstanding the majority’s arguments in defense of the district judge’s actions, they simply cannot be supported on the ground he offered, or on any other ground available under the law as it now stands.

Whether Theodore Kaczynski suffers from severe mental illness, and which of the various psychiatric diagnoses that have been put forth is the most accurate, are questions that we cannot answer here. However, it is not now, nor has it ever been, disputed that under the governing legal standards, he was competent to waive his right to the assistance of counsel. Therefore, whatever we may think about the wisdom of his choice, or of the doctrine *1120 that affords a defendant like Kaczynski the right to make that choice, he was entitled, under the law as enunciated by the Supreme Court, to represent himself at trial. A review of the transcript makes startlingly clear that, under the law that controls our decision, the denial of Kaczynski’s request violated his Sixth Amendment rights. There is simply no basis for the district court’s assertion that the request was made in bad faith or for purposes of delay. Because, as the majority acknowledges, the erroneous denial of a self-representation request renders a subsequent guilty plea involuntary as a matter of law, I must respectfully dissent from the majority’s holding that Kaczynski’s plea was voluntary.*

I.

By the time of his arrest in a remote Montana cabin on April 3, 1996, Ted Kaczynski had become one of the most notorious and wanted criminals in our nation’s history. For nearly two decades, beginning in 1978, the “Unabomber”—so designated by the FBI when his primary targets appeared to be universities and airlines—had carried out a bizarre ideological campaign of mail-bomb terror aimed at the “industrial-technological system” and its principal adherents: computer scientists, geneticists, behavioral psychologists, and public-relations executives. Three men—Hugh Scrutton, Gilbert Murray, and Thomas Mosser—were killed by Kaczynski’s devices, and many other people were injured, some severely.

In 1995, Kaczynski made what has been aptly described as “the most extraordinary manuscript submission in the history of publishing.” Kaczynski proposed to halt all his killings on the condition that major American newspapers agree to publish his manifesto, “Industrial Society and Its Future.” The New York Times and Washington Post accepted the offer, and that most unusual document, with its “dream ... of a green and pleasant land liberated from the curse of technological proliferation,” revealed to the world the utopian vision that had inspired Kaczynski’s cruel and inhumane acts. Among the readers of the manifesto was David Kaczynski, who came to suspect that its author was his brother Ted, a former mathematics professor at Berkeley who had isolated himself from society some quarter-century before. David very reluctantly resolved to inform the FBI of his suspicions, although he sought assurances that the government would not seek the death penalty and expressed his strong view that his brother was mentally ill. On the basis of information provided by David, the FBI arrested Kaczynski and, despite David’s anguished opposition, the government gave notice of its intent to seek the death penalty.

Following Kaczynski’s indictment, Federal Defenders Quin Denvir and Judy Clarke were appointed to represent him. Attorney Gary Sowards joined the defense team some time later. All three are superb attorneys, and Kaczynski could not have had more able legal representatives. From the outset, however, Kaczynski made clear that a defense based on mental illness would be unacceptable to him, and his bitter opposition to the only defense that his lawyers believed might save his life created acute tension between counsel and client. That tension persisted, and periodically erupted, throughout the many months leading up to Kaczynski’s guilty plea, and the dispute was not definitively resolved until Judge Burrell ruled on January
7, 1998, that Kaczynski’s attorneys could present mental-health evidence even over his vehement objection. It was that ruling, Kaczynski maintains—and the record indisputably reflects—that compelled him to request self-representation the very next day as the only means of preventing his portrayal as a “grotesque and repellent lunatic.” In doing so, Kaczynski was merely exercising the right that Judge Burrell had recognized he possessed the day before, immediately after he issued his controversial ruling that counsel, not client, would control the presentation of mental-health evidence.\footnote{Kaczynski cites to dozens of notes that he wrote to his attorneys in the weeks and months prior to November 25, 1997, in which he expressed, in the strongest terms, his unwillingness to present a mental-health defense at trial. For example, in June of 1997 he wrote: “I categorically refuse to use a mental-status defense.” In October, he explained in a note to Sowards: “I am bitterly opposed to the development of a science of the human mind....” Kaczynski asserts that he was led to believe that “the defense would argue that the offenses [he] was alleged to have committed were a kind of self-defense against the ‘intrusion’ of industrial civilization into the wilderness of Western Montana.” He submitted to psychiatric evaluations, he contends, only after receiving “false promises and intense pressure” from his attorneys, who understood that his primary concern was to “refute the image of him as mentally ill that was projected by the media with the help of his mother and brother.” In May or June of 1997, Kaczynski wrote to his attorneys: “I would like to get reliable psychological data about myself before the public in order to counteract all this silly stuff about me that the media have been pushing.” Even when Kaczynski began to suspect that his attorneys intended to use some mental-health evidence and testimony at his trial, he “had no idea they intended to portray him as suffering from major mental illness,” and he still believed that all such evidence was privileged and could not be released without his approval.}

Whether Kaczynski’s self-representation request was made in good faith, as Judge Burrell repeatedly stated on January 8, or whether it was a “deliberate attempt to manipulate the trial process for the purpose of causing delay,” as Judge Burrell subsequently held when explaining his reason for denying the request, is the issue before us. Although the answer is absolutely clear from the record, it is helpful to set forth a number of colloquies that demonstrate that everyone involved—including counsel for both sides and the district judge—was fully aware that Kaczynski’s request was made in good faith and not for purposes of delay. The record reveals that Kaczynski’s aversion to a mental-health defense was, indisputably, heartfelt, and that no one—least of all Judge Burrell—ever questioned Kaczynski’s sincerity prior to the time the judge commenced formulating his January 22 ruling.

II.

Kaczynski contends that he first learned on November 25, 1997 that his attorneys intended to present evidence that he suffered from major mental illness, specifically paranoid schizophrenia.\footnote{On that day, in open court, Kaczynski discovered that numerous psychiatric reports, the contents of which he had been assured would be privileged, had been released to the public without his consent. Although it is true, as the majority notes, that Kaczynski had previously been aware that his attorneys were planning to introduce some evidence that he might suffer from neurological problems—he had consented to the filing of a notice under Rule 12.2(b) of the Federal Rules of Criminal Procedure to leave open the possibility of introducing expert testimony on that point—he nevertheless believed that he had the right to prevent the mental-health experts who had examined him from testifying at his trial.\footnote{Kaczynski cites to dozens of notes that he wrote to his attorneys in the weeks and months prior to November 25, 1997, in which he expressed, in the strongest terms, his unwillingness to present a mental-health defense at trial. For example, in June of 1997 he wrote: “I categorically refuse to use a mental-status defense.” In October, he explained in a note to Sowards: “I am bitterly opposed to the development of a science of the human mind....” Kaczynski asserts that he was led to believe that “the defense would argue that the offenses [he] was alleged to have committed were a kind of self-defense against the ‘intrusion’ of industrial civilization into the wilderness of Western Montana.” He submitted to psychiatric evaluations, he contends, only after receiving “false promises and intense pressure” from his attorneys, who understood that his primary concern was to “refute the image of him as mentally ill that was projected by the media with the help of his mother and brother.” In May or June of 1997, Kaczynski wrote to his attorneys: “I would like to get reliable psychological data about myself before the public in order to counteract all this silly stuff about me that the media have been pushing.” Even when Kaczynski began to suspect that his attorneys intended to use some mental-health evidence and testimony at his trial, he “had no idea they intended to portray him as suffering from major mental illness,” and he still believed that all such evidence was privileged and could not be released without his approval.}

Did Gary [Sowards] give that info to the prosecutors with your knowledge and consent? If you all assume responsibility for revealing what is being revealed now, then this is the end between us. I will not work with you guys any more, because I can’t trust you....

This case is developing in a direction that I certainly did not expect. I was lead [sic] to believe that this was not really a “mental health” kind of defense, but that you would try to show that my actions were a kind of “self defense.” Gary [Sowards] gave me the impression that we would use only Dr. Kriegler, and would use her only to show I would not “do it again.”

In the weeks that followed, Kaczynski also wrote three separate letters to Judge Burrell in which he explained his conflict with his attorneys and sought replacement of counsel. However, Denvir and Clarke prevailed upon him to delay bringing the conflict to the attention of the judge while they were engaged in negotiations with the Justice Department aimed at allowing him to plead guilty
conditioned while preserving his suppression issues for appeal. When those negotiations failed, Denvir and Clarke agreed to deliver Kaczynski’s letters to Judge Burrell, and they did so on December 18.

The letters reveal the depth of the rift that had developed between Kaczynski and his attorneys regarding the issue of mental-health evidence. The first letter, dated December 1, 1997 begins: “Last Tuesday, November 25, I unexpectedly learned for the first time in this courtroom that my attorneys had deceived me.” Kaczynski explained that he had been assured by his attorneys that the results of psychiatric examinations that he reluctantly agreed to undergo—and even the fact that he had been examined at all—would be protected by attorney-client privilege and would not be disclosed absent his approval. Moreover, he had been “led to believe that [he] would not be portrayed as mentally ill without [his] consent.” Kaczynski insisted that he had initially been misled as to the nature of a “12.2b defense”—he had been assured that it was “only a legal device to enable a certain mental-health professional [Dr. Kriegler] whom I know and like to tell the jury what kind of person I am.” He was never informed that the results of his psychiatric examinations would be released.

In a letter dated December 18, Kaczynski offered his reasons for objecting to a defense based on mental-health evidence:

I do not believe that science has any business probing the workings of the human mind, and ... my personal ideology and that of the mental-health professions are mutually antagonistic.... [I]t is humiliating to have one’s mind probed by a person whose ideology and values are alien to one’s own.... [Denvir, Clarke, and Sowards] calculatedly deceived me in order to get me to reveal my private thoughts, and then without warning they made accessible to the public the cold and heartless assessments of their experts.... To me this was a stunning blow ... [and] the worst experience I ever underwent in my life.... I would rather die, or suffer prolonged physical torture, than have the 12.2b defense imposed on me in this way by my present attorneys.

Previous consent to such a defense was, Kaczynski contended, “meaningless because my attorneys misled me as to what that defense involved.”

Kaczynski proposed three possible solutions: that his attorneys be prevented from using a “12.2b” defense; that he be permitted to represent himself, preferably with appointed counsel to assist him; or that new counsel be appointed for him. After receiving Kaczynski’s letters, Judge Burrell ordered an ex parte hearing, to be held on December 22, during which Kaczynski’s conflict with counsel would be explored. At that hearing, Kaczynski agreed to an accommodation, which he characterizes as “tentative,” according to which Denvir and Clarke would withdraw the 12.2(b) notice (thereby precluding introduction of expert testimony about Kaczynski’s mental state during the guilt phase of the trial), but would be permitted to introduce mental-state evidence in the penalty phase. Kaczynski insists that his understanding at the time was that the agreement would preclude the presentation of any mental-state evidence during the guilt phase of the trial, even though the rule (the text of which Kaczynski contends he never saw) applies only to expert testimony. Kaczynski’s misunderstanding was reasonable; in fact, Judge Burrell shared it, as he later acknowledged:

I agree with something Mr. Kaczynski said. He indicated that he assumed, when counsel with [sic] withdrew the 12.2(b) defense, that all such defenses would be withdrawn. That was my assumption too. But I recognize, as Mr. Kaczynski recognizes, that that’s technically in error. But I felt the same way he felt.... And then later I thought since Mr. Kaczynski is not learned in the law, and I don’t mean that disrespectfully, not to the extent that I hope I am, I assume that he would not realize that the mental status defense was not necessarily fully withdrawn with the 12.2(b) notice being withdrawn.... I understand what Mr. Kaczynski was telling me, because I thought the same thing he thought.13

Immediately following the December 22 agreement, the parties exercised their peremptory strikes and the jury was selected. Kaczynski maintains that from December 22 through January 4, he believed that (1) his attorneys would not be permitted to introduce any mental-state evidence during the guilt phase of his trial, and (2) attorney J. Tony Serra—who had written to Kaczynski and offered to represent him without employing a mental-health defense but had subsequently withdrawn the offer of representation—was unwilling to serve as his counsel at trial. Kaczynski first learned of his attorneys’ intention to present non-expert mental-state testimony at the guilt phase of his trial on the evening of January 4, 1998—the day before trial was to begin. Denvir and
Clarke visited him at the jail that evening and read him their opening statement. Kaczynski declares that he was “horrified to learn that his attorneys planned to present extensive nonexpert evidence of severe mental illness in the guilt phase.”

On the morning of January 5, Kaczynski informed Judge Burrell of his continuing conflict with counsel, and the judge appointed attorney Kevin Clymo as “conflicts counsel” to represent Kaczynski’s interests. Proceedings were postponed until January 7. On that day, Judge Burrell ruled that Kaczynski’s counsel could present mental-state testimony even if Kaczynski objected. Judge Burrell then offered Kaczynski the option of self-representation, warning: “I don’t advise it, but if you want to, I’ve got to give you certain rights.” At the time of the court’s offer, Kaczynski declined to accept it, explaining that he was “too tired ... [to] take on such a difficult task,” and that he did not feel “up to taking that challenge at the moment.” By then, according to his section 2255 motion, “Kaczynski was already contemplating suicide as the most probable way out of this cul-de-sac.” Later that same day, the court was informed that Tony Serra would, after all, be willing to represent Kaczynski. Kaczynski promptly requested a change of counsel, but Judge Burrell denied the request on the ground that substituting counsel would require a significant delay before trial could commence.14

On January 8, Kaczynski decided to accept the court’s offer of the previous day and informed the court that he wished to represent himself.15 Kaczynski’s counsel conveyed his request to the court with great reluctance:

Your Honor, if I may address the Court, Mr. Kaczynski had a request that we alert the Court to, on his behalf—it is his request that he be permitted to proceed in this case as his own counsel. This is a very difficult position for him. He believes that he has no choice but to go forward as his own lawyer. It is a very heartfelt reaction, I believe, to the presentation of a mental illness defense, a situation in which he simply cannot endure.

Kaczynski’s attorneys made clear that he was not seeking any delay in proceedings and that he was prepared to proceed pro se immediately. On that day, as before, Judge Burrell did not intimate that he perceived any bad-faith motive on Kaczynski’s part. To the contrary, he made numerous comments demonstrating his belief that Kaczynski sought self-representation solely because of the conflict over control of the mental-health defense—in other words, solely because of his desire to prevent the introduction of evidence regarding his mental health. Each of the following statements was made on January 8, 1998, immediately following Kaczynski’s assertion of his right to act as his own counsel:

THE COURT: And there’s even another issue, which I think is perhaps the key issue. That issue involves who controls the mental status defense. It is my opinion that that’s what this is all about.

[GOVERNMENT]: I think the issue today, when the defendant says he wants to represent himself, is the question of Fareta and—

THE COURT: He’s only saying that, in my opinion, because he wants to control the mental status defense.

THE COURT:..... In my opinion, the defendant would not be asking to represent himself if he was in control of the mental status defense. That’s my opinion.

THE COURT:..... I think the crux of the question centers on who controls [the mental status] defense. And I believe that Mr. Kaczynski has expressed the interest of representing himself because I told him he doesn’t control that defense.

No one disputes that Kaczynski had a constitutional right to represent himself if, as the court plainly recognized, the assertion of his right was motivated by the dispute over the mental-state defense. It is therefore no surprise that Judge Burrell, who repeatedly acknowledged that Kaczynski’s request was induced by a genuine aversion to the presentation of mental-health evidence, signaled his inclination to grant the request:

[M]y tentative opinion is that if he’s ready to go now, I’m inclined to let him do that; if we’ve reached this point, reached that point, assuming he’s competent.... [I]f I ultimately decide Mr. Kaczynski’s competent, which, frankly, that’s my view at this very moment—and I mean competent to stand trial—if I decide that, knowing that he only wants to represent himself because of his dispute with trial counsel over the assertion of the mental status defense—knowing that, I would probably have to allow him to do that, if he’s competent.

In fact, when the government tried to advise the court that it strongly believed that Kaczynski had the right to
represent himself, the court reiterated its agreement with that view, subject only to the question of competency. The court repeatedly asserted that the key to the self-representation issue was whether Kaczynski was “competent,” and did not even hint at the possibility of a bad-faith motive. Ultimately, Kaczynski’s own attorneys called their client’s competency into question, expressing the view that his efforts to waive what appeared to be his only meritorious defense attested to the need for a competency evaluation. At that point, all counsel (including the court-appointed conflicts counsel) and Judge Burrell agreed that Kaczynski should undergo a psychiatric evaluation to determine his competency to exercise his right to self-representation, and the next day the judge issued an order for the necessary medical examinations.

The competency evaluation would, of course, have been altogether unnecessary had Judge Burrell believed on January 8 that Kaczynski’s request to represent himself was made in bad faith. The judge could simply have denied the request on that ground. Nevertheless, two weeks later, after Kaczynski had been determined to be competent by a government psychiatrist, Judge Burrell denied the self-representation request, characterizing it—in a manner that directly contradicted the numerous statements he had made at the prior proceedings—as a “deliberate attempt to manipulate the trial process for the purpose of causing delay.”

It stretches the imagination to believe that at some point during the two weeks in *1126 which Kaczynski was undergoing mental competency tests, initially suggested by Judge Burrell, the judge suddenly came to believe that he had been hoodwinked by Kaczynski from the start. Rather, as some of his later comments on the subject indicate (e.g., the trial would become a “suicide forum”), Judge Burrell became more and more appalled at the grotesque and one-sided spectacle over which he would be forced to preside were Kaczynski to conduct his own defense. He understandably developed a strong desire to avoid the chaos, legal and otherwise, that would have ensued had Kaczynski been allowed to present his twisted theories to a jury as his defense to a capital murder charge. Not only would such a trial have had a circus atmosphere but, in light of Kaczynski’s aversion to mitigating evidence, it would in all likelihood have resulted in his execution. It is not difficult to appreciate, therefore, how the denial of Kaczynski’s request for self-representation—regardless of the unquestionable legitimacy of the request—must have seemed the lesser evil.

III.

It is impossible to read the transcripts of the proceedings without being struck by Judge Burrell’s exceptional patience, sound judgment, and sincere commitment to protecting Kaczynski’s right to a fair trial—and his life. Judge Burrell’s commendable concern about preventing Kaczynski from pursuing a strategy that would almost certainly result in his execution is reflected most dramatically in statements made in connection with the judge’s January 22, 1998 oral ruling denying Kaczynski’s self-representation request. The judge observed that by abandoning a mental-health defense and proceeding as his own counsel, Kaczynski would be foregoing “the only defense that is likely to prevent his conviction and execution....” That ill-advised objective is counterproductive to the justice sought to be served through the adversary judicial system, which is designed to allow a jury to determine the merits of the defense he seeks to abandon.” Judge Burrell was unwilling to permit Kaczynski to use the criminal justice system “as an instrument of self-destruction,” explaining that “a contrary ruling risks impugning the integrity of our criminal justice system, since it would simply serve as a suicide forum for a criminal defendant.” He contended, in effect, that society had an interest in preventing capital defendants from using the instrument of the state to commit suicide. As legal support for his reasoning, Judge Burrell cited Chief Justice Burger’s dissenting opinion in Faretta. 16

Nevertheless, Judge Burrell did not base his decision denying Kaczynski’s Faretta rights on his views of the role of the criminal justice system in capital cases; he was not free to do so under controlling law. 17 Indeed, Judge Burrell did not suggest *1127 that Kaczynski could be deprived of the right to represent himself if his desire for self-representation were sincere. Such a ruling would have conflicted with Supreme Court precedent holding that a defendant who is competent has the right to conduct his own defense. Because Kaczynski’s psychiatric evaluation resulted in a declaration that he was competent, the only available basis for denying his request was to find that it was not made in good faith—but rather for the purpose of delay—even though the record squarely refuted that conclusion. 18

There can be no doubt that Judge Burrell’s admirable desire to prevent an uncounseled, and seriously disturbed, defendant from confronting, on his own, the “prosecutorial forces of organized society” 19—in this case, three experienced federal prosecutors aggressively seeking that defendant’s execution—lay at the heart of his denial of Kaczynski’s request for self-representation. A fair reading of the record provides no support for the
finding that Kaczynski’s purpose was delay. Instead, it leads to the inexorable conclusion that Kaczynski requested self-representation on January 8, 1998, not because he wished to manipulate the trial process, but because Judge Burrell’s rulings of the previous day had ensured that his lawyers would present the mental-health defense that he found so abhorrent. Yet it is easy to appreciate why, as one commentator has suggested, “[t]he judicial system breathed a collective sigh of relief when the Unabomber pled guilty.” Indeed, all the players in this unfortunate drama—all except Kaczynski, that is—had *reason to celebrate Kaczynski’s unconditional guilty plea. His attorneys had achieved their principal and worthy objective by preventing his execution. The government had been spared the awkwardness of pitting three experienced prosecutors against an untrained, and mentally unsound, defendant, and conducting an execution following a trial that lacked the fundamental elements of due process at best, and was farcical at worst. Judge Burrell, as noted, had narrowly avoided having to preside over such a debacle and to impose a death penalty he would have considered improper in the absence of a fair trial. It is no wonder that today’s majority is not eager to disturb so delicate a balance.

The problem with this “happy” solution, of course, is that it violates the core principle of Faretta v. California—that a defendant who objects to his counsel’s strategic choices has the option of going to trial alone. Personally, I believe that the right of self-representation should in some instances yield to the more fundamental constitutional guarantee of a fair trial. Here, the district court understood that giving effect to Faretta’s guarantee would likely result in a proceeding that was fundamentally unfair. However, Faretta does not permit the courts to take account of such considerations. Under the law as it now stands, there was no legitimate basis for denying Kaczynski the right to be his own lawyer in his capital murder trial.

IV.

I do not suggest that the result the majority reaches is unfair or unjust. It is neither. I would prefer to be free to uphold the district judge’s denial of Kaczynski’s request on the basis of the societal interest in due process for all defendants, and particularly capital defendants. Unfortunately, I am not permitted by precedent to do so. Because I am bound by the law, I am also unable to vote to affirm on the basis the district court relied on: that Kaczynski’s request was made in bad faith. Thus, with much regret, I must conclude that Kaczynski’s plea of guilty was not voluntary and that he was entitled to withdraw it. Accordingly, I most respectfully dissent.

All Citations

Footnotes


2 Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (recognizing a criminal defendant’s Sixth Amendment right to represent himself).

3 The New Jersey Indictment was transferred to the Eastern District of California under Fed.R.Crim.P. 20(a) pursuant to Kaczynski’s plea agreement.

4 Fed.R.Crim.P. 12.2(b) provides:
If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall ... notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk.

5 As Kaczynski’s January 21 letter to the court states, he agreed to his counsel’s recommendation to defer calling the conflict to the court’s attention so that his counsel could use their conflict “as a lever to persuade the U.S. Justice Department to agree to a conditional plea bargain that would allow Kaczynski to appeal his Motion to Suppress Evidence.”

6 In a letter to the court, Kaczynski wrote:
Your Honor, I recognize that you are an unusually compassionate judge, and that you sincerely believe yourself to
be acting in my best interest in seeking to prevent me from representing myself. In an ordinary case your course would be the most compassionate one, and the one most likely to preserve the defendant's life. But I beg you to consider that you are dealing with an unusual case and an unusual defendant and that preventing me from representing myself is not the most compassionate course or the one most likely to preserve my life.

7 The district court issued another order May 4, 1998, the day of sentencing, in which it further detailed its reasons for finding that Kaczynski was competent (not at issue on appeal) and had not asserted his request for self-representation in a timely manner or consistent with a good faith invocation of the Faretta right.

8 Specifically, the constitutional rights to a public and speedy trial; to a jury trial, presumption of innocence, and unanimous verdict; to confrontation of witnesses; to compulsory process; to the privilege against self incrimination; to appeal conviction after trial; and to the representation of counsel.

9 There is no dispute this refers only to the disagreement about presentation of mental state evidence.

10 The government submits that Hernandez was incorrectly decided, but this, of course, is for the court sitting en banc, not for this panel, to say.

11 We have held that a Faretta request is timely if made “before meaningful trial proceedings have begun,” United States v. Smith, 780 F.2d 810, 811 (9th Cir.1986), and have also held that a request is timely if made “prior to jury selection,” and “before the jury is empaneled.” Moore v. Calderon, 108 F.3d 261, 264 (9th Cir.1997); United States v. Schaff, 948 F.2d 501, 503 (9th Cir.1991). The district court found that Kaczynski’s first unequivocal request for self-representation was untimely because it occurred after the jury was empaneled on December 22, when strikes had been exercised and jurors were selected. The parties dispute whether the jury was “selected” or “empaneled” and whether “meaningful trial proceedings” could have begun before the jury was sworn, but we do not need to resolve these issues because we assume that Kaczynski’s request was not untimely unless it was made for purposes of delay.

12 Although Kaczynski correctly points out that the district court had once indicated that he might have reasonably believed that his attorneys’ withdrawal of the 12.2(b) notice meant that no lay evidence would be presented on his mental status during the guilt phase of the trial, the court subsequently found that, “after reflecting upon Kaczynski’s general acuity, the content of the agreement itself, which was known to him, his awareness of the questions his attorneys asked jurors during voir dire, and his expression and demeanor during voir dire that showed his clear approval of his lawyers’ effort to use that defense to save his life, I became convinced that Kaczynski knew that his lawyers intended to offer mental status evidence during the guilt phase of trial.” Order of May 4, 1998 at 18, n. 20 (citations to record omitted).

13 Given our disposition there is no need to reach Kaczynski’s request for a different judge on remand.
That decision was not without controversy. Although the government made no explicit promise to David Kaczynski that it would not seek the death penalty, “[s]ome FBI agents told (David) Kaczynski that Ted would be better off and could get help if he turned him in,” said one source. ‘Some in the Justice Department feel that they owe David because of what the FBI said.’ ” Gary Marx, U.S. Will Seek Death in Trial of Kaczynski: Prosecutors Reject Plea from Family of Unabomber Suspect, Chi. Trib., May 16, 1997.

The government agreed with Kaczynski that he, not counsel, had the right to decide whether mental-health evidence should be presented and warned the court of “grave appellate error” if it ruled otherwise.

Because this is a section 2255 motion and no hearing was held, we must take the facts as alleged by Kaczynski unless they are directly contradicted by the record. Most of the facts that determine the outcome of the question before us are, however, undisputed in the record.

Rule 12.2(b) provides: “If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall ... notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk....” In his section 2255 motion, Kaczynski stated that his consent to the filing of the 12.2(b) notice was “reluctant”; that he consented “under pressure from the defense team”; and that his agreement was conditioned on assurance by counsel that the defense team “would make no use of ‘disease’ or ‘defect,’ but only of the ‘condition’ aspect of the Rule,” and that the purpose of the notice was to allow psychologist Julie Kriegler, “who did not seem to think that [Kaczynski] suffered from serious mental illness,” to testify at his trial. There is no reason to doubt these facts and we are required, under the applicable rules, to assume that they are true.

Kaczynski’s motion to suppress evidence seized from his Montana cabin had been denied by the district court.

Kaczynski’s characterization is supported by the record of the hearing. In response to Kaczynski’s statement to the judge that his preference would be to exclude attorney Gary Sowards (who was principally responsible for the preparation of mental-state evidence) from the case, Judge Burrell responded, in part: “Why don’t we try it this way first, to see if this works. And if you have difficulty with it, I think you know how to reach me.” Later in the hearing, Kaczynski made the following statement: “On that basis, Your Honor, I’m willing to proceed with my attorneys. And I think the conflict is at least provisionally resolved.”

Judge Burrell made those remarks on January 7, 1998. His subsequent explanation, offered two weeks later when he denied Kaczynski’s self-representation request, that upon reflection he came to believe that Kaczynski always understood the true import of the withdrawal of the 12.2(b) defense, is difficult to reconcile with his own firm and unequivocal declaration that he, too, had misunderstood the agreement and that, in fact, he had misunderstood it in precisely the same way Kaczynski had.

Kaczynski does not challenge the court’s denial of his request for substitution of counsel.

The night before, Kaczynski apparently attempted suicide, although the record shows that Judge Burrell was unaware of that fact until after the January 8 hearing was over.

Judge Burrell’s reasoning regarding the integrity of the criminal justice system and its obligation to protect the rights of capital defendants is appealing, and has been eloquently expressed on other occasions by some of our most distinguished jurists. See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 171–72, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (Marshall, J., joined by Brennan, J., dissenting) (careful review of capital cases “is necessary not only to safeguard a defendant’s right not to suffer cruel and unusual punishment but also to protect society’s fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community’s conscience or undermines the integrity of our criminal justice system”); Gilmore v. Utah, 429 U.S. 1012, 1019, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976) (Marshall, J., dissenting) (“I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”).

See, e.g., Whitmore, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (states may execute a competent and willing defendant without any appellate review of the validity of the conviction and sentence); Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 782 (1990) (same). It is undoubtedly for this reason that in his lengthy written order of May 4 setting forth his reasons for denying Kaczynski’s self-representation request, Judge Burrell made no mention...
of the societal interests he so forcefully and compassionately discussed when making his oral ruling.

18 Judge Burrell also found that Kaczynski’s request was untimely as a matter of law, but that finding is also inconsistent with our case law, and the majority does not rely on it. Kaczynski asserted his right of self-representation before the jury was sworn. In United States v. Smith, 780 F.2d 810 (9th Cir.1986), we held that a Faretta request is timely as a matter of law if “made prior to jury selection, or if made before the jury is empaneled, unless it is made for the purpose of delay.” Id. at 811, 95 S.Ct. 2525 (citations omitted) (emphasis added). Here, the jury was selected but not empaneled. Therefore, the majority is correct to “assume that Kaczynski’s request was not untimely unless it was made for purposes of delay.” Maj. op. at 1122 n. 11. That, then, brings us back to the issue presented by this appeal: did Kaczynski seek to represent himself because of the reasons the record so clearly reflects, or because he was trying to delay his trial?


20 The majority makes much of Kaczynski’s consent to the presentation of mental-health evidence in the penalty phase, asserting that because “he agreed to evidence of his mental state, it cannot be for this reason that he later invoked the right” of self-representation. Maj. op. at 1117. This conclusion cannot be squared with the record, which makes abundantly clear that Kaczynski’s aversion to mental-health evidence was genuine, and that his sincerity was unquestioned by any participant in the proceedings prior to Judge Burrell’s January 22 ruling. Kaczynski explains that he acceded to the compromise allowing mental-state evidence in the penalty phase (in exchange for withdrawal of the notice permitting such evidence in the guilt phase) with “great reluctance” because he “believed he had no hope of getting anything better”; his attorneys had warned him that “new counsel would probably force on [him] the same kind of mental-status defense” that he objected to; “elimination of mental-status evidence from the guilt phase would have greatly reduced the amount of time that [he] would have to spend listening to a portrayal of himself as insane”; and he was under intense psychological pressure and “decided to get what he could while the getting was good”—i.e., the withdrawal of the 12.2(b) notice.

Moreover, excluding the mental-health evidence from the guilt phase might, under Kaczynski’s view of the law, have resulted in its total exclusion from the trial proceedings. Kaczynski thought highly of the environmental defense (imperfect self-defense) he wished to offer. In Kaczynski’s mind, a jury should find him not guilty, because his acts were justified. Thus, as Kaczynski undoubtedly saw it, there might well never be a penalty phase.


22 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

23 See Farhad, 190 F.3d at 1101–1109 (9th Cir.1999) (Reinhardt, J., concurring specially).

Synopsis

Background: Following affirmance on direct appeal of capital defendant’s aggravated murder conviction and death sentence, 349 Or. 174, 243 P.3d 31, the Circuit Court, Marion County, Joseph Guimond, J., issued death warrant setting a date for defendant’s execution, after determining that defendant had validly waived his rights to further challenge his conviction and sentence. Thereafter, anti-death penalty organization filed petition for writ of mandamus, arguing that the Circuit Court had discharged defendant’s lawyers and issued death warrant without a sufficient inquiry into defendant’s competence, and defendant’s discharged attorneys submitted a letter supporting petition. The Supreme Court determined that the organization had not made the necessary showing that it had any legal authority to bring the proceeding on defendant’s behalf, but that defendant’s discharged lawyers had the authority to challenge defendant’s competency to discharge them, and issued a writ of mandamus directing trial court to comply with certain directives and hold a hearing to determine defendant’s competency to waive any further challenges to his conviction and death sentence and his competency to be executed. Thereafter, the Supreme Court, on its own motion, dismissed the writ, prior to the date on which the competency hearing was scheduled to occur. Thereafter, substitute counsel were appointed for defendant, and the Circuit Court, following the evidentiary hearing, concluded that defendant was competent to waive any further challenges to his conviction and sentence and that he was competent to be put to death. Organization then filed request for the Supreme Court to act on its own motion and issue an order enforcing the writ of mandamus.

[ Holding: ] The Supreme Court, Balmer, J., held that the Circuit Court completed all procedural actions that writ of mandamus required, such that Supreme Court’s dismissal of the writ was warranted.

Request for enforcement denied.

Walters, J., dissented, with opinion, in which De Muniz, C.J., and Durham, J., joined.

De Muniz, C.J., dissented, with opinion, in which Durham and Walters, JJ., joined.

West Headnotes (5)

[1] Mandamus

Scope of inquiry and powers of court

Supreme Court would consider arguments made by anti-death penalty organization in its request to the Court to enforce writ of mandamus that the Court had dismissed on its own motion upon determining that trial court had complied with writ’s directives concerning determination of capital defendant’s competency to waive any further challenges to his conviction and death sentence and his competency to be executed, though organization lacked legal authority to seek to enforce the writ, as the Court would assume that, having dismissed the writ on its own motion, it could reinstate the writ on its own motion, if the dismissal of the writ had been issued by mistake or in error, and the Court would assume further that although organization had not established any authority to make its request, the Court was not precluded from considering its arguments in determining whether to act on its own motion. West’s Or.Rev. Stat. Ann. 34.105(4).

Cases that cite this headnote

Dismissal before hearing

Supreme Court’s dismissal of writ of mandamus it had issued directed at trial judge requiring him to take certain actions in connection with determining whether death warrant should issue for capital murder defendant was justified, though the evidentiary hearing that the writ required trial judge to conduct had not yet occurred, as trial judge had complied with other directives of the writ, the evidentiary hearing was scheduled to occur at time writ was dismissed, and this was sufficient for the Court to determine that the trial judge had complied with the writ, in that compliance did not require that the Court know what evidence would be offered or admitted at the hearing, nor did it require the Court to know the outcome of the hearing.

Cases that cite this headnote

Mandamus

Trial judge’s failure to have attorneys who had initially represented capital murder defendant present evidence at hearing concerning determination of defendant’s competency to waive any further challenges to his conviction and death sentence and his competency to be executed did not constitute noncompliance with Supreme Court’s directives in its writ of mandamus ordering trial judge to conduct competency hearing, though writ referred to these attorneys by name, as Court identified them by name in the writ because they were defendant’s recently discharged attorneys who were serving as stand-by counsel and who had filed petition that resulted in issuance of writ, the writ conferred no right on these attorneys to appear in any capacity other than as defendant’s counsel, and, following issuance of writ, these attorneys were determined to have a conflict of interest with defendant, and substitute counsel was appointed.

Cases that cite this headnote

Mandamus

Trial judge’s failure to sua sponte consider affidavit of neuropsychologist stating her opinion that capital murder defendant was not competent to be put to death at hearing concerning determination of defendant’s competency to waive any further challenges to his conviction and death sentence and his competency to be executed did not constitute noncompliance with Supreme Court’s directives in its writ of mandamus ordering trial judge to conduct the competency hearing, as the text of the writ did not direct the trial judge to consider this affidavit, nor did it order the trial judge to consider evidence regardless of whether it was offered by any party and was determined to be admissible, and defendant’s counsel, appointed after it was determined that his initial counsel had a conflict of interest with defendant, specifically decided not to offer the affidavit at the hearing.

Cases that cite this headnote

Mandamus

Trial judge’s alleged failure, in holding hearing mandated by Supreme Court to determine capital murder defendant’s competency to waive any further challenges to his conviction and death sentence and his competency to be executed, to hold a hearing at which “one side” contends that defendant was competent and the “other side” takes the contrary position, did not constitute noncompliance with Supreme Court’s writ of mandamus, as the writ did not direct “one side” to present evidence of defendant’s competence and the “other side” to present evidence to the contrary, but, rather, the writ simply ordered that a hearing be held at which the parties could offer evidence pertinent to defendant’s mental capacity to make a competent, knowing, and voluntary waiver of his rights and to the question of whether defendant was competent to be put to death.
Opinion

BALMER, J.

This matter comes to this court on a “request” that it enforce, on its own motion, an alternative writ of mandamus that it previously issued in connection with Gary Haugen’s death warrant proceeding. After that writ issued, this court determined that it had been complied with, and then sua sponte dismissed it. The request to now enforce the dismissed writ is premised on an assertion that the trial court did not comply with the writ. The request is filed by Oregon Capital Resource Center (OCRC), an organization that, when it attempted to participate in the earlier mandamus proceeding, failed to establish any right or authority to do so. As we will explain, we deny OCRC’s request, without deciding whether OCRC properly may make it, because we conclude that the judge to whom the writ was addressed has taken the actions that the writ required.

We begin by describing the procedural posture in which OCRC’s request arises. We then turn to the contrary arguments advanced by OCRC and the contrary legal analysis urged by the dissenting members of the court.

I. BACKGROUND

This court affirmed Haugen’s aggravated murder conviction and death sentence, State v. Haugen, 349 Or. 174, 243 P.3d 31 (2010). Judge Guimond, who had been the trial judge, then held a hearing on whether to issue the death warrant. Haugen was represented at the hearing by two lawyers, Simrin and Goody. Before the hearing, Haugen had made clear his desire to waive all further challenges to his conviction and sentence. Simrin and Goody, however, believed that Haugen was not competent to be executed. They filed a motion to declare Haugen incompetent, supported by Goody’s declaration that Haugen had been interviewed and evaluated by a neuropsychologist, Dr. Lezak, who had concluded that Haugen was not competent to be put to death.

At the hearing, before considering Simrin and Goody’s motion, Judge Guimond received a letter from Haugen, asking him to remove Simrin and Goody as his lawyers and to permit him to proceed pro se. Simrin and Goody objected to being removed as Haugen’s lawyers, arguing that Judge Guimond had to hold a so-called “Faretta” hearing before accepting Haugen’s waiver of counsel and permitting him to go forward without representation; Simrin and Goody urged that Lezak’s evaluation was relevant and necessary to that issue. Judge Guimond disagreed on the necessity of an evidentiary hearing, and instead conducted a colloquy with Haugen. After doing so, and after advising Haugen of the risks of proceeding without counsel, Judge Guimond found Haugen to be competent, concluded that he was knowingly choosing to proceed pro se, and discharged Simrin and Goody. Judge Guimond, however, simultaneously appointed Simrin and Goody as “stand by” counsel to provide legal advice to Haugen at any point at which he might want that advice. Judge Guimond then asked Haugen a series of questions. Based on Haugen’s responses to those questions, Judge Guimond concluded that Haugen was validly waiving his rights to further challenge his conviction and sentence. Judge Guimond issued a death warrant setting a date for Haugen’s execution.

After the death warrant issued, OCRC filed a petition for a writ of mandamus contending that the trial court had discharged Haugen’s lawyers and issued the death warrant without a sufficient inquiry into Haugen’s competence. In support of that petition, OCRC filed an affidavit by Lezak attesting that, in her opinion, Haugen was not competent to be executed. Simrin and Goody, Haugen’s discharged lawyers, submitted a letter supporting the petition. The state opposed the petition, arguing that OCRC lacked standing to file it. Haugen, appearing pro se, also opposed the petition, arguing principally that neither OCRC nor Simrin and Goody had authority to represent him or to seek relief on his behalf. Haugen also claimed that Simrin and Goody had divulged privileged and confidential attorney-client

Cases that cite this headnote

Attorneys and Law Firms

**70 Jeffrey E. Ellis, Oregon Capital Resource Center, Portland, filed the request and reply on behalf of Oregon Capital Resource Center.

Timothy A. Sylwester, Assistant Attorney General, Salem, filed the response for Adverse Party State of Oregon. With him on the response were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Greg Scholl, of Metropolitan Public Defender, Hillsboro, filed the response for Relator Gary Haugen.
communications in their letter to the court, without his authorization.

This court concluded that OCRC had not made the necessary showing that it had any legal authority to bring the proceeding on Haugen’s behalf. The court further concluded, however, that Simrin and Goody, as Haugen’s former lawyers, had authority to challenge Haugen’s competency to discharge them. We therefore construed Simrin and Goody’s letter as a petition for an alternative writ challenging certain findings, rulings, and orders that Judge Guimond had entered, including the order discharging Simrin and Goody without adequate procedures to determine Haugen’s competence to waive counsel and proceed pro se. Having so construed Simrin and Goody’s letter, this court issued an alternative writ of mandamus directed to Judge Guimond.

In the order issuing the writ, the court described the state of the record at that **72 point—Simrin and Goody had obtained Lezak’s evaluation, Lezak had concluded Haugen was not competent to be executed, and Simrin and Goody had sought an evidentiary hearing on the issue of Haugen’s competency, which Judge Guimond had denied. Given those facts, this court concluded that Judge Guimond had been obligated to follow certain statutory procedures—ones that he had not followed—before discharging Simrin and Goody and allowing Haugen to proceed pro se. In particular, the court noted, ORS 137.464 provides that, at a death warrant hearing, if a defendant wishes to waive his or her right to counsel and the trial court has “substantial reason to believe *330 that, due to mental incapacity, the defendant cannot engage in reasoned choices of legal strategy and options,” then the trial court “shall order” that the Oregon Health Authority or its designee assess the defendant’s mental capacity. The writ therefore directed Judge Guimond to vacate his related findings, rulings, and orders, including “[t]he finding that defendant Haugen is competent to waive his right to counsel” and “[t]he order removing Simrin and Goody as counsel for defendant Haugen[.]” Judge Guimond was ordered to then take the following further actions or to show cause for not doing so:

“1. Pursuant to ORS 137.464, order that the Oregon Health Authority or its designee perform an assessment of the defendant’s mental capacity to engage in reasoned choices of legal strategies and options;

“2. Pursuant to ORS 137.463(3) and (4), after completion of the assessment by the Oregon Health Authority or its designee and any other inquiry you deem appropriate, and before issuing a death warrant, hold an evidentiary hearing and

“a. permit Simrin and Goody to offer evidence pertinent to defendant Haugen’s mental capacity to make a competent, knowing, and voluntary waiver of his rights and to the question of whether defendant is competent for the purposes of being executed;

“b. advise defendant Haugen that he is entitled to counsel in any post-conviction proceeding and that counsel will be appointed if the defendant is financially eligible for appointed counsel at state expense;

“c. determine whether defendant [Haugen] wishes to waive counsel, and whether that waiver is competent, knowing, and voluntary;

“d. make findings on the record whether defendant Haugen suffers from a mental condition that prevents Haugen from comprehending the reasons for the death sentence and its implication; and

“e. determine whether defendant Haugen intends to pursue any challenges to the sentence or conviction and, if not, advise defendant Haugen of the consequences and make a finding on the record whether the defendant competently, knowingly, and voluntarily waives the right to pursue available challenges to his death sentence.”

*331 The alternative writ issued on June 29, 2011. Immediately after it issued, Haugen wrote letters to this court vigorously objecting to its issuance. Among other points, he objected to having Simrin and Goody reinstated as his attorneys, asserting that they had a conflict of interest in representing him. Haugen also objected to any use or disclosure of Lezak’s evaluation or her opinion of his competency without his written consent. Haugen asserted that his interview with Lezak was confidential and subject to a privilege that he had not waived; that Simrin and Goody had not adequately advised him in connection with Lezak’s evaluation; and that Simrin and Goody’s actions in disclosing Lezak’s opinion without his consent were both unethical and illegal. Haugen asked this court, if it determined that Haugen did not have a right to object to the release of information about Lezak’s examination, to appoint independent counsel to represent him on that issue.

This court responded to Haugen by letter, advising him that the case had been returned to the circuit court, where further proceedings were to be conducted. The court informed Haugen that copies of his letters raising his objections would be provided to Judge Guimond. The court’s letter also acknowledged Haugen’s request to have separate counsel appointed to represent him on **73 “medical records and other issues.” The letter advised
Haugen that copies of his letters would be forwarded to the Office of Public Defense Services for “their consideration and further action as warranted.” The court’s letter so advising Haugen was copied to, among others, Judge Guimond and all counsel involved, including Simrin and Goody.

Meanwhile, Judge Guimond opted to comply with the writ rather than show cause for not doing so. Judge Guimond promptly reinstated Simrin and Goody as Haugen’s counsel. He also directed the Oregon Health Authority to assess Haugen’s competence. Finally, he scheduled an evidentiary hearing to determine Haugen’s competence, to be held after that evaluation was completed.

On July 14, 2011, Haugen notified Judge Guimond that he wanted Simrin and Goody to be removed as his counsel. Haugen did not, however, ask to proceed pro se. Instead, Haugen requested substitute counsel. In making that request, Haugen raised substantially the same issues that he had raised with this court immediately after the writ issued—including that Simrin and Goody had violated the confidentiality of his examination by disclosing the results without his consent and that they had acted unethically and illegally. Judge Rhoades, rather than Judge Guimond, presided at the hearing on Haugen’s motion for substitution. She determined that a conflict of interest existed between Haugen and his counsel, based on an irremediable breakdown in their attorney-client relationship. Judge Rhoades accordingly removed Simrin and Goody as Haugen’s counsel and ordered a substitution of counsel. Within a few days, different lawyers—Scholl and Gorham—were appointed to represent Haugen.

On July 15, 2011, Simrin and Goody filed a second petition for a writ for mandamus, challenging Judge Rhoades’s decision to remove them as Haugen’s counsel and to substitute different counsel in their place. This court denied that petition three days later.

On August 5, 2011, this court on its own motion dismissed the alternative writ that had issued on June 29, 2011, directing Judge Guimond to take particular actions in connection with the death warrant proceedings. The court did so, reciting that Judge Guimond had notified the court that he would comply with the alternative writ and that, “[f]rom our review of [the] OJIN [register] entries, it appears that Judge Guimond has taken the actions necessary to comply with that writ.” As noted, Judge Guimond had vacated his earlier orders and had taken certain other actions directed by the writ. The evidentiary hearing that the writ contemplated, although scheduled, had not yet occurred when that dismissal order issued. Neither the parties to the writ proceeding nor OCRC objected to the writ’s dismissal, however.

After substitute counsel were appointed to represent Haugen, Dr. Hulteng was selected to perform the evaluation of Haugen on behalf of the Oregon Health Authority. Hulteng performed that evaluation and submitted his assessment that Haugen is competent. Judge Guimond then held a hearing at which the lawyers for the parties were permitted to offer further evidence on Haugen’s competency. At that hearing, Scholl, Haugen’s lead counsel, did not offer Lezak’s affidavit or other evidence of Lezak’s opinion of Haugen’s competency. Rather, the only expert evidence presented at that hearing was Hulteng’s evaluation. Hulteng’s written report was placed in evidence, and Hulteng testified at the hearing. Counsel for both sides questioned Hulteng about his assessment of Haugen’s mental competence. At the conclusion of the hearing, based on Hulteng’s written report and in-court testimony, Judge Guimond concluded that Haugen was competent to waive any further challenges to his conviction and sentence and that he is competent to be executed.

** 74 II. COMPLIANCE WITH THE WRIT

A. OCRC’s Request and Status

[1] On October 17, 2011, OCRC filed the “request” that brings this matter before the court. OCRC’s specific request is for “this court and/or the Chief Justice to act on its own motion and issue an order enforcing [the] alternative writ of mandamus.”

The threshold problem with OCRC’s request is that it is made by OCRC, rather than by a party with a demonstrated interest in the proceeding. In the order issuing the alternative writ of mandamus, we stated that “OCRC has not made the necessary showing of legal authority to bring this proceeding on behalf of Haugen under ORS 34.105(4).” We concluded that Simrin and Goody had authority to seek mandamus, because the trial court had permitted Haugen to discharge them and proceed pro se without first holding a hearing to determine his competence to do so. In its request to now enforce the writ of mandamus, OCRC has not offered any additional reason why it was entitled in that original petition to seek mandamus on Haugen’s behalf. If OCRC lacked authority to seek a writ of mandamus in the first place, it necessarily follows that it lacks authority to seek to enforce the writ that we issued.
For present purposes, however, we assume that this court, having dismissed the writ on its own motion, could reinstate the writ on its own motion, if the dismissal had been issued by mistake or in error. And we assume further that, although OCRC has not established any authority to make the request that it makes, we are not precluded from considering its arguments in determining whether to act on our own motion. We look past those potential issues because the trial court fully complied with the writ.

B. Judge Guimond’s Actions after the Writ Issued

[2] We have already quoted the writ, at length and verbatim. The operative directives were straightforward in what they required. As pertinent here, the terms of the June 29, 2011, alternative writ stated four directives to Judge Guimond: to vacate certain findings and orders; to order the Oregon Health Authority or its designee to conduct an assessment of defendant Haugen’s competence; to hold a hearing to determine Haugen’s competence after receiving that assessment; and to permit Haugen’s counsel at that hearing to offer evidence bearing on Haugen’s competence.

Judge Guimond has complied with those directives. In particular, he

• vacated his earlier orders and, in doing so, reinstated Simrin and Goody as Haugen’s counsel;

• ordered the Oregon Health Authority to perform an assessment of Haugen’s mental capacity pursuant to ORS 137.464, which Hulteng then performed;

• held an evidentiary hearing to determine Haugen’s mental capacity before issuing a death warrant; and

• permitted Haugen’s counsel at that hearing to offer further evidence pertinent to Haugen’s mental capacity.

Those were the actions that the writ contemplated. When this court dismissed the writ on August 5 after concluding that it had not yet occurred. But it was scheduled to occur. That was sufficient for this court to determine that Judge Guimond had complied with the writ. Compliance did not require that the court know what evidence would be offered or admitted at the hearing; compliance did not require the court to know the outcome of the hearing.

Our dismissal of the writ was correct when it issued on August 5. It remains correct now. The writ required Judge Guimond to take the steps outlined above, which he had committed to doing when the dismissal occurred, and which he has since done. Judge Guimond followed through on all procedural actions that our writ required. No further enforcement of the writ is necessary or appropriate.

**75 III. THE ARGUMENTS TO THE CONTRARY

We turn to the arguments to the contrary advanced by OCRC and the two dissenting opinions. Those arguments center on three issues: (1) whether our writ commanded that Simrin and Goody have a role in the death warrant proceedings regardless of their status as Haugen’s lawyers; (2) whether our writ commanded that Lezak’s opinion on Haugen’s competency be considered by Judge Guimond regardless of whether any party to the proceeding offered it in evidence; and (3) whether the evidentiary hearing held by Judge Guimond comported with due process requirements. We address those issues in turn. Although we ultimately disagree with the conclusions reached in the dissenting opinions, we do so with respect for the legal analyses that are offered in those opinions and for the views of the members of the court who have authored and have joined them.

*336 A. The Role of Simrin and Goody

[3] Both dissenting opinions argue that Judge Guimond failed to comply with this court’s writ because he did not have Simrin and Goody present evidence regarding Haugen’s competency at the evidentiary hearing conducted after issuance of the writ. The dissents rely on the fact that the writ referred to Simrin and Goody by name. Their position in that regard, however, fails to take into account (a) the context in which the writ issued; (b) the text of the writ itself; (c) the proceedings in the trial court and this court following the June 29, 2011, writ; and (d) the events that did and did not transpire at the post-writ evidentiary hearing held by Judge Guimond.

First, the court issued the writ because it concluded that Simrin and Goody’s status as Haugen’s “stand by” counsel after the trial court had allowed Haugen to discharge them permitted them to take—or at least did not prohibit them from taking—“any legal action to challenge Haugen’s competency to discharge them.” Accordingly, we construed Simrin and Goody’s letter to the court as a petition for an alternative writ of mandamus and, on that basis, issued the writ. Simrin and Goody thus were not lawyers who were strangers to the case petitioning to
participate in the proceedings; rather, as our order explained, they were Haugen’s recently discharged counsel—now serving as “stand by” counsel for him in the death warrant proceeding at issue. Moreover, Haugen had just been found by the trial court to be competent (without the trial court having the benefit of expert testimony), had waived his rights to further challenges to his sentence, and had been given an execution date—all at a hearing in which he was not represented by counsel. For those reasons (among others), we issued the June 29 writ directing Judge Guimond to vacate his earlier rulings, to order an examination by the Oregon Health Authority, and to hold an evidentiary hearing pursuant to the procedures prescribed by ORS 137.463 and ORS 137.464.

It was in that context that we directed Judge Guimond to “permit Simrin and Goody to offer evidence pertinent to defendant Haugen’s [competence].” Nothing in the court’s order issuing the writ conferred any special “ombudsman,” “next friend,” or similar status on Simrin and Goody. *337 Rather, it identified them by name because they were Haugen’s recently discharged lawyers and had filed the petition that resulted in the issuance of the writ.

Second, the text of the writ itself stated that the trial court should “permit Simrin and Goody to offer evidence pertaining to Haugen’s mental state. The writ conferred no right on them to appear in any capacity other than as Haugen’s counsel. It did not require Judge Guimond to permit them, as opposed to other counsel for Haugen, to appear at the hearing. The writ did not require Simrin and Goody to offer any evidence. **76 It did not require Simrin and Goody to offer, or the trial court to admit, any particular evidence, including the Lezak affidavit.

If there were any question about Simrin and Goody’s role as contemplated by the June 29 writ, that question is answered by events that occurred following the issuance of the writ. As we have noted, Haugen wrote this court asserting that Simrin and Goody had a conflict of interest, and removed Simrin and Goody. Judge Rhoades also appointed Scholl and Gorham to represent Haugen. Simrin and Goody filed a mandamus petition seeking reversal of the order, and this court—unanimously—denied that petition on July 18, 2011.

This court was aware that those events had taken place on August 5, when it determined on its own motion that Judge Guimond had complied with the writ and dismissed it. If this court had viewed the June 29 writ as requiring Simrin *338 and Goody specifically—as opposed to other duly appointed counsel—to participate at the death warrant hearing, it would have granted their mandamus petition challenging their removal. Likewise, if this court had viewed the writ as requiring Simrin and Goody specifically—as opposed to other duly appointed counsel—to participate in the death warrant hearing, this court would not have concluded that Judge Guimond had complied with the June 29 writ and would not have dismissed it on its own motion. Simply put, those actions by this court cannot be reconciled with the dissents’ views that the June 29 writ required that Simrin and Goody personally participate in the death warrant hearing and present evidence despite their status as lawyers who no longer represented Haugen and who have a conflict of interest with him.*

Finally, what occurred at the post-writ evidentiary hearing itself demonstrates that no one, including Simrin and Goody, interpreted the writ as mandating that they appear personally and present evidence on Haugen’s competency, regardless of their status. At that hearing, Haugen was represented by counsel; he did not appear pro se, as he had in the initial death warrant hearing that led to issuance of our writ. Judge Guimond did not find Haugen to be competent based solely on his own colloquy with Haugen, as happened in the initial death warrant hearing. Instead, Judge Guimond also relied on the evidence presented by the parties at the evidentiary hearing, as our writ required. The evidence both parties chose to present was Hulteng’s evaluation—which was the expert evaluation contemplated by the statutory procedure that our writ ordered Judge Guimond to invoke. Simrin and Goody did not appear at the hearing, did not seek to participate, and did not offer evidence. Their inaction at least suggests that they, too, understood the writ to be *339 directed to them only insofar as they remained Haugen’s lawyers.

**77 B. The Lezak Affidavit

[4] In urging that the writ must be enforced because Judge Guimond has not complied with it, OCRC’s arguments
rest principally on the assertion that the writ required Judge Guimond to consider Lezak’s evaluation in making the competency determination. The dissenting opinions agree. Our writ, however, did not order Judge Guimond to do so.

To state the obvious first: the text of the June 29 writ does not direct Judge Guimond to consider the Lezak affidavit. Had this court concluded that a reliable determination of Haugen’s competence could not be made without evidence of Lezak’s expert opinion, it would have directed Judge Guimond specifically to consider the Lezak affidavit, in terms that expressed that obligation. The writ, however, contained no such directive. Insofar as Lezak’s opinion of Haugen’s mental competency in particular was concerned, the writ did not refer to it at all in the directives issued to Judge Guimond.\(^\text{8}\) Rather, the writ was open-ended: Haugen’s lawyers could “offer evidence pertinent to defendant Haugen’s mental capacity to make a competent, knowing, and voluntary waiver of his rights and to the question of whether defendant is competent for the purposes of being executed.” The writ did not order Judge Guimond to consider evidence \(^\text{340}\) regardless of whether it was offered by any party and was determined to be admissible. Nothing in the writ prejudged what evidence Haugen’s lawyers might offer or preempted any disputes that might arise over evidence offered by either side. Instead, the writ commanded Judge Guimond to hold an evidentiary hearing, which he has done. It also commanded Judge Guimond to permit Haugen’s lawyers to offer evidence pertinent to Haugen’s competency, which he has also done. The writ ordered nothing more, and nothing less.

As events transpired, Simrin and Goody were replaced by Scholl and Gorham because Simrin and Goody had a conflict of interest with Haugen. Scholl, as Haugen’s lead counsel, independently assessed the evidence on Haugen’s competency, the legal issues involved, and his own ethical obligations to his client. Scholl properly did not consider himself bound to pursue whatever legal strategies and positions Simrin and Goody had pursued, as opposed to assessing those matters anew. Scholl decided to rely on Hulteng’s evaluation, which was the expert evaluation contemplated by the statutory procedure that our writ ordered Judge Guimond to follow. Scholl specifically decided not to submit the Lezak affidavit at the evidentiary hearing.\(^\text{3}\) By \(^\text{341}\) directing Judge **78** Guimond to permit Haugen’s lawyers to offer evidence pertinent to Haugen’s competency, the writ referred to the judgment of Haugen’s lawyers to decide what evidence to offer. That deference is consistent with how this court approaches virtually all significant legal proceedings, including those in death penalty proceedings.

The dissenting opinions question how a majority of this court can now conclude that Judge Guimond complied with this court’s writ, when Simrin and Goody did not participate in the hearing and the Lezak affidavit was not considered. The reasons we have set forth above answer their question: Simrin and Goody presumably (and correctly) understood that, once they had been replaced as counsel by Judge Rhoades (with this court unanimously declining to vacate that action), they had no role to play in the hearing; they did not seek to appear at or participate in the hearing or to introduce the Lezak affidavit; and nothing in the order required Judge Guimond to sua sponte consider the Lezak affidavit.

C. The Evidentiary Hearing on Haugen’s Competency

\(^\text{3}\) As noted, after Hulteng performed his evaluation of Haugen as the designee for the Oregon Health Authority, Judge Guimond held an evidentiary hearing to determine Haugen’s competency. At that hearing, Haugen was represented by Scholl and Gorham, rather than by Simrin and Goody. As required by our June 29 writ, Judge Guimond permitted Scholl and Gorham, as Haugen’s counsel, “to offer evidence pertinent to defendant Haugen’s [competence],” and they did so. As already described, Scholl, as Haugen’s lead counsel, decided not to offer the Lezak affidavit; he relied on Hulteng’s expert evaluation instead. Judge Guimond was presented with both Hulteng’s written report and his testimony. Both parties examined Hulteng about his conclusions. No one has come to this court—including OCRC—challenging Hulteng’s credentials, the thoroughness of his evaluation, or even his expert opinion. Judge Guimond made findings of fact based on the evidence so presented and concluded that Haugen was competent.

\(^\text{342}\) Justice Walters argues in dissent that Judge Guimond failed to comply with the writ because he did not hold a hearing at which “one side contends that Haugen is competent” and the “other side takes the contrary position * * *.” However, our writ did not direct “one side” to present evidence of Haugen’s competence and the “other side” to present evidence to the contrary. Rather, the writ simply ordered that a hearing be held at which the parties could “offer evidence pertinent to defendant Haugen’s mental capacity to make a competent, knowing, and voluntary waiver of his rights and to the question of whether defendant is competent for the purposes of being executed [.]” The two “sides” at the hearing were the state and Haugen. Consistent with Oregon statutes and our adversarial legal system, the parties to the proceeding were permitted to present what
To the extent that OCRC and the dissents argue that the United States Supreme Court’s decisions in *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), and *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), require a different result, they read those cases for more than they hold. Those cases stand for the principle that, when a prisoner seeks a stay of execution and makes a “substantial threshold showing of insanity,” due process requires that the state provide the prisoner with a hearing at which both the prisoner and the state are free to put on evidence. *Panetti*, 551 U.S. at 949–50, 127 S.Ct. 2842 (summarizing Justice Powell’s opinion concurring in part and concurring in the judgment in *Ford*).10 Neither the controlling opinion in *Ford* nor the majority opinion in *Panetti* suggests that the procedure that the trial court followed in this case violates the Due Process Clause.

*343 IV. CONCLUSION*

This court’s June 29 writ commanded Judge Guimond to take four actions pertinent here. He was to vacate certain findings and orders; to order the Oregon Health Authority or its designee to conduct an assessment of defendant Gary Haugen’s competence; to hold a hearing to determine Haugen’s competence after receiving that assessment; and to permit Haugen’s counsel at that hearing to offer evidence bearing on Haugen’s competence. Four members of this court so understood the writ so understood it still. *A fortiori*, those are the writ’s terms. Judge Guimond has complied with those directives.

The writ set out the directives described above. It did not require that particular evidence be provided to or considered by Judge Guimond, and it did not direct Judge Guimond to consider the Lezak affidavit regardless of whether Haugen’s lawyers offered it in evidence. The writ did not give Simrin and Goody a personal right or legal role entitling them to present evidence on Haugen’s competence—their status was, and is, that of former lawyers for Haugen who have been discharged due to a conflict of interest and replaced by other duly appointed counsel. The writ did not preempt Haugen’s counsel from choosing what evidence to offer at the evidentiary hearing based on their assessment of the evidence, the law, and their ethical responsibilities to their client. The adversarial process would be ill-served were we to prevent Haugen’s lawyers from making those choices, or were we to take action to override or circumvent those choices. We did not do so in issuing the writ, and we decline to do so now, on our own motion, by enforcing the writ on revised terms.

Our conclusion that Judge Guimond has complied with the writ, of course, does not make this case any less fraught or sobering. We agree with the dissenting opinions that, as this court and the United States Supreme Court have said, “death is different.” *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *State v. Haugen*, 349 Or. 174, 203, 243 P.3d 31 (2010). And we agree that the procedures established by the legislature that can *lead to an execution must be followed scrupulously. We share the dissenters’ premise that every death penalty case raises the most profound issues of morality and social justice. The record before us, however, demonstrates no legal error in Judge Guimond’s conduct of the proceedings to determine Haugen’s competence, nor any failure on his part to comply with the terms of our writ.

The request submitted by Oregon Capital Resources Center to enforce the June 29, 2011, writ is denied.

WALTERS, J., dissented and filed an opinion in which DE MUNIZ, C.J., and DURHAM, J., joined.

DE MUNIZ, C.J., dissented and filed an opinion in which DURHAM and WALTERS, JJ., joined.

WALTERS, J., dissenting.

Because the law requires Judge Guimond to decide whether Haugen is mentally competent to be executed and because Judge Guimond has not yet considered expert testimony relevant to that issue, this court should not conclude that Judge Guimond “has complied” with this court’s alternative writ of mandamus. That writ permitted counsel to present a challenge to Haugen’s mental competence and evidence of Haugen’s incompetence. Until Judge Guimond hears and considers that challenge and evidence, no death warrant should issue.

Before the death warrant hearing that Judge Guimond conducted on May 18, 2011, Haugen’s lawyers, Simrin and Goody, filed a motion pursuant to
137.463(4)(a), asking Judge Guimond to find that Haugen was not mentally competent to be executed or to set a hearing to consider evidence on that issue. Simrin and Goody explained that a neuropsychologist, Dr. Muriel Lezak, had conducted a neuropsychological assessment of Haugen’s mental capacity and had informed them that she was prepared to testify to her opinion that Haugen was not mentally competent to be executed.¹ Judge Guimond declined to entertain Simrin’s and Goody’s motion or the evidence that they proffered. Instead, after discharging Simrin and Goody at Haugen’s request, Judge Guimond permitted Haugen to withdraw the motion. Judge Guimond then conducted a colloquy with Haugen and issued a death warrant.

This court issued its alternative writ of mandamus on June 29, 2011. This court explicitly ordered Judge Guimond to conduct a new “evidentiary hearing” and, at that hearing, to permit “Simrin and Goody” to “offer evidence pertinent to * * * the question of whether defendant Haugen is competent for the purposes of being executed.” (Emphases added.) The terms and context of that order required Judge Guimond to conduct the evidentiary hearing that Simrin and Goody had sought and to hear the evidence that they had proffered. This court’s direction to Judge Guimond was not limited to ensuring that Haugen was represented by competent counsel or was mentally competent to waive his right to counsel. This court ordered Judge Guimond to reinstate Simrin and Goody—lawyers who intended to challenge Haugen’s competence to be executed—and to permit them to present evidence pertaining to that challenge—the testimony of Lezak.

This court anticipated that, at the evidentiary hearing that it ordered, the state and Haugen would take the position that Haugen is mentally competent to be executed. This court anticipated that Simrin and Goody would take the contrary position that Haugen is not mentally competent to be executed and to offer Lezak’s testimony to prove that fact. This court adhered to the view that “truth * * * is best discovered by powerful statements on both sides of the question[,]” United States v. Cronic, 466 U.S. 648, 655, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (internal citations omitted), and issued its writ to ensure that the issue of Haugen’s mental competence to be executed would be tested, as our system tests all questions of fact, by subjecting it to the crucible of the adversary process.

This court now knows that Simrin and Goody no longer represent Haugen and that no lawyer has filled the role that it anticipated that Simrin and Goody would fill. No lawyer has challenged Haugen’s mental competence to be executed or presented Lezak’s opinion that he is incompetent. Because Judge Guimond has not heard or considered that challenge or that evidence, this court cannot conclude that Judge Guimond “has complied” with this court’s order.

When this court entered its order dismissing the alternative writ of mandamus, it acted prematurely. ORS 34.250(6) provides that if the judge or court whose action is being challenged by a petition for a writ of mandamus “performs the act * * * required by the alternative writ,” the relator shall notify, and the judge, court, or any party may notify, the Supreme Court that the judge or court “has complied.” (Emphases added.) In this case, after this court entered its writ, Judge Guimond notified this court that he “would comply,” and this court dismissed its writ on that basis. In fact, however, neither the relator, the judge, nor any party has notified us that Judge Guimond “has complied” with this court’s order as ORS 34.250(6) requires. At the time that the court entered its order of dismissall, Judge Guimond had not held an evidentiary hearing as to Haugen’s mental competence to be executed, and this court did not know what evidence he would consider on that issue. This court should recall its order of dismissal and enter further orders enforcing and, if necessary, clarifying its writ.

This court should order Judge Guimond to vacate the findings and conclusions that he entered on October 7, 2011, stay Haugen’s execution, and hold an evidentiary hearing on the issue of Haugen’s mental competence to be executed. This court should order Judge Guimond to grant Simrin and Goody the status necessary to permit them to challenge Haugen’s mental competence, or appoint alternate counsel to serve in that role. See Wright v. Thompson, 324 Or. 153, 157, 922 P.2d 1224 (1996) (assuming, arguendo, that Oregon law may provide third-party standing to seek relief for an incompetent convicted defendant); Ford v. Haley, 179 F.3d 1342 (11th Cir.1999) (capital defendant’s former lawyer retained standing to file appeal challenging district court’s finding that capital defendant is mentally competent to discharge former counsel and its dismissal of habeas action); Mason by and through Marson v. Vasquez, 5 F.3d 1220, 1223 (9th Cir.1993) (for purpose of competency hearing, court permitted participation of lawyer that defendant had discharged); and Lenhard v. Wolff, 603 F.2d 91, 92–93 (9th Cir.1979) (per curiam) (dismissing writ of habeas corpus filed by capital defendant’s former lawyers for lack of standing, but suggesting that result would have been different if there had been evidence that defendant was incompetent). This court should require Simrin and Goody, or alternate counsel, to present relevant evidence of Haugen’s incompetence, including Lezak’s assessment, opinion, and testimony. Finally, this court should grant
Judge Guimond the alternative of contesting this court’s order and proceeding with briefing and oral argument.

Clearly, those are actions that this court has the jurisdiction and authority to order. Article VII (Amended), section 2, of the Oregon Constitution expressly confers on this court authority to, “in its own discretion, take original jurisdiction in mandamus * * * proceedings.” If this court chooses to exercise that discretion (as it did in this case when it initially issued its June 29 order allowing the requested alternative writ of mandamus), it has at its disposal “all the means to carry [that jurisdiction] into effect[,]” ORS 1.160, 2 including, particularly, the authority to recall its own erroneous dismissal of a writ so that it may enforce or clarify that writ or determine whether the acts required have been performed.3

**82 **348 In this case, Judge Guimond’s failure to hear and consider Lezak’s opinion that Haugen is incompetent to be executed presents serious constitutional implications. The Eighth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits a state from carrying out a sentence of death when a prisoner is not competent to be executed. Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007); Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). If a prisoner makes “a substantial threshold showing of insanity,” the protection afforded by procedural due process includes a ‘fair hearing’ in accord with fundamental fairness.” Panetti, 551 U.S. at 949, 127 S.Ct. 2842 (quoting Ford, 477 U.S. at 426, 106 S.Ct. 2595 (Powell, J., concurring)). Such a hearing must include the opportunity to submit “evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.” Id. at 950, 127 S.Ct. 2842 (quoting Ford, 477 U.S. at 427, 106 S.Ct. 2595 (Powell, J., concurring)). To ensure that Oregon acts consistently with those constitutional mandates, Oregon law requires that a trial judge conduct a death warrant hearing in every case in which a defendant is sentenced to death, make an “appropriate inquiry” as to the defendant’s mental capacity, and make findings on the record on that issue. ORS 137.463(2), (4)(a).

When this court reviewed the letter from Simrin and Goody that it construed as a petition for a writ of mandamus, it was not convinced that the death warrant hearing that Judge Guimond had conducted on May 18, 2011, satisfied those constitutional and statutory requirements. This court knew that a man’s life hung in the balance, and it was not willing to tolerate the risk that, because Judge Guimond had failed to conduct an evidentiary hearing on the issue of Haugen’s mental competence and to consider the expert evidence of Haugen’s mental incompetence that his lawyers had proffered, Judge Guimond had wrongly issued a death warrant. See Beck v. Alabama, 447 U.S. 625, 637–38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (Supreme Court decided that it could not tolerate a risk created by the lack of a different procedural safeguard—the opportunity for a jury to consider convicting the defendant of a lesser-included offense).

Death is different in kind from all other sentences and requires heightened judicial scrutiny:

“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”


The majority agrees that death is, indeed, different, see State v. Haugen, 349 Or. 174, 203, 243 P.3d 31 (2010) (“To state the obvious, the penalty of death is different in kind from incarceration”), and apparently assessed OCRC’s request that we enforce our writ of mandamus in that light. However, in declining to take action in response to the information that OCRC provided, the majority **83 does not meet this court’s obligation to see that Judge Guimond follows the constitutional and statutory procedures necessary to ensure the reliability of his decision.
The majority concludes that Judge Guimond “has complied” with this court’s order because it does not interpret *350 the writ to require Judge Guimond to consider Lezak’s opinion. In the majority’s view, it is enough, under the express terms of the writ, that Haugen had counsel—Scholl—and that Scholl chose not to present Lezak’s opinion. The problem with that view is that Scholl’s representation does not meet the terms or the purpose of the writ. The terms and purpose of the writ require that Judge Guimond hear from lawyers who take a position contrary to Haugen’s and consider expert evidence that Haugen is mentally incompetent to be executed. In the affidavit that Scholl filed with this court, Scholl acknowledges that he did not advocate for that position or present that evidence. Scholl explains his belief that he is ethically required to abide by Haugen’s decisions and to advance Haugen’s personal position as Haugen directs.

The stark problem that this court faces is that two sets of lawyers have reached two contrary conclusions as to Haugen’s mental competence to be executed. If Haugen is mentally competent, then he is entitled to determine his legal strategy and ask to be executed. Scholl represents that position. If Haugen is not mentally competent, the court must appoint lawyers to represent his best interests and advance legal positions in accordance with those interests. Simrin and Goody represent that position.4 No neutral judge has decided which of those two sets of lawyers is correct. To this date, Judge Guimond has not conducted an evidentiary hearing at which one side contends that Haugen is competent, and the other side takes the contrary position, and presents Lezak’s testimony and other evidence in support of that position, as Simrin and Goody were prepared to do. Haugen may be correct that he is mentally competent to be executed, and he certainly is entitled to the assistance of counsel in pressing that point. However, Oregon law requires a neutral judge, and not Haugen or lawyers acting at his direction, to decide that *351 question of fact. ORS 137.463(4)(a). And a neutral judge cannot make that decision until the judge conducts a “fair hearing” in accordance with the Constitution of the United States and makes an “appropriate inquiry” as required by Oregon law, considering not only the evidence that Haugen, or lawyers acting at his direction, wish to offer, but also the evidence of Haugen’s incompetence. See Panetti, 551 U.S. at 949, 127 S.Ct. 2842 (requiring “fair hearing”); ORS 137.463(4)(a) (requiring “appropriate inquiry”).

The majority decides otherwise and finds significance in this court’s denial of Simrin and Goody’s petition for a writ of mandamus, in which they objected to the substitution of Scholl as counsel for Haugen. At the time that this court denied that petition, however, this court did not know that Scholl would not proceed as Simrin and Goody had and would not challenge Haugen’s mental competence or offer relevant evidence of Haugen’s incompetence, including Lezak’s testimony. Had Scholl done so, there would have been no question that the terms and purpose of the writ had been met. And, in any event, denial of a petition for writ of mandamus does not constitute a ruling on the merits of the issues raised. See North Pacific v. Guarisco, 293 Or. 341, 346 n. 3, 647 P.2d 920 (1982) (because mandamus is extraordinary and discretionary remedy, denial of petition is not binding on determination of issue); State ex rel. Venn v. Reid, 207 Or. 617, 633, 298 P.2d 990 (1956) (nothing said in denying writ “is res judicata as to the merits of the controversy”).

The majority also suggests that Scholl’s decision not to present Lezak’s opinion was **84 manifestly correct and this court should defer to Scholl’s expertise. The majority notes that Scholl stated that he could have offered Lezak’s affidavit if he had thought that it would be useful, but that he had decided not to do so because the affidavit “did not seem thorough or complete,” and he “would not try to establish anyone’s incompetency in court or otherwise with the information in that document.” However, when OCRC filed Lezak’s affidavit in this court, it did not intend that that affidavit would substitute for Lezak’s testimony.5 It is therefore not *352 surprising that Lezak’s affidavit summarized her conclusions and itself was not thorough or complete. If Simrin and Goody, or alternate counsel, had been permitted to offer Lezak’s opinion, they certainly would have offered more than Lezak’s affidavit.

In the affidavit that he filed with this court, Scholl does not aver that he had actually interviewed Dr. Lezak to learn the basis for her conclusions or that he had asked her for a more complete report. Nevertheless, Scholl decided that Haugen was mentally competent and that he must abide by Haugen’s directions. Whether Scholl was correct in that decision is not, however, the question before us. The question before us is, instead, whether Judge Guimond himself should hear, consider, and evaluate all of the relevant evidence.

It is true that Judge Guimond held an evidentiary hearing on September 27, 2011, and that Haugen had legal counsel at that hearing.6 But at that September hearing, as at the May hearing, Judge Guimond again heard only the evidence that Haugen chose to present. That Haugen was represented by counsel in September does not change the fact that, on both occasions, Haugen controlled the evidence of his own competence that Judge Guimond heard and considered. It is wrong for this court to refuse to acknowledge that that circumstance resulted in a
flawed procedure—one in which Judge Guimond failed to consider relevant expert evidence of Haugen’s incompetence. And it is wrong for this court to refuse to correct that error.

I firmly believe that the writ that this court issued required Judge Guimond to permit Simrin and Goody, or if necessary, other alternate lawyers, to present a challenge to *353 Haugen’s mental competence to be executed and the opinion of Lezak that Haugen is incompetent. If, however, because this court failed to anticipate Simrin and Goody’s discharge as counsel for Haugen, the writ was not sufficiently clear then, this court should accept responsibility and issue a more specific order now. But either way, this court should act.7

In a death warrant proceeding, it is the trial judge who decides whether, as a matter of fact, a defendant who is sentenced to death is mentally competent to be executed. ORS 137.463(4)(a). This court must ensure that the procedure that the trial judge uses to make that factual decision accords with constitutional and statutory mandates. If the required procedure is followed, then, like the rest of society, this court trusts that whatever factual decision the trial judge makes will be the correct one. The correct procedure helps ensure the reliability of the result. In a death warrant hearing, the result affects not only the defendant, who has committed unthinkable crimes warranting a **85 death sentence, but also the people of this state who impose that penalty. For society, what is at stake is ‘our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name.’ " Whitmore v. Arkansas, 495 U.S. 149, 172, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (Marshall, J., dissenting) (quoting Franz v. Lockhart, 700 F.Supp. 1005, 1024 (E.D.Ark.1988)). The majority errs in concluding that the procedure that has been followed in this case is sufficient to that end.

Every day I trust that truth will be the victor if the facts are subjected to a fair adversary process. When I am assured that a fair process has been followed, I trust the decision of the judge or jury to such an extent that I can join my colleagues in affirming the sentence that results—even a death sentence that will be carried out, at least in part, in my name. But here, I have no such assurance, and I can neither trust nor join.

I can only, respectfully, dissent.

*354 DE MUNIZ, C.J., dissenting.

I join with Justice Walters’s dissent, but write separately in an effort to clarify the issues, at least as they appear to me.

The alternative writ of mandamus that this court issued was clear on its face. It expressly required the trial court to take certain actions or show cause for not doing so. Those actions were: (1) order the Oregon Health Authority to assess Haugen’s mental capacity; (2) hold an evidentiary hearing to determine whether, as a matter of law, he was competent to be executed; and (3) permit lawyers Simrin and Goody—identified by name in the writ—to submit evidence regarding Haugen’s capacity to make a competent, knowing and voluntary waiver of his right to counsel, as well as evidence pertaining to his mental competency. The trial court, for its part, agreed to follow the requirements set out in the writ.

With regard to the competency hearing that was to follow, it is a certainty that Simrin and Goody would have offered into evidence the opinion and testimony of Dr. Muriel Lezak, Ph.D., a neuropsychologist licensed to practice psychology in Oregon and a Professor Emerita, Neurology, at Oregon Health Sciences University—that is, had they been given the opportunity to do so. Lezak is an acknowledged authority in the field of neuropsychology and her book, Neuropsychological Assessment, is recognized as an authoritative text on the subject.1 At the behest of Simrin and Goody, Lezak conducted a five-hour neuropsychological assessment of Haugen and executed a sworn affidavit that was subsequently tendered to this court setting out her ultimate conclusions in writing. In it, Lezak stated that, in her professional opinion, Haugen

“does not have a ‘rational understanding’ of the connection between the crime and the punishment in this case. *355 Instead, in my opinion he suffers from a delusional disorder that makes him incompetent to be executed.”

She also stated that she was willing to testify regarding that opinion and the reasons underlying it at a hearing.

**86 The trial court, however, never afforded Lezak the opportunity to so testify. Before her opinion could be received as evidence at Haugen’s competency hearing, the trial court granted Haugen’s pro se motion to discharge Simrin and Goody, and appointed new counsel to represent him. The trial court then granted a second pro se request made by Haugen and excluded Lezak’s opinion from consideration during the death warrant hearing.7 As a result, this court’s express requirement in the writ that
Simrin and Goody be permitted to submit evidence regarding Haugen’s mental competence was not followed. As the court of last resort in this state, we should not allow a mistake of that magnitude to go uncorrected.

If I appear jealously protective of the Oregon Supreme Court’s authority in this matter, it is because I am. The legislature has assigned this court an extraordinary responsibility when a man or woman in this state has been sentenced to die for crimes that they have committed. ORS 138.012(1) charges this court with “direct and automatic review” of a death sentence, an appellate procedure that takes place whether or not a defendant asks for it. See ORAP 12.10(1) (automatic review of death sentence occurs without defendant filing notice of appeal). The purpose of our automatic review is to ensure to a legal certainty that the trial courts have fully and fairly carried out the processes leading to the execution of a human being, including the careful consideration of all relevant evidence.

In this case, we determined that lawyers Simrin and Goody must be permitted to submit evidence from Lezak regarding Haugen’s competency to the trial court with the expectation that that evidence—like all the evidence that preceded it—would be given due consideration. The trial court was entitled to give Lezak’s testimony and her opinions as much or as little weight as they deserved, and it was certainly within the trial court’s authority to allow Haugen to discharge his lawyers after that evidence was taken. The trial court, however, was not authorized to simply ignore evidence relevant to Haugen’s competence to be executed, whether that was Haugen’s wish or not.

This court has the authority to “make and enforce all rules necessary for the prompt and orderly dispatch of the business of the court[,]” ORS 2.120 (emphasis added). It should do so here. The legislature has mandated that, after a death warrant hearing has taken place, there shall be no appeal from a trial court’s decision to issue the resulting death warrant and set an execution date. ORS 137.463(8).

As part of that hearing, however, the legislature has also required Oregon trial courts to conduct an “appropriate inquiry” into the defendant’s mental condition and to “make findings on the record whether the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the death sentence or its implication.” ORS 137.463(4)(a). This court’s purpose in issuing a writ of mandamus here was to ensure absolute compliance with those procedures before a nonappealable death warrant was issued and Haugen’s execution date was set. A death warrant proceeding in which relevant evidence goes unconsidered by a trial court, in direct contravention of a determination made by this court, is not the “appropriate inquiry” statutorily mandated by the legislature, and is not consistent with state and federal constitutional requirements.

Haugen has repeatedly expressed his desire to be executed, and he may well be legally competent to receive that penalty for his horrible crimes. His desire to be put to death, however, does not excuse this court’s failure to require strict adherence to the legislature’s mandated procedures in this, and every other, death penalty proceeding.

I respectfully dissent.

DURHAM and WALTERS, JJ., join this dissenting opinion.

Footnotes

1 Specifically, this court concluded that OCRC had not made the necessary showing of legal authority to bring the action under ORS 34.105 to 34.320. In particular, under ORS 34.105(4), a relator in a mandamus proceeding must be “the beneficially interested party on whose relation” the proceeding is brought. OCRC brought the petition alleging Haugen to be the relator, while also acknowledging that it did not represent Haugen. The court decided that OCRC had not made the necessary showing of legal authority to bring the proceeding on Haugen’s behalf.

2 A “Faretta” hearing refers to a hearing comporting with Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in which the United States Supreme Court articulated the test for a valid waiver of the Sixth Amendment right to counsel. See generally State v. Meyrick, 313 Or. 125, 831 P.2d 666 (1992) (discussing requirements of inquiry into a defendant’s exercise of the right to waive counsel under both state and federal constitution). This court has explained that a colloquy on the record between the court and a defendant in which the court, “in some fashion, explains the risks of self-representation” is generally the preferred means of assuring that the defendant understands those risks. Meyrick, 313 Or. at 133–34, 831 P.2d 666. Simrin and Goody did not cite or otherwise refer to the
procedures under ORS 137.464, which, as we later explain, apply at a death warrant hearing in which the defendant wants to waive counsel and there is a substantial question about the defendant's mental capacity to represent himself or herself adequately.

What we describe as a single hearing was held on September 27, 2011, and October 7, 2011, and encompassed proceedings relevant to both the evidentiary hearing on competency, as well as other proceedings required as part of the death warrant hearing.

When OCRC filed the request for this court to enforce the writ, Judge Guimond had not signed a death warrant setting the date of Haugen's execution. Judge Guimond, on November 18, 2011, did so. Haugen's execution is now scheduled for December 6, 2011.

The fact that a writ of mandamus has been complied with does not mean that this court has no authority to direct further or different actions on the official's part based on circumstances that may arise after a writ issues. But for the court to have that authority requires a further petition for a writ of mandamus, one addressed to any further or different actions to be ordered and to the official's legal duty to perform them. And that petition must be brought by someone who makes the necessary showing of interest to bring it. No one has come before the court seeking a new or further writ of mandamus. OCRC's request is limited to a claim that the trial court did not comply with the writ that the court issued on June 29. Our disposition is limited to a denial of that request.

Justice Walters suggests that this court denied the mandamus petition that Simrin and Goody filed to challenge their removal as counsel and the substitution of Scholl and Gorham, assuming that Scholl and Gorham would take the same positions in representing Haugen (including introducing evidence that he was not competent) as Simrin and Goody had. Nothing in the record supports that assertion, and the court took no official action consistent with it. As discussed elsewhere in this opinion, this court does not and should not purport to control the choices made by counsel in representing their clients. We did not do so here.

Worth noting is that OCRC does not dispute the propriety of removing Simrin and Goody based on their conflict of interest with Haugen. Nor does OCRC, unlike the dissenting members of this court, assert that Simrin and Goody, once they were removed as Haugen's lawyers and different counsel were appointed to represent Haugen, had any proper role to play at the evidentiary hearing held pursuant to our writ.

The order issuing the June 29 writ, as opposed to the writ itself, discussed Lezak's opinion and relied, in part, on Simrin and Goody's attempt to present that evidence to Judge Guimond. The significance of Lezak's opinion to the issuance of the writ was that Simrin and Goody's attempt to offer evidence of her opinion at the initial death warrant hearing triggered Judge Guimond's obligation under ORS 137.464 to order an evaluation by the Oregon Health Authority and to hold an evidentiary hearing afterwards. Our writ concerned only what procedures Judge Guimond was required to follow. The dissenters view this court as having decided what evidence should be offered and considered by Judge Guimond in following the required procedures, but that was not an issue before us or one that we could have or should have resolved, given the limitations of our record and the procedural posture of the case. We did not address or resolve that issue when we issued the writ.

In response to OCRC's request to enforce our writ, Scholl, as Haugen's lead counsel, has submitted an affidavit explaining his decision. Scholl knows Hulteng's work well, having worked with and against him on many different cases. Scholl was present during Hulteng's evaluation interviews of Haugen, and Hulteng allowed Scholl to question him and Haugen during the evaluation. In addition, Hulteng allowed Scholl to record the interviews by filming them. Based on his knowledge of Hulteng's work, Scholl considers Hulteng "a fair evaluator and a knowledgeable * * * expert." With regard to Hulteng's assessment of Haugen's mental competence specifically, Hulteng "is credible and unbiased in [Scholl's] opinion." Scholl states that, "[i]n the end, Dr. Hulteng's opinion about defendant's competency was very similar to my own view and that of defendant himself."

In his affidavit, Scholl explains that, in contrast to Hulteng's expert evaluation and opinion, Lezak's affidavit "does not offer a diagnosis, or present any detailed client history. It does not establish defendant's incompetence. As an attorney with experience in this area, I would not try to establish anyone's incompetency in court or otherwise with the information in that document." Scholl emphasizes that he "could have offered [Lezak's affidavit]" during the death warrant hearing if that affidavit was "thought credible and if it furthered the objectives of the representation." For Scholl, however, Lezak's affidavit seemed neither thorough nor complete. He declined to offer it at the evidentiary hearing on Haugen's competency. Scholl, of course, is not a medical professional. However, he explained that, in the course of his work as the Director of the Washington County Section of Metropolitan Public Defender, he has "litigated competency issues in my own cases, and assessed competency questions in the cases of other attorneys in the office. My work has required regular client competency analysis, and in more areas than just a client's ability to aid and assist in their own
As the Court explained in *Panetti*, Justice Powell’s opinion concurring in the judgment in *Ford* was narrower than Justice Marshall’s plurality opinion regarding the procedures for determining competence. *Panetti*, 551 U.S. at 949, 127 S.Ct. 2842. Accordingly, because Justice Powell’s opinion was necessary to form a majority position, it controls. *Id.* We note that OCRC relies on Justice Marshall’s plurality opinion, even though it is not the controlling precedent on the process that the constitution requires to determine a prisoner’s competency to be executed.

With their motion, Simrin and Goody filed a declaration summarizing the conclusion that Lezak had reached and to which they expected Lezak would testify. OCRC later attached a sworn affidavit from Lezak to the petition for writ of mandamus that it filed with this court. In that affidavit, Lezak states that Haugen suffers from a delusional disorder that “prevents him from comprehending the reasons for his death sentence or its implication[,]” rendering him incompetent to be executed under *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and ORS 137.463(6)(a).

ORS 1.160 provides:

“When jurisdiction is, by the Constitution or by statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the procedural statutes.”

The authority of this court and, indeed, of any court of record in this state, to act to recall its previous orders cannot be denied. See, e.g., *Bailey v. Steele*, 263 Or. 399, 502 P.2d 586 (1972) (“the authority of a court to vacate or set aside its own judgments is an inherent power of all courts of record or of general jurisdiction and may be exercised without any special statutory authority”). This court has exercised that power previously, in the context of orders disposing of petitions for review. See, e.g., *State v. Saner*, 342 Or. 254, 149 P.3d 1213 (2006) (on own motion, vacating order denying review); *Zimmerlee v. Baldwin*, 330 Or. 281, 6 P.3d 1100 (2000) (vacating on own motion denial of petition for review 14 months later); *Ponder v. Baldwin*, 330 Or. 281, 6 P.3d 1100 (2000) (on own motion, granting reconsideration and withdrawing order denying review); *Cooper v. Maass*, 329 Or. 10, 994 P.2d 119 (1999) (on own motion, reconsidering petition for review previously denied and withdrawing order denying review). Although, as indicated, the power to correct may be exercised without any special statutory authority, there also are statutes that explicitly address that authority. See, e.g., ORCP 71 A, C (providing that certain errors may be corrected by trial court at any time on its own motion and that “[t]his rule does not limit the inherent power of a court to modify a judgment within a reasonable time”); ORS 19.270(6)(a) (appellate court, which normally loses jurisdiction over cause when appellate judgment issues, retains jurisdiction to “[r]ecall the appellate judgment as justice may require”).

That fact that Simrin and Goody questioned Haugen’s mental competence is an important factor in assessing Haugen’s contentions that Simrin and Goody had a conflict of interest and should not have had him examined by Lezak or disclosed her opinion to the court. The ethical rules anticipate that a lawyer may take necessary action to protect client with diminished capacity. See Oregon Rules of Professional Conduct (RPC) 1.14(b) (lawyer may take necessary action to protect client with diminished capacity even if action against client’s wishes).

As Simrin and Goody explained to this court in the letter that we construed as a petition for a writ of mandamus, the death warrant hearing that was held on May 18, 2011, was originally scheduled for May 13, 2011. Before that date, Simrin and Goody had been operating under the assumption that the hearing would be continued to give Lezak time to write a complete report and testify in person. However, on May 13, Judge Guimond agreed with the state that the applicable statute required the hearing to be conducted within 30 days of the issuance of the appellate judgment and, therefore, declined to continue it. Because Lezak was then out of the country, Simrin and Goody filed their own declaration summarizing Lezak’s opinion. Later, as noted, Lezak also signed a sworn affidavit summarizing her conclusions, which OCRC attached to the petition for writ of mandamus that it filed with this court.

That hearing was continued on October 7, at which time Judge Guimond entered findings of fact and conclusions of law.

We also should not consider ourselves bound by the arguments of OCRC. We can determine the procedure that the constitution and statutes require and mandate that it be followed.
In *U.S. v. Hammer*, 404 F.Supp.2d 676, 706 (2005) a United States District Court made the following findings regarding Lezak’s professional credentials:

“221. Muriel Lezak is an authority in the field of neuropsychology and she wrote the text, *Neuropsychological Assessment.* (U) [undisputed].”

“222. Neuropsychological Assessment is an authoritative text in the field of neuropsychology.”

As the Supreme Court held in *Panetti v. Quarterman*, 551 U.S. 930, 960, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007):

“Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford* and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.”

The fact that the trial court apparently sealed Lezak’s written assessment of Haugen’s competence in September 2011 is of no moment here. This court received Lezak’s affidavit stating her ultimate conclusions in June 2011 as part of the documents originally submitted by the OCRC in this matter and it has freely considered those documents during its deliberations ever since.
Over the last 25 years, there has been a measurable attempt in the mental health professions and in the training of criminal defense lawyers to use a systematized, evidence-based approach to the evaluation of competence to stand trial. Notable works covering the actual practice of the assessment of competence in criminal cases have been published since 2000, including the following: Dr. Thomas Grisso’s Evaluating Competencies: Forensic Assessments and Instruments; Dr. Douglas Mossman and his co-writers’ Practice Guidelines for the Forensic Psychiatric Evaluation of Competence to Stand Trial; Dr. Richard Rogers’ writings and his group’s development of the ECST-R (one of the “new generation” instruments for the assessment of competency to stand trial); Richard Bonnie and the co-authors of the MacCAT-CA (MacArthur Competence Assessment Tool Criminal Adjudication, another “new generation” competence assessment instrument); and Dr. Melton et al. (Psychological Evaluation for the Courts). A “best practices” series booklet by Drs. Zapf and Roesch addresses Evaluation of Competence to Stand Trial.1

Today’s “best practices” of competence assessments have been attentive to the injunction provided by Dr. Jay Ziskin some time ago that “movement toward a productive and valid law and behavioral science relationship can best be served by placing in the hands of lawyers tools by which they can aid courts and juries to distinguish science from authoritarian pronouncement and validated knowledge from conjecture.”2

While many publications have addressed trial competence assessments as envisioned by the mental health professions and by some lawyers who have focused on the subject, there are a few highly useful court rulings and competence-related orders that provide critical information for those seeking to understand how to present information and evidence bearing on competence. After all, trial competence is a legally defined mental condition, and having some knowledge of the way that courts have viewed competence-related evidence is clearly an important part of “operational” knowledge of this area. Regrettably, there are only a few rulings detailed enough to supply useful practice advice about judges’ views of the strengths and limitations of particular competence evidence, or pointing to what courts have deemed highly significant in arriving at a competence ruling. This truism is best illustrated by the U.S. Supreme Court’s one-page decision in Dusky v. United States, which sets

Selected Competence-Related Rulings: Useful Lessons in Approaches To the Analysis of Competence to Stand Trial

BY JOHN T. PHILIPSBORN
forth definitions without other detail. But a few rulings do set out some of the competence "red flags," and offer cautionary tales about the strengths and weaknesses of competence-related evidence. Some of these rulings are the subject of this piece.

From a few reviewing court decisions applying the Drope/Dusky standard, one learns the importance of attorneys' making a record of "red flags." Drope itself makes reference to the importance of an attorney's information about competence. From federal trial court rulings, interested readers can glean concerns about attention to the validity of symptoms, the importance of multiple sources (multiple experts and lay witnesses) of evidence, attention to those who have had prolonged opportunities to observe and evaluate, and attention to the use of accepted and suitably validated methodologies. Looking over these cases should inform the lawyering in competence adjudication.

One of the things missing from all of the rulings referenced here is any mention or notion that professional practice guidelines exist that address the practice of competence assessments. While some briefing has addressed these, only one of the decisions addressed here cites to the now dated ABA Criminal Justice Mental Health Standards as a useful source for information on forensic mental health issues. None of the decisions cites the various (including ABA sponsored) handbooks or compendiums on mental health law, or more specific competence assessment-related guidelines in great detail. This is a noticeable omission in part because both state and federal courts have recently been filing detailed decisions describing the application of the proper professional practices in Atkins v. Virginia litigation, in which the cognitive functioning of the defendant can be ruled a trump against death penalty eligibility. The U.S. Supreme Court's 2014 ruling in Hall v. Florida addresses the use of a statute that "disregards established medical practice" as applied to Atkins litigation. The fact that competence rulings often do not address whether the methods used comply with established practices may well underscore a problem with lawyering. Training offered to lawyers today often points to the utility of knowing the spectrum of published practice guides and authoritative literature pertinent to a given kind of assessment. Harkening back to the observations of Dr. Jay Ziskin, quoted earlier in this piece, tethering the presentation of competence-related data and background information from mental health experts to tools such as current professional practice guidelines and authoritative literature can help ensure some degree of reliability in addressing competence assessments and discourage the highly individualized, understandardized approaches that are characteristics of many brief competence assessments. Here are a few of the practice hints that can be drawn from recent rulings.

Focus and Use of a Wide-Ranging Database Helps

Judge R. David Proctor, of the U.S. District Court for the Northern District of Alabama, wrote a 2013 competence-related order that emphasizes the utility of wide-ranging information, and of the dissection of the legal elements of competence to stand trial in view of the case evidence. The competence issues arose in a robbery murder case (a death penalty case) in which there was an evidentiary hearing on competence that addressed the divergent opinions of six experts:

There is much at stake here. Among the most fundamental rights possessed by the accused is the right not to be tried for a serious crime unless one is competent to stand trial. As to this issue, the two sides are in utter disagreement about defendant's mental state, and the court has no medical or psychiatric training. There are no easy answers.

There was an evidentiary hearing, which resulted in the development of a lengthy record. The government called four mental health experts, two nurses, and two correctional officers. The defense attorneys called three examining experts, one attorney expert, a jail psychiatrist, their client's sister, and their client's former girlfriend. Based on the argument that Federal Bureau of Prisons examiners were biased, the district court directed the government to retain "independent" examiners — and two neuropsychologists were retained as a result. Note the number and nature of the witnesses — and also notable is the fact that several examiners were not called during the hearing, but served only as foundational sources of information.

The eventual ruling focused on whether there was sufficient evidence to support the defense's contention that Mr. Merriweather had a major mental illness that rendered him incompetent — or whether the evidence of mental illness demonstrated incompetence. This included some consideration of what it means for the accused to have a "rational understanding" of proceedings.

In its analysis, the court dissected the concept of competence and reviewed evidence of the accused's factual understanding of the proceedings; rational understanding of the proceedings; ability to confer intelligently and testify coherently; ability to follow and evaluate the evidence presented; awareness of the significance of the proceedings; ability to understand the charges and the defenses available; and ability to understand the basic elements of the criminal trial. Note the understanding and abilities that the court associated with competence. In his analysis, the judge considered whether the accused suffered from a major mental illness and in doing so concentrated on evidence related to hallucinations, mutism, poor hygiene, flat affect, weight loss, malingering, and brain scans. At the end of those pretrial proceedings, Merriweather was found to be competent.

The Merriweather court's analysis, however, contains a few notable omissions, which may not have been factors in the evidence and exhibits. One was the omission of any substantive discussion of the accepted reliable methodologies for competence assessments and authoritative literature on the competence assessment process and related generally accepted methodologies. There was thus no discussion of whether examiners adhered to these methodologies. This ruling sheds no substantive light on what kind of competence assessment approach meets (or fails to meet) the Daubert criteria. The ruling emphasizes the judge's reasoning for his favorable view of the government's experts, including the utility of corroborating lay witnesses. The ruling focuses, to a significant extent, on whether the accused was mentally disordered to the point of incompetence, and the evidence associated with the legal competence requirements is summarized without any detail on how either mental health examiners
assessed each of the competence characteristics addressed in the ruling.

The ruling helps to focus on a few matters essential to effective lawyering of competence questions. First, when serious competence questions are presented, suitable time must be taken to assess the accused and acquire necessary information. Second, it will take more than one examiner or one witness to address the issue. Third, the definition of competence must be discussed in its full legal and assessment-related dimensions. Having corroboration of long-term indications of incompetence from lay witnesses (or such evidence undermining the claim of incompetence) can be highly significant.

**Reviewing Courts Can Be Impressed by Red Flags That Were Missed, Particularly Information From Counsel**

The importance of making a useful and detail-oriented record can easily be gleaned from pertinent cases. It may be a lawyer’s observations and statements for the record that make the eventually accepted point that there should be judicial attention devoted to competence issues that are being described by counsel (a point that is not always covered in practice guides on competence assessments).

The U.S. Supreme Court’s decision in *Drope v. Missouri* mentions its consideration of a reported history of irrational behavior of the accused coupled with counsel’s comments about his client, causing the Supreme Court to state the following:

> [W]e are constrained to disagree with the sentencing judge that counsel’s pretrial contention that “the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial” did not raise the issue of [the accused’s] competence to stand trial.”

The Court observed that there had been evidence that Drope had acted violently prior to trial, and that in context, the reviewing courts of Missouri had given “insufficient attention” to the evidence of incompetence that had been developed before the trial court. In addition to the statements of counsel, the Court zeroed in on information that had been provided by the accused’s wife.5

Note the combination of pieces of information: evidence of behavior; statements by counsel concerning the accused; and use of information from a lay witness. The ruling in *Drope* allows defense attorneys to understand the utility of developing a detailed record of evidence of incompetence.

A 2012 ruling from the District of Columbia Court of Appeals provides another example of how the combination of repeated statements by counsel and other evidence available to the trial court was considered on appeal as indicative of “red flags” that there were competence problems. The appeals court determined the case should be remanded under local legal standards for an inquiry into competence at time of sentencing.16

A Connecticut Court of Appeal ruling provides another example of how a reviewing court, faced with a record of statements made by counsel to the effect that the accused had an inability to effectively communicate with him, provided, under Connecticut law, a basis for reversing the case due to a failure of inquiry.17

These rulings are in line with this U.S. Supreme Court observation: “We do not suggest that courts must accept without question a lawyer’s representation … [however,] an expressed doubt by one ‘with the closest contact with the defendant’ [citation omitted] is unquestionably a factor which should be considered.”18

A California Court of Appeal reversed the conviction of an individual with a history of mental illness, who had been the subject of medication regimens, and who had been allowed to represent himself, notwithstanding the history and a series of fairly bizarre statements to the trial court. While noting that a single factor such as bizarre courtroom behavior might not call for reversing a case on a claim of trial court error in the handling of a competence issue, the reviewing court found that the totality of the evidence in the case required reversal.19

These are a few examples of recent reviewing court rulings. The combination of repeated statements from counsel evidencing concern about competence issues and information about a client’s history and behavior that is consistent with incompetence is taken as red flags.

**Importance of Making a Full Record, Including Extent of Opportunity To Assess Competence**

From a lawyering viewpoint, several issues of interest emerge from the *Merriweather* ruling referenced above. First, following a procedure that is now often used in federal capital cases where court-ordered evaluations have occurred, the defense moved that all interviews of Mr. Merriweather be videotaped, and that input from specified experts (a neuropsychiatrist and/or neurologist) be included in the final report. This methodology for the preservation of the record of the assessment, and for ensuring that a breadth of expertise is brought to bear, allows useful development of evidence for litigation.20

Also, Mr. Merriweather was observed over a period of time while at the Bureau of Prisons facility at Butner, and the court ruling makes it clear that prior to providing opinions, experts who were given weight by the court had seen Merriweather on several occasions: “Dr. Berger…conducted four videotaped formal interviews in addition to seeing Merriweather on a daily basis for 496 days.”21 One of the defense examiners, a psychiatrist, had spent 16 hours with him. Another expert, a neuropsychiatrist, ordered imaging studies, though the expert was commented upon by the judge as having spent only an hour and a half to two hours with Merriweather.22

As many state court practitioners are aware, there are entire competence assessments (lasting less than two hours) that involve only one examiner relied on for a final competence adjudication. These are the proverbial “drive by” evaluations of competence which should not be used in a complex or controversial competence assessment. Practitioners may deem it significant that the *Merriweather* trial judge viewed two hours as a short time for a competence evaluation. In that sense, the ruling in *Merriweather* is highly useful, in that it is highly descriptive of the kind of information that was gleaned over hours of contact between assessing (and/or observing) witnesses and the accused. This ruling is one of the few that allows a clear understanding that a court viewed competence assessment as a process rather than a snapshot.

A practice note may be worthy of inclusion at this juncture — where
there has been an attentive and detailed record (in the form of recordings or copies of test booklets, examiner notes, and the like) of a competence assessment made, lawyers have the detail to define exactly how assessments were conducted and how examiners inquired into specific elements of the legal condition of competence.

Invalid Symptoms As a Trump Card

Another useful source of information about judicial perspectives on competence evaluations and expert testimony on competence is the series of rulings addressing competence in the case of Vincent Gigante, including one from a well-known district judge from the Eastern District of New York, Judge Weinstein, who authored an extensive order addressing evidence of Mr. Gigante’s competence in a case in which several examiners had found him incompetent.21

Even prior to the submission of evidence and legal arguments addressing Mr. Gigante’s competence for sentencing purposes (note that sentencing and trial competence are sometimes differentiated depending on case-specific issues), Judge Weinstein had issued an extensive ruling on evidence of Mr. Gigante’s competence to stand trial.24 Those rulings are important to know because they are referenced today as evidence of the failure of some examiners to detect the allegedly long-term exaggeration of symptoms of significant mental illness.25 In forensic assessment terms, this would be described as a failure to reliably assess symptom validity and/or a failure to detect evidence of malingering.

Judge Weinstein’s ultimate decision on sentencing competence emphasizes a point made elsewhere as well — evidence of a mental disorder is not necessarily evidence of incompetence to stand trial. Judge Weinstein found that competence at a sentencing hearing would include the ability to consult with and assist counsel; participate in a sentencing allocution; and understand how and why the accused is being punished. Memory, ability to reason both concretely and abstractly, and the ability to communicate are all described as ingredients of the characteristics of sentencing competence.26 Notwithstanding some evidence of impairment, Judge Weinstein found Mr. Gigante competent.

At the conclusion of his analysis of the utility of the experts’ testimony, Judge Weinstein observed that some of the defense evidence was “insufficiently helpful in accounting for the striking differences between defendant’s activities observed by lay persons and those observed by experts.”27 This observation became a platform from which Judge Weinstein stated his view that government experts in the case provided a more “cohesive narrative” and diagnoses consistent with what the court had observed than did defense experts. The competence-related Gigante ruling28 reviews the interpretation of imaging studies, psychological testing and psychiatric assessment, with a specific focus on what information formed the basis of opinions stated by defense and government experts.

Note the importance attributed to observations by lay persons that are credited with being useful in corroborating or undermining examiners’ opinions. This observation underscores the utility of tapping lay observer evidence — a type of evidence also remarked upon by the U.S. Supreme Court in Droepe. Only rarely do works on competence assessments published by either mental health professionals or lawyers dwell on the potential significance of lay witness observations — often in competence cases involving persons who either supervise or guard or accompany the accused on a daily basis.

The Gigante sentencing competence ruling examines anecdotal information provided by correctional officers who saw Mr. Gigante over a period of time. It details some of the personal interactions that a correctional officer and a registered nurse covered in their testimony. The judge addressed evidence provided by lay persons of the accused’s memory for names, memory for events of specified types, and other matters that are referenced in the published opinion.

The Gigante ruling also addresses the onset and symptoms of dementia, a condition that occasionally is the focus of a competency inquiry. While the ruling is dated, counsel representing individuals assessed to have the onset of dementia-like symptoms will want to review it.

When a case presents serious competence questions, it will take more than one examiner or one witness to address the issue.

cases like Gigante will remain cautionary tales, given the attention focused on the case, and the number of examiners said to have “missed” evidence of invalid symptoms of mental disorder. It continues to be a predictable theme from the prosecution when evidence of incompetence is contested. Any useful forensic assessment of competence will take the trump valve of claims of exaggeration or faking into account.
MEMBERSHIP APPLICATION

SPECIAL INTRODUCTORY OFFER:
15 months of NACDL® membership for the price of 12! (New members only)

___ YES! Sign me up as a new member of NACDL® and start my subscription to *The Champion®* today!

Applicant Name: ________________________________________________________________

Referred By: _____________________________

Address: _____________________________________________________________________________

City: _____________________________ State: ___________ Zip: _____________________________

Date of Birth: __________________________ Gender: _____________________________

Phone: _____________________________________________________________________________

Fax: _____________________________________________________________________________

E-mail: _____________________________________________________________________________

State Bar(s) & Admission Date(s): _______________________________________________________________

Bar Number(s): _____________________________________________________________________________

☐ I certify that I meet the criteria for the membership category to which I am applying.

☐ Attorneys: I am a member of the bar in good standing and I am not subject to suspension or disbarment in any jurisdiction. I understand that prosecutors are not eligible to be NACDL members.

Signature: _____________________________ Date: _____________________________

I qualify for the following membership category (Please check one)

Membership Categories:                        Annual Dues:

☐ Regular                                      $319

☐ New Lawyer                                            $179

☐ Law Professor                                     $165

☐ Fedl. or State Public Defender**                $135

☐ Judge                                         $189

☐ Military                                        $165

☐ Law Student                                     $65

☐ Associate                                       $189

☐ International                                   $179

☐ Sustaining                                      $465

☐ President’s Club                                 $689

☐ Life Member***                                  $5,000

* New Lawyer Membership – for members of the bar for less than 5 years

** Public Defender Membership – for full-time, salaried employees of non-profit or government agency

*** Life Membership – a one-time contribution; or 5 installments of $1000 each over 5 consecutive years

Credit Card #: _____________________________ Expiration Date: _____________________________

Card Type: _____________________________ Billing Address: _____________________________

Name on Card: _____________________________ Signature: _____________________________

www.nacdl.org / memberservices@nacdl.org

Membership Hotline: 202-872-4001

In *United States v. Duhon,* Judge Methvin (Western District of Louisiana, which has produced a number of recent notable mental health-related rulings) was called upon to review the possibility that Mr. Duhon’s competency had been restored. Mr. Duhon, a man diagnosed with what under DSM-5 would be mild intellectual disability, was said to have been restored to competence through his involvement in a Federal Bureau of Prisons (BOP) competency restoration program. The district court concluded in a wide-ranging ruling that the BOP forensic evaluation of Duhon was not reliable. The evidence presented did not rely on generally accepted practices in the field. In sum, the mental health opinion evidence did not pass the gateway tests under *Daubert*:

“Furthermore, because the issue of competency for a criminal defendant is a critical one, with constitutional implications, it is even more important for the court to be vigilant in disallowing unreliable psychological evidence.”

Having reviewed the evidence before it, the Duhon court found that the competency restoration report by the Federal Bureau of Prisons contained no explanation of what information was presented to Duhon and what he actually understood as opposed to what he memorized in rote responses. Dr. Berger [one of the BOP experts] was unable to provide any insight because he had never attended one of the [competency restoration] classes. The court further explained that one of the other expert’s testimony “establishes that the use of competency restoration groups is controversial and not generally accepted in the psychological community.”

The Duhon court’s conclusion on the Daubert aspects of the case is all the more interesting because the court reviewed, at some length, the type of evidence that was presented to it, noting, for example, that when it came to the question of how well accepted competency restoration programs are, the court had not been provided with “any articles or peer review or other professional writings supporting the effectiveness of the practice.” This observation underscores the importance, from a lawyering perspective, of having mastered the practice guidelines, research,
and literature that cover the methods used in the assessment at hand.

The court also found that there had not been any basis, found either in an accepted study or clinical approach, for whatever protocol had been used in the competence restoration group. The gist of the court's analysis was that in view of evidence from one examiner about Mr. Duhon's underlying condition of intellectual disability (mild mental retardation), and observations by an experienced forensic examiner, it was difficult to assess whether Mr. Duhon's responses were “conditioned verbalizations” as opposed to understanding or appreciation of content. As a result, under the circumstances, there was sufficient “diminished intellect and poor adaptive functioning” to make it unlikely that he would be able to be restored to competence.

The testimony of this expert was offered as a counterpoint to the BOP-produced evidence of restoration, and was supplemented by the testimony of a criminal defense lawyer, previously a federal prosecutor, who concluded that Duhon lacked the capacity to consult with counsel with a reasonable degree of rational understanding or to otherwise assist in his defense.

### Conclusion

The lessons from these reported cases are easy to identify. Lawyers’ observations and statements of concern made on the record about evidence of a client’s incompetence are important to effective lawyering and to sound professional practices. Especially in complex cases, when there is a history of mental health issues, lawyers should emphasize the need for multidisciplinary evaluations that will take time. A variety of subparts of the competence concept should be addressed during the assessment. Both lawyers and experts should be aware that competence to stand trial, as a legal construct, has both fundamental and operational elements — and these have been recognized by courts that have reviewed the basic legal definitions and then applied these to describe the strengths and weaknesses of the experts’ assessments in a case. The importance given to corroborating lay witness evidence in rulings at all levels underscores the value, in adjudications, of presenting lay witness testimony when it is available. Meticulous documentation of the assessment process should occur so that an appropriate level of scientific and legal reliability is assured. Finally, as clarified by Duhon, the expertise brought to bear should have evidenced conformity with professional standards, be well founded in a technical sense, and defensible in technical and scientific terms. It should show the examiners’ interest in a reliable process.

The utility to lawyers (and experts) of having some of the described rulings at hand is to demonstrate the approaches and concerns that have surfaced in detailed competence adjudications — and to underscore that competence assessment often cannot be completed in a short time with the type of minimal efforts that appear to be preferred in some jurisdictions.

### Notes

1. DR. THOMAS GRISO, ASSESSING COMPETENCIES (2d ed. 2003); DR. DOUGLAS MOSSMAN ET AL., AAPL Practice Guidelines for the Forensic Psychiatric Evaluation of Competence to Stand Trial, 15 J. AM. ACAD. PSYCHIATRY & L. SUPPLEMENT (November 2007); DR. RICHARD ROGERS ET AL., ECST-R, Evaluation of Competency to Stand Trial (2004); ZAPF & ROESCH, EVALUATION OF COMPETENCY TO STAND TRIAL.
issues, whether for good reason or not. Have not been updated since 1989, which courts make short work of competence questions. Rather, it is to point out that the rulings stand out mainly because of incompetence assessments. Other writings have noted these considerations.

2. United States v. Duohon, 104 F. Supp. 2d 663, 670 (W.D. La. 2000). The ABA Criminal Justice Mental Health Standards have not been updated since 1989, which explains why other publications are more useful and current.

3. See John Parry, CRIMINAL MENTAL HEALTH


7. Id. at 1276-77.

8. Id. at 1301-03.

9. Id. at 663, 678.


11. Id. at 177-78.


16. There are, admittedly, strategic and tactical considerations that color the decision for the defense to move for the recording of competence assessments. Other writings have noted these considerations.

17. Merriwether, 921 F. Supp. 2d at 1274-75.

18. Id. at 1285. Notable in the finding offered in the Merriwether ruling is a discussion of the credibility of an expert who had been challenged based on his allegedly false testimony in a prior case — a challenge the district judge took some pain to indicate he was not crediting. Id. at 1286.


21. See Gigante, 982 F. Supp. at 176-77, for example, referencing “the suggested partial diagnosis of ‘malingering’,” and a prior judicial “determination that defendant Gigante feigned mental illness over many years to avoid his day of reckoning.”

22. Id., at 202-03.

23. 996 F. Supp. 2d, at 206-07.


25. Judge Weinstein made it a point not to disparage any of the experts involved, making the observation that “[a]ll of the experts assisting the court in dealing with the difficult questions surrounding diagnosis of defendant’s mental condition were able, ethical, and candid.” Id. at 200-01.


31. One of those who wrote about it was Dr. William Reid, EXPERT EVALUATION, CONTROVERSIAL CASES, AND THE MEDIA, 9 J. PSYCHIATRIC PRAC. 388 (2003).


33. For example, Dr. Richard Rogers and the contributors in CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION (3d ed.); Dr. Kyle Boone, CLINICAL PRACTICE OF FORENSIC NEUROPSYCHOLOGY: AN EVIDENCE-BASED APPROACH (2013). Both of these book-length treatments, and especially Dr. Boone’s, reference not only stand-alone measures of performance and symptom validity, but also the utility of embedded measures (embedded in these are developed from existing psychological and neuropsychological tests and thus are another way of capturing data, especially on performance validity during the taking of tests, and also of providing some data relevant to the assessment of symptom validity).


35. 104 F. Supp. 2d 663, 678.


37. 104 F. Supp. 2d 663, 676.

38. Id. at 677-78.

39. Id. at 678.

40. Id. at 672.

41. Id. at 672-73.

42. Id. at 676.

43. Id. at 676.

About the Author

John Philipsborn, a criminal defense lawyer for more than 37 years, has litigated a wide variety of mental health issues. He regularly lectures and writes for lawyers as well as mental health professionals on forensic mental health issues. For the last 24 years, he has served as the amicus chair for California Attorneys for Criminal Justice.

John T. Philipsborn
Law Offices of John T. Philipsborn
507 Polk Street, Suite 350
San Francisco, CA 94102
415-771-3801 x25
Fax 415-771-3218
E-mail: jphilipsbo@aol.com
In 2000, a federal district court in Louisiana wrote one of the most extensive and thoughtful rulings on trial competence available today. The court's ruling in *U.S. v. Duhon* responded to a government agency recommendation for a finding of restoration to competence of an accused who had undergone extensive evaluation, had been found mildly mentally retarded, and had undergone competence “training” while in federal custody.  

*Duhon* is notable in at least two ways. First, the court discussed at length the fabric of the case law that defines the meaning of competence to stand trial, and also what it means to be truly restored to competence. Second, the court detailed the various categories of evidence that might be considered in a competence assessment. These ranged from the specific testing processes, to the meaning of the data obtained in testing, through the role played by lay persons' observations, and to the value of an attorney-expert's views on an accused's competence. The discussion includes consideration of the strengths and limitations of the various approaches taken by mental health professionals in assessing and “treating” Duhon.

*13* From NACDL's point of view, the case is distinguished by the fact that the district court chose to rely, in passing, on an article published in *The Champion* describing the limitations inherent in a mental health expert's capabilities of assessing the ability to assist counsel.  

On the other hand, the citation is symptomatic of a problem in the competence assessment process. There are few authoritative guides on the standards of practice for both mental health experts and defense counsel in approaching competence assessment.

The dearth of published and accepted standards of practice for lawyers in competence assessments is arguably one of the many causes of the unevenness in the approaches to competence issues.  

Indeed, the courts have been extremely uneven in dealing with the definitions of competence (particularly where state statutes are far afield from U.S. Supreme Court decisions); what categories of evidence should be deemed reliable and valid where competence is at issue; what type of expertise should be relied upon by the trier of fact; what role the appointed or retained trial counsel should play in informing the court (and/or the experts) of the bases for a competence (or incompetence) adjudication;
and how the approaches to competence assessments accepted in the mental health community can, and should, be integrated into the judicial findings about an individual's trial competence.

This article discusses some of the approaches experienced criminal defense lawyers have used in dealing with competence issues, especially since the previously mentioned article was published in The Champion in June 1998. 4

Insofar as competence questions are among the “standard” mental health questions that arise in criminal cases, an effort is made to review the discussion of these questions offered in the current mental health literature on competence to stand trial questions. 5 This article also urges the leading criminal defense organizations to be more attentive to the development of standards of practice, and to provide more training and continuing education for criminal defense lawyers on trial competence issues. This is not only so that we, as a group, can do a better job in performing our duties, but also so that we can encourage the courts to do a better job of showing the fundamental respect for persons charged with crimes that is the basis for the requirement that a person be competent to stand trial.

Competence And Incompetence Revisited

[If] a Man in his Sound Memory Commits a Capital Offense ... [a]nd if, After he has Plead, the Prisoner Becomes Mad, he Shall not be Tried, for How can he Make his Defence?” Blackstone, Commentaries XXIV

In 1960, the United States Supreme Court announced in a simple, one-page opinion what is generally considered the modern statement of the requirement of competence in Dusky v. United States. 6 The requirement of competence to stand trial is “rudimentary,” and it must be clear that “… the trial of an incompetent defendant violates due process.” 7 8 Dusky set out what are today generally considered the three basic elements of competence. The accused must: (1) be rational; (2) have a sufficient present ability to consult with counsel with a “reasonable degree” of rational understanding; and (3) have both a rational and factual understanding of the proceedings. 9 Fifteen years after Dusky, the Supreme Court decided Drope v. Missouri, which added what some commentators consider to be the fourth element of the competence test. This additional element requires that the accused have the ability to assist counsel in preparing his or her defense. 10

In the years that followed Dusky and Drope, the techniques and approaches to assessing trial competence were of continuing interest to a specific community of mental health and legal scholars who focused on mental health issues in the criminal courts generally. As has tended to be true about issues involving the intersection of mental health and the law, the “line” defense bar seems to have given the development of standards of practice surrounding the evaluation, assessment, and litigation of competence a fairly wide berth. A review of the draft “ABA Standards on the Prosecution Function and Defense Function,” dating back to the decade after the decision in Dusky, reveals no specific discussion about competence per se.

By 1986, however, the ABA Criminal Justice Mental Health Standards addressed a wide variety of mental health and criminal case issues, including competence to stand trial. Anecdotal evidence suggests that these ABA standards were not regularly covered during continuing education programs for the criminal defense bar until the increase in sophistication in the training for death penalty defenders took hold over the last 25 years. Indeed, some otherwise extremely skilled and knowledgeable defense lawyers informally polled during the writing of this piece indicated that they have never received any training on competence assessments.

Since 1986, the United States Supreme Court has decided several cases of importance to our current understanding of competence. Two of these rulings occurred in the early 1990s. The first is Medina v. California. 11 There, the Court affirmed a decision of the Supreme Court of California, which had noted in language that has made all too little of an impression on the criminal defense bar that “…one might reasonably expect that the defendant and his counsel would have better access than the People [prosecution] to the facts relevant to the court's competency inquiry.” 12 In additional language that was anointed by
the United States Supreme Court's affirmance, the California Supreme Court had noted that with respect to the “... defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability.”

This state court *dicta* underscores the value of information possessed by the criminal defense lawyer. This lawyer-based information is something that mental health professionals have integrated into their published approaches to competence assessments -- at least at the high end. The assessment of an accused's competence is not a task that should be undertaken without the participation of that client's lawyer -- and the *dicta* quoted above supports this view. This truism has been *14* commented on both in published decisions and in the professional literature, in part because only defense counsel in a given case can provide a description of how the lawyer and client are actually interacting, in contrast to what interaction is actually needed in the case context. “One of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would normally go into the defense of the case.”

Indeed, without finding out from counsel of record what the nuances of the charges and available defenses are, and how the accused is interacting with counsel, how does a mental health professional gauge both situational awareness of rights and procedures, and the ability to assist counsel in conducting the defense? Yet, even today, anecdotal evidence suggests that neither mental health experts nor defense counsel participate in this recommended interaction -- often out of sheer ignorance of the case law and literature.

Where the question of competence involves the nature, quality, and characteristics of communication (or lack of communication) between counsel and client, defense counsel will often be the best source of information. *15* In a standard work on mental health and the courts, the authors make a succinct point. “The clinician also needs to obtain information from the attorney ... more important, only the attorney can provide the clinician with information about the length, substance, and nature of previous attorney-client contacts.”

This practice note should be emphasized to the criminal defense bar and mental health experts.

The second significant U.S. Supreme Court case from the early 1990s was the 1993 decision in *Godinez v. Moran*. *17* For practitioners who want real familiarity with the Court's definition of competence, *Godinez* is a “must read.” *Godinez* is really the only case in which the Court has discussed the combination of the characteristics of competence to stand trial and the attributes of the accused who is competent. The *Godinez* court sets out its expectations of the situational awareness that the accused should have of his or her procedural rights, as well as the decisional abilities that are expected to flow from the accused's understanding of the case, and interaction with counsel.

In *Godinez*, the Supreme Court ruled that there was no difference between being competent to plead guilty and being competent to stand trial. The Court emphasized that there are certain decisions that any competent accused will be assumed to have the ability and capacity to make, regardless of whether that person is going to plead guilty or stand trial. The breadth of the abilities and capacities that the court attributes to a competent accused come as a surprise to numerous lawyers and mental health professionals:

“In sum, all criminal defendants -- not merely those who plead guilty -- may be required to make important decisions once criminal proceedings have been initiated ... these decisions include whether to waive the privilege against self incrimination, whether to take the witness stand, whether to waive the right to trial by jury ... whether to decline to cross-examine certain witnesses, whether to put on a defense, and whether to raise one or more affirmative defenses.”

Some of the sophisticated recent mental health literature covering competence acknowledges the importance of *Godinez*. *19*

There are other significant trial competence rulings from the U.S. Supreme Court handed down beginning in 1996. In *Cooper v. Oklahoma*, the Court decided that the standard of proof placed on the accused who is attempting to prove his incompetence
cannot be so high as to violate the Due Process Clause of the U.S. Constitution. Oklahoma’s “clear and convincing” standard proved too high. The Cooper opinion reviews the history of the requirement of competence in the Anglo-American legal tradition, and the court rejects a burden of proof by clear and convincing evidence based in part on what it found to be the vagaries of the competence assessment process, on the one hand, balanced against the need for courts to be assured that they are only trying competent people, on the other.

One can read into the Cooper decision the view that the mental health assessment sciences have not yet reached a point at which it makes sense to require high standards of proof. Because of the premium put on competence, requiring only proof by a preponderance of the evidence of incompetence will decrease the risk of erroneous findings of competence.

In 2003, the Court reconsidered psychoactive medication and competence in Sell v. United States, a decision that builds on the Court's first such decision, Riggins v. Nevada. These two decisions will continue to be of great importance, particularly as the mental health professions in state and federal institutions administer psychotropic medications with accuseds facing trial. These cases guide the discussion in any case in which a client facing trial has been administered psychotropic medications, and particularly anti-psychotic drugs that are known, in the literature and/or in the case law, to have extensive side effects. Indeed, there is an entire body of federal and state court case law discussing the level of due process that attends the administration of anti-psychotic medication to persons in custodial settings, some of which serves as a useful backdrop to the litigation of concerns about the effects of anti-psychotics generally.

A secondary but extremely important reason for defense counsel to be familiar with the body of law that regulates the administration of psychotropics to potentially incompetent accuseds is to ensure that trial courts properly consider all factors required by Sell before allowing the trial of a person medicated with, or in need of, certain classes of psychotropics to go forward.

One additional recent ruling warrants comment here. It is from the U.S. Court of Appeals for the Ninth Circuit, and involved a non-communicative death row inmate. In Rohan ex rel. Gates v. Woodford, the Ninth Circuit decided, first, that an accused must be competent when pursuing federal habeas relief. Second, the Court noted that the competence element requiring the ability for rational communication now has an expanded definition.

As the Court noted, it is no longer only the capacity to communicate rationally that characterizes the compete defendant -- it is also, in a larger sense the ability to assist in one's own defense. This is a point worthy of consideration since few competence evaluations are based on examination of the latter ability. Many examiners would not know (without being informed) what goes into the defense of the case at issue. The change in the case law’s focus is a subtle elaboration. For example, a mentally retarded or disordered person may have the ability to communicate rationally on basic subjects without having a real ability to assist counsel in the conduct of the defense of a complex case. The same may be true of persons with a wide range of disorders. More generally, this means that competence assessments that focus merely on the ability to interact do not measurably advance an understanding of an accused's trial (or post conviction) competence.

Case Law Yields Variable Assessment Practices

One is hard pressed to find the United States Supreme Court making reference to the many scholarly articles on the competence assessment protocols, tools, techniques, and instruments available. The reason for mentioning the value of the ruling in U.S. v. Duhon in the introduction is that it is one of the very few cases reflecting judicial commentary on what seemed defensible, or indefensible, in a particular competence assessment process. The exception is where the courts discuss questions of “medication into competence” under Riggins and Sell by urging a combination of methodical fact finding and caution -- making note of the literature on the effects of certain classes of psychoactive medications that have yet to be fully understood in the mental health sciences.
However, we have yet to read a decision from the Court dealing with competence issues that goes as far as the Court's 2002 landmark decision in *Atkins v. Virginia* in referring to what might be considered authoritative mental health literature and standards that lower courts and legislatures might consider when establishing statutory requirements for competence adjudications.  

In several respects, requiring trial competence without providing anything but a legal definition of the concept has resulted in the absence of precise guidance on how to evaluate and adjudicate competence. This means that there are numerous options open, and the quality of practice has suffered as a result. In essence, the state of the law is such that, at the low end, the litigation practice embodies the *dictum* that “if you don't know where you're going, any road will get you there.” The California Supreme Court indirectly acknowledged this problem in commenting on the value of expert testimony specific to competence:

“The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion ... it does not lie in his mere expression of conclusion.”

Reviewing courts rarely address competence questions by expressing concern either at the inadequacy of the lawyering related to a competence issue or on the poverty of an expert's approach that compromised the integrity of proceedings. It is understood that lawyering that is measurably departing from the ABA standards, and what is locally accepted as effective lawyering, may cause reversal of a conviction or death sentence. Since the court's ruling in *Strickland v. Washington*, it has generally been understood that while not controlling, the ABA standards will be viewed as indicative of the standard of practice for lawyers defending criminal cases.

While the federal courts have not issued notable decisions in which ineffective lawyering was viewed as the cause for the poor handling of the accused's possible incompetence to stand trial, there have been a few cases in which the courts were presented with sufficient post-conviction evidence of incompetence that cases have been remanded for a retrospective competence assessment. These are cases in which the question is not whether there was ineffective representation that caused a prejudicial error warranting reversal, but rather whether there is sufficient evidence of incompetence of the accused in the record that there might have been a violation of due process in that an incompetent person was subjected to trial and punishment. These retrospective competence cases give us a type of backward description of what post-conviction courts have viewed as useful sources of information on competence.

The retrospective competence inquiry process first appeared to be disfavored by the United States Supreme Court, which warned that there would be “the difficulty of retrospectively determining an accused's competence to stand trial ..." However, over time, federal and state reviewing courts have remanded so that trial courts could revisit competence questions. For example, when the Ninth Circuit remanded *Odle v. Woodford* for a retrospective competence hearing, it did so with instructions to the state trial court to determine whether “the record contains sufficient information upon which to base as reasonable psychiatric judgment” the accused's competence to stand trial many years before. Because neither the trial judge nor defense counsel had raised a competence question, the *Odle* court's “recipe” for the determination was extremely basic, encouraging inquiry into the availability of information from the record, any experts, and the lawyers, or investigators who might still be available.

Other courts have issued similarly basic orders for a retrospective competence assessment hearing, noting the expectation that lawyers and examining experts may have useful material available to assist in the retrospective assessment. Significantly, while trial competence standards are described as exclusively legal, in retrospective competence assessment cases, courts have used the “reasonable psychiatric judgment” test to gauge the existence of post-conviction evidence of trial incompetence.

**Understanding Of Law Necessary To Comprehend Literature**
Because competence to stand trial is a legal requirement, an understanding of the case law and statutes that make up the legal framework of competence is itself an essential foundation for a criminal defense lawyer’s reading of the pertinent mental health literature. Dr. Thomas Grisso, one of the leading scholars on the subject of evaluating legal competencies, has written several works that confirm the value of knowing the legal framework of competence to stand trial as a basis for planning, and indeed evaluating, a competence assessment process.

In his recently updated Evaluating Competencies: Forensic Assessments and Instruments, Dr. Grisso begins the discussion of the evaluation of competence to stand trial by reviewing the legal standards. This recent discussion of the legal construct of competence is much more extensive than the one contained in his well-known early work on the subject.

Drs. Melton and Poythress, who are mental health experts, joined law professors Petrila and Slobogin to publish their well-known Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers, which is in its second edition. These authors also set out certain key legal definitions as part of their discussion of legal competencies, including the competency to stand trial. They set forth useful but very brief discussions of the controlling law to introduce legal concepts of importance.

The same is true, though in a different way, of the ABA/SJI National Benchbook on Psychiatric and Psychological Evidence and Testimony, which was published in 1998. As with Melton, et al., the Benchbook covers a great many topics in the intersection between the mental health sciences and the law. The Benchbook also offers some discussion of the salient cases, while not dwelling on the textual analysis of significant United States Supreme Court opinions. The practitioner needs to understand what these good sources of information offer, and what he or she needs to have sought elsewhere.

What emerges from a review of the analysis of the law offered to us by these well-known experts in the field of competence assessments, and forensic mental health assessments generally, is the understanding that they opt for synthesis and a succinct statement of their views on the legal structure and definition of competence. They do not offer a lawyer preparing a case a detailed dissection of the law.

Thus, there is no substitute in this area for a thorough reading and understanding of the pertinent case law. This is not to attack the mental health literature — the manuals written exclusively for lawyers present similar problems. This holds true even though a different approach has been taken in some of the practice manuals that have been developed for the capital defense bar. For example, in the long published California Death Penalty Defense Manual, the emphasis tends to be on an updating of the case law related to mental health cases. In a section on mental health experts, the Manual offers a discussion of recent decisions pertinent to certain mental state mitigation, mental state defense, and competence issues in conjunction with a discussion of some of the pertinent scientific literature.

Admittedly, death penalty defense publications may not be a useful litmus of the practice guides available for the criminal defense bar, as death penalty defense is highly specialized. However, death penalty defenders in general are expected to have greater expertise on mental health issues than many of their colleagues. But even a knowledgeable reader of the Death Penalty Manual will need to review the relevant cases in approaching a competence inquiry.

A knowledge of the case law exposes those areas in the mental health literature that may need to be reviewed carefully with an examining expert. For example, Melton, et al., discuss “competency to plead guilty” under the rubric of “criminal competencies.” As they point out certainly in enough detail to remind the knowing lawyer (and expert), in Godinez v. Moran the Supreme Court held “... with the majority of federal courts that a person who is competent to stand trial is also competent to plead guilty.”
But then, they point out that not all jurisdictions follow Godinez. That observation on their part might shock some experts on criminal procedure, in that it is not at all clear that the United States Supreme Court decision in Godinez allows the states to require differing standards in the definition of competence to plead guilty versus competence to stand trial. Moreover, the mental health expert who has relied upon Melton, et al. to define competence to plead guilty as a separate category from “competence to stand trial,” may be open to cross-examination on this point.

This remark is not meant as a criticism of Melton, et al., whose works are well-respected and much cited. However, it is meant to illustrate that in the absence of the acquisition of a good working knowledge of the case law, a lawyer seeking a quick fix of overall competence knowledge might accept as completely defensible a viewpoint stated by authors whose analysis of the law might, at least in the respect just used as an example here, be taken as a minority view.

Therefore, the practice note here is that lawyers approaching a competence assessment should review the applicable case law, concentrating on decisions that cover both the big picture and case specific issues.

**Leading Mental Health Literature Addressing Competence**

When the United States Supreme Court concluded that it is not constitutionally acceptable for the mentally retarded to be executed in Atkins v. Virginia, the Court relied in part on the definition of mental retardation found in Sadock and Sadock's, Comprehensive Textbook of Psychiatry (7th ed.). That work is cited here because it is an example of a useful text for lawyers seeking to learn about a variety of mental health issues. Its editors deal with competency in a relatively brief section of the book, correctly noting that “legal criteria, not medical or psychiatric diagnoses, govern competency.” Their book is filled with cross-references, and the editors steer readers towards well-known sources in the mental health literature on competence to stand trial, including Dr. Thomas Grisso, and Melton, et al.

Sadock and Sadock outline the diagnostic criteria for various mental disorders, conditions and issues, while also covering the basic treatment approaches. The book is written as a reference work for mental health professionals. Importantly, since part of what lawyers are concerned about in understanding the mental health professional's approach to competence assessment are the various protocols and guidelines for forensic examinations, the editors provide brief but useful references to the literature, including the guidelines for forensic psychiatric examinations.

Melton, et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers (2d. ed.) has previously been mentioned. This book covers a lot of territory in addition to competence to stand trial. However, it specifically provides a series of useful observations and bits of information that should be known to lawyers approaching competence assessments.

The authors dissect the definition of competence in such a way as to allow a lawyer to understand what a qualified mental health examiner should know about competence. For example, they make the point that “With respect to the first prong of the competency test, for instance, a level of capacity sufficient to understand simple charges ... may be grossly insufficient when a more complicated offense is involved ....”

This is a significant point, since many competence examiners do not appear to consider that the nature and complexity of the charge is a consideration in a competence assessment. Lawyers approaching competence assessments need to be thoroughly familiar with literature such as this, which supports the notion that competence assessments are conducted in a context -- a point also made by Dr. Grisso, as will be further noted below.

Helpfully, Melton, et al. review what is now a somewhat dated list of the various structured evaluation formats and testing protocols available for use by mental health professionals in competence assessments. Id. at 139. These include the Competency
Screening Test; the Competency Assessment Instrument; the Interdisciplinary Fitness Interview; the two versions of the Georgia Competency Test; the Computer-Assisted Competency Assessment Tool; the MacArthur Competence Assessment Tool; and the Competence Assessment for Standing Trial for Defendants with Mental Retardation.

Importantly, for our purposes, the authors focus on what mental health professionals need to understand about the attorney-client relationship and attorney-client communications. As previously noted, they, among others, place among the “required” inquiries to be made by the assessing mental health professionals an interview with the defense attorney concerning the length, substance, and nature of previous attorney-client contacts. They make the following important observation:

“Points of misunderstanding about charges and the legal process will be interpreted differently depending on whether they occur after hours of counseling from the lawyer or, as may often be the case given the press of dockets and lawyers' caseloads, after a five-minute meeting at a preliminary hearing. And, as noted previously, information about the quality of the relationship is crucial in addressing this second Dusky prong and in fulfilling the consultation role.”

Another source that defense counsel should be thoroughly aware of in approaching competence assessments are the pertinent works of Dr. Thomas Grisso. His 1988 workbook entitled *Competency to Stand Trial Evaluations: A Manual for Practice* is useful, though now not only supplanted by some of his own work, but that of other reputable scholars as well. The 1988 work includes a few important observations, particularly where a lawyer is preparing to cross-examine a mental health examiner who has performed a “drive by” examination -- characterized by a brief review of a few records, and by one relatively quick interview with the accused, which may or may not have included some competence-specific assessments.

One characteristic of a “drive by” of this type is that often the examiners neither taperecord the sessions nor use a methodical way of documenting both their competence-pertinent questions and the specific answers given. Often, these “drive bys” contain a brief summary of the charges, some anecdotal patient history, notations concerning any records reviewed, and a series of observations about competence. As Dr. Grisso points out, they may not even have a specific methodology that will allow their opinion to be compared with those of other examiners. The end product of these sad professional exercises is a conclusion by the examiner largely based on a statement of the examiner's professional qualifications, and an “I know it when I see it” type of assessment.

Noting that mental health professionals have an obligation to keep themselves informed of new developments that arise in their field of practice, Dr. Grisso points out that a defendant may be legally competent for one purpose but not for another, and that the examiner must be careful to have used a method that can be validated for the competence inquiry to which it has been applied.

Thus, in this early work, Dr. Grisso noted that a competency assessment might include five objectives, focused on the description of the defendant's strengths and deficits; a causal explanation for the deficits in abilities that are known to define legal competence to stand trial; a description of mental disorder; possible causes of incompetence, including malingering, or the purposeful faking or exaggerating of deficiencies; the establishment of a relationship between the causal conditions and the deficits in competency abilities; and the interactive significance of deficits in competence abilities.

Dr. Grisso has pointed at one of the great deficits in the competence assessment process, which is that mental health examiners are not held, even in their professional circles, to particular methodologies in competence to stand trial procedures. Thus, it is rare that two examiners use the same methodologies, questions, response formats, and ways of evaluating the examinee's responses.

In a more recent work published in 2003, Dr. Grisso wrote that while mental health professionals have contributed to some improvements in the assessment of legal competencies, there continues to be a level of ignorance of the legal standards, the relevant professional literature that leads to irrelevance in courtroom testimony. At the same time, because courts and lawyers
are often not sufficiently knowledgeable about competence issues, they allow the intrusion of psychiatric and psychological concepts into legal matters such as the definition of competence. Dr. Grisso observed that there is still a problem with the sufficiency and credibility of information provided to the courts to allow reliable competence assessments, while applauding the fact that there are guidelines published by various mental health profession groups that should help improve the panorama.

From a practitioner's viewpoint, there are a number of useful points made in Dr. Grisso's work that should be of value to lawyers of all levels of experience. For example, he reiterates the distinction between “screening evaluations,” which may consist of an interview, or the administration of one test, and assessments conducted over time, noting the quality and extent of data that one might get through various inpatient or extended out-patient assessment processes.

Moreover, he makes a point that is of great significance, particularly where the objective of the cross-examination is to point out the inherent problems in the competence assessment process. He observes that “little is known empirically about the methods that clinicians actually use in collecting data for competence to stand trial evaluations.”

Grisso repeats the area in which “... [a]lmost all texts describing pretrial competence evaluations have agreed [, which is] that examiners need structure and a clear conceptualization of their objective, as well as appropriate methods, in order to perform evaluations that will have clinical quality, legal relevance, and practice utility to the courts.” Id. at 82.

Helpfully, especially for lawyers, Grisso outlines his view of how the various available forensic instruments relate to the assessment process as he understands it. From defense counsel's viewpoint, he offers a very useful “critique” of a number of the standard instruments.

In addition to the several already discussed, there are a number of other valuable works that address competence to stand trial and competence assessments. Well-known scholars have been working in the area for some time. For example, Professors Golding and Bonnie have separately published a number of works pertinent to competence, as have several researchers who have worked on the various MacArthur mental health projects, some of whom have addressed competence issues over the years. Bruce Winnick has for years dealt with various competence assessment issues. He wrote some of the scholarship that dealt with medication and competence issues dating back to the 1970s, and continues to publish today.

Dr. Richard Rogers' work on the assessment of malingering, and on forensic assessments generally, is reflected in several well-received books that he has authored. He has developed and recently published an approach to competence assessment. In addition, several researchers have been working on the issue of competence regarding juveniles, and the need to address (and for lawyers to understand) the important differences between the assessment of adult and juvenile competence. Look for a new Rogers book in 2005 that will offer a very useful addition to the literature on competence assessments.

As a number of mental health professionals point out to lawyers, studies funded by the MacArthur Foundation have produced valuable literature.

**Strengths And Limitations Of Competence Assessment Devices**

There are several sources that discuss the generally accepted structured interviews, assessment inventories, and instruments specific to the assessment of competence to stand trial. A number of these have been described, at least by name, in the above review of the pertinent literature. Moreover, these items are all best seen in their original formats, and are more knowledgeably commented upon by the authors whose works have been mentioned at some length in this piece than they are by the present author.
For example, it does not take a great deal of time to review the Competency Screening Test, or any of the other much used competence assessment tools. What is commonly known as “The MacArthur” is an example of a “new generation” assessment tool that requires the uninitiated lawyer to be briefed by a mental health professional who has both the manual and knowledge of the relevant literature, as well as a copy of the screening device available.  

The MacArthur uses scenarios presented to the examinee to elicit responses, which are then integrated into the assessment process. The MacArthur Competence Assessment Tool is described as divided conceptually into what the law might describe as separate capability or ability areas, allowing the examinee to be assessed in those specific areas as he or she navigates various scenarios presented.

A number of the older assessment devices clearly concentrate on situational awareness, emphasizing questions such as What does the judge do?, Who is the judge?, What does the jury do?, What does your lawyer do?, etc.

There are new assessment devices being published, and in use, constantly. There are in-patient programs whose clientele involves a large number of persons there for competence assessment, or competence restoration, that have adapted and “retooled” a number of the published instruments and assessment devices. Thus, a practitioner who acquires an understanding of the panorama of assessment tools and devices from the literature may be surprised to find that at a given state hospital, the competence inventory administered for a “situational awareness” is not one of the “standard” and well-known devices.

Not all useful competence assessment inventories are extremely recent. For example, some time ago, Dr. Stephen Lawrence from Southern California, developed what he called the “Lawrence Psychological-Forensic Examination for Use within the *21 Criminal Justice System.” This structured interview was designed for a California competence inquiry, but it is well suited, from a lawyer's viewpoint, to help organize a number of areas that involve or implicate competence to stand trial.  

This instrument is mentioned here as an example of a useful tool that is, in a sense, “off the radar” of mainstream mental health competence assessment tools, but useful for lawyers to review. It is certainly not unique, in that sense. Other experts have also developed worthy materials. It is an example of an inventory that a lawyer can use to gauge how thorough a competence assessment process has been in a given case.

From a lawyer's viewpoint, an examiner's use of a given competence-specific assessment device is only part of the concern. Given that the case law and literature encourage trial lawyers to have input into a client's competence assessment, it makes little sense for lawyers to defer the responsibility of a competence assessment exclusively to a mental health expert. Moreover, as pointed out above, it is unclear that such experts have any foundation for opining on the significance of attorney-client communications in the absence of consultation with trial counsel.

Without counsel's input, mental health professionals can only provide general information on the accused's “ability to assist in the defense” and, indeed, most mental health professionals do not inquire sufficiently into the characteristics of a given case, the nature of attorney-client communications, and the specific defense strategies (and legal defenses) available, to understand the accused's situational awareness and ability to assist.

It is for this reason, as previously indicated, that it is important for lawyers to understand the accepted protocols for competence assessments, including the place that specific competence assessment tools, structured interviews, and situational awareness “tests” used by mental health experts should occupy. No one test or structured interview device is going to provide a sufficient basis for a defensible competence assessment. A competence assessment is contextual, and counsel should treat it as such. Counsel should certainly interact with competence examiners to have input on the elements of a given competence assessment.

**Developing A Client -- And Case -- Specific Competence Approach**
While the case law places at least the ability to monitor competence (and in some states, the responsibility to monitor competence) on defense counsel, it is relatively rare for a defense lawyer to have developed a defensible understanding of what goes into a competence assessment. Here, the understanding referred to is not what a mental health professional does in assessing competence, but rather what defense counsel needs to know to assess whether, when, and how to raise the question of a client's incompetence.

A number of well-qualified and well-intentioned lawyers will point out that there are a variety of strategic and tactical reasons for not “fronting” a client's incompetence where there would, in general, be some case-related “loss” for the client. This view is legitimate in the following respects. First, it may be that an amazingly good settlement opportunity is being presented to a client who, in a lawyer's judgment, is marginally competent. The settlement possibility will be eclipsed if a competence question is raised, and therefore, with the long view in mind, the lawyer *22 decides not to raise the issue.

There may be other serious concerns about raising competence questions. For example, in a death penalty case, or in other cases involving mental state issues, raising a competence question will give both the trial court and the prosecution, insight into a client that neither would normally have. In some jurisdictions the prosecution is able to essentially control the nature and extent of the competence assessment. Therefore, a competence inquiry amounts to a combination prosecutorial discovery and prosecution evidence, notwithstanding the rules of judicial immunity that may limit the collateral uses of a client's statements during a competence assessment. Careful planning of a prosecution competence assessment may allow the prosecutor to assemble ammunition to rebut a mental state defense, and perhaps also in a death case, to assemble facts in aggravation, or rebut an Atkins claim.

Indeed, because of the U.S. Supreme Court's ruling in Atkins, there are even more refined questions asked of a capital case defender today than previously. For example, it may be that the lawyer who suspects that his or her client is likely both mentally retarded and incompetent will feel that the presentation of a competence question will trigger an examination of the client intended to neutralize defense evidence of mental retardation. Thus, a death penalty defense team might delay the raising of the competence question until the assessment, and even the adjudication, of the Atkins issue takes place -- knowing that such an adjudication may actually have a bearing (either useful or useless) on the later competence adjudication. Indeed, there has already been litigation on the type of protocol that should be used in an Atkins examination to differentiate such an assessment from a competence assessment.

Undoubtedly, from a practitioner's viewpoint, outcome-oriented, competence-related decision making is legitimate, and discarding a competence question in favor of obtaining what is defined as a “better” outcome for a client is difficult to argue against. Moreover, it may be that the defenders will be guided by the viewpoint that in any event a competence claim cannot really be waived. This is a risky outlook, however. Indeed, some of the retrospective competence assessment cases demonstrate how difficult it is to prove a client's incompetence during a trial that occurred several and, in some cases, many years ago, especially where trial counsel did little to document the evidence of incompetence. For that reason, especially where the competence “punch” is being pulled, counsel should carefully think through how to memorialize concerns about incompetence so that if a case “blows up,” the reality of the client's incompetence is not lost.

A Competence Issues Checklist

Assuming that the lawyer has arrived at the conclusion that the competence issue must be raised, a number of attendant questions need to be answered. First, in addition to collecting the relevant case law and mental health literature, counsel should begin to define whether the competence question centers around situational awareness, including awareness of procedural and substantive rights, case outcomes, and the like, or the ability to communicate with, and assist counsel, or both.

Second, while considering the practical and strategic issues involved in the release of various forms of client history, counsel should outline what in the available records, including the available medical, psychological and psychiatric treatment records
(if there are any), institutional behavior, and attorney-client related interaction records, may either support or undermine a claim of incompetence.

Third, counsel should identify all persons who are possible sources of information, and available witnesses, on competence questions, including family, friends, custodial personnel, medical personnel, court staff, and jail visitors.

Fourth, together with one or more mental health professionals, the lawyer should arrive at an understanding of what testing and assessment protocols are indicated, including whether basic psychological testing is needed; whether some understanding of the implications of medication or medical/psychiatric issues is required; and how the examiners propose to use the broad range of competence assessment tools available.

Fifth, the lawyer also should consider what position he or she needs to occupy in the proceedings -- whether to remain as counsel of record, or essentially to become a witness. Obviously, there are some dangers in selecting the latter course, but note: the literature on competence clearly assigns an information sharing role to the lawyer of record. Moreover, at the high end, lawyers who have litigated competence issues where the issue centers on attorney-client communication and ability to assist are aware that counsel of record’s input is critical.

A lawyer’s role can be variable. On the one hand, it can involve discussions with a designated attorney-expert who becomes the lawyer’s surrogate (and is a likely witness) during the course of the litigation of the competence question. There is a wide variety of formats used in connection with this type of approach. Counsel of record may allow the attorney expert (who is retained or appointed solely for that purpose) to communicate directly with the client, or to communicate with the client, lawyer, and a wide range of sources of information. In the alternative, counsel of record may use the attorney-expert only to explain: the duties of defense counsel; the requirement of competence and the attributes of competence; how a competent client and defense counsel interact in the defense of that particular type of case. Often the in-court examination of such an attorney-expert involves a series of hypothetical questions.

Sixth, counsel of record must not only plan how his or her own information will be presented to the trier of fact, but also how to interact with mental health professionals on the case. There are a number of different formats that have been used in this respect. Some lawyers have gone so far as to videotape their interaction with the client, knowing that the video tape would be produced to the prosecution, and eventually to the court. However, the videotape, usually covering a discussion involving both situational awareness and ability to communicate issues, provides a unique insight into the nature of the communication problems that may be raised in a given case.

In other settings, counsel have provided experts with a diary, or chronicle of communication issues and problems, together with jail records evidencing a client's psychological deterioration, and increasingly incoherent conversations and statements. A clear record of the transmission of these materials is made so that when mental health professionals testify in proceedings, and essentially base their views on material other than that, counsel can successfully examine to point out that sources of information acknowledged both in U.S. Supreme Court opinions (remember Medina v. California), and accepted mental health literature clearly delineate and define the defense lawyer as a valuable front line source of information on trial competence.

Elsewhere, it has proven possible *23 for a mental health professional to essentially serve as the surrogate for the lawyer, by not only using the arsenal of tools available to mental health professionals, but also by videotaping interaction with the client that involves a carefully planned set of questions designed to demonstrate the client's responses to questions involving situational awareness, and ability to assist in the conduct of the defense. On occasion, incidentally, the record of either attorney meetings, or mental health professional meetings, has proven to be extremely long -- in part in order to assure the trier of fact that the possibility or hypothesis of malingering, and exaggeration of symptoms was considered.

Some Pertinent Legal Issues
At the beginning of this writing, emphasis was placed on the usefulness of the district court's restoration to competence-related ruling in *U.S. v. Duhon.*

For those whose cases involve presentation of evidence under the guidance of the Federal Rules of Evidence or similar rules, the reality is that psychological or psychiatric evidence often falls into a “soft science” area. For example, in federal courts, since *Daubert,* there have been a number of rulings on the threshold for the admission of psychological or psychiatric evidence that is not itself dependent on some new technique.

Under *Daubert,* a central question was “whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.” Several federal courts have indicated that the “non-scientific expertise” threshold for the presentation of expert testimony found in *Kumho Tire* is applicable to psychological, psychiatric, and social sciences. Indeed, during the years between *Daubert* and *Kumho Tire,* several circuit courts had already decided that psychological and psychiatric testimony was really “specialized expertise” rather than testimony that was the product of a specific scientific theory.

Thus, in a number of jurisdictions, where psychiatric and psychological expertise is at issue, the question is whether the expert has the appropriate qualifications; sufficient special knowledge, skill, experience and training to formulate the competence opinion; and generally employed methodologies and techniques that render the evidence sufficiently reliable to be proffered.

Thus, in addition to having reviewed the literature on competence, and competence-specific definitions, counsel should be acquainted with the evidentiary tests, thresholds, and standards applicable to the introduction of expert testimony on competence -- carefully differentiating those instances in which an examiner is relying on “a classic” combination of interviews and assessment devices that are recognized in the pertinent literature from those instances in which the examiner has either clearly done insufficient work (according to the literature) or has combined techniques, methods, and tests in a way that is novel and not supported in the literature.

A basic survey of reviewing court decisions where competence was at least one of the issues considered indicates that it is rare that counsel will have made an extremely thorough record where “bad science” has been involved. Thus, we have few opinions that cover research specific to the admission of psychological and psychiatric testimony in a given competence assessment process.

**Every Case**

In 2004, the United States Supreme Court unexpectedly issued a ruling (*Blakely v. Washington*) that has raised substantial questions about sentencing processes around the United States, and may change the way that criminal trials are conducted in certain instances, as well. While astute commentators and scholars may well have predicted that after the seminal *Apprendi* ruling, the Court would be headed towards *Blakely,* before 2004 most practitioners certainly were not litigating their cases as though *Blakely* was looming large on the legal horizon.

It is unclear whether the United States Supreme Court intends to tinker much with the current definition of trial competence, or with the procedures for the assessment of competence. Nonetheless, in subtle ways, since the Court's ruling in *Godinez v. Moran,* it has grown increasingly expansive in its dealings with certain aspects of trial competence. But, the criminal defense bar has continued to treat trial competence almost as a passing matter, a question that is easily addressed. Indeed, there are probably more opportunities for criminal defense lawyers to be trained on the vicissitudes of fingerprint examination than on the requirement of each and every client's competence to stand trial.
With competence, we have used a sort of “learn as we go” approach. Unless a lawyer has taken an accidental interest in learning about competence, or is faced with a competence assessment requiring a fast self-study course on competence issues, many lawyers remain barely acquainted with what competence means, how it should be assessed, and when a client's incompetence should be raised.

The requirement of competence is sufficiently important that we should be learning about it at the same time that we learn trial techniques and the basic skills of criminal defense lawyering. Unlike many aspects of the lawyer’s case-specific knowledge, knowing about competence is not something that may be of benefit in only one case in a lifetime. Knowledge of competence and incompetence to stand trial is a factor that plays a part in every case that we handle.

Footnotes

a1 John T. Philipsborn is in private practice in San Francisco, has been involved in the litigation of competency issues and competence to stand trial standards in the federal and state courts, and has written for, and lectured to, forensic psychiatrists and lawyers on competency issues.


3 As used throughout this article, the word “competence” means competence to stand trial, unless otherwise indicated.

4 See n.3 above.

5 There are many types of legally recognized “competencies.” As used in this article, the word “competence” means only competence to stand trial in a criminal case.

6 Dusky v. United States, 362 U.S. 408 (1960) per curiam.


9 Dusky v. United States, supra, 362 U.S. 408.

10 Drope v. Missouri, 420 U.S. 162, 171 (1975). The court described these as the basic tests in use today in Medina v. California, supra, 505 U.S. 437, 452.


13 People v. Medina, supra, at 884-85.

14 U.S. v. Duhon, supra, 104 F.Supp.2d 663 at 668, n.21, citing Burt and Philipsborn, supra.

15 As noted, this truism is recognized in the mental health literature per DR. THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS, (2d. ed.) Kluwer Academic Publishers (2003). Note that Dr. Grisso points out: the Godinez Court included decision-making abilities within the Dusky standard.” Id. at 73.

16 Id. at p. 150.


18 509 U.S. 389, 398.
A good example of the understanding that an experienced mental health expert brings to this matter is found in DR. THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS, (2d. ed.) Kluwer Academic Publishers (2003). Note that Dr. Grisso points out: the Godinez Court included decision-making abilities within the Dusky standard.” Id. at 73.


See Washington v. Harper, 494 U.S. 210 (1990), a case that discusses the hearing requirements for the involuntary administration of anti-psychotics to a prisoner.

334 F.3d 803, 808 (9th Cir. 2003): “Capacity for rational communication once mattered because it meant the ability to defend oneself [citations omitted] ... while it now means the ability to assist counsel in one's defense ...” [further citations omitted]


Odle v. Woodford, 238 F.3d 1084, 1089 (9th Cir. 2001).


GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENT AND INSTRUMENTS, 2d ed., supra, at p. 70.

GRISSO, COMPETENCY TO STAND TRIAL EVALUATIONS: A MANUEL FOR PRACTICE (Professional Resource Exchange, 1988).

Reference is to the AMERICAN BAR ASSOCIATION/STATE JUSTICE INSTITUTE NATIONAL BENCH BOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY (ABA, 1998). The section of the ABA that contributed to the work was the Commission on Mental and Physical Disability Law.

This manual, published by the California Public Defenders Association and California Attorneys for Criminal Justice, has been used as a model in various parts of the country. A new edition has been published this year under the editorship of Michael Ogul, who has taken over from well respected death penalty defense counsel, Michael Burt. Burt edited the manual for years prior to the current edition. Thankfully, both Michael Burt and Michael Ogul have a great interest in mental health and the law, and have developed the publication accordingly. The present author has co-authored the sections on mental health experts with Michael Burt and Jennifer Friedman.

Melton, et al., 2d. ed., at 163.

Ibid.
For example, a lawyer wishing to review an approach to competence assessment and malingering should become familiar with the tortured history of U.S. v. Gigante, 982 F. Supp. 140 (E.D.N.Y. 1997) and U.S. v. Gigante, 996 F. Supp. 194 (E.D.N.Y. 1998) and Gigante's eventual admission of malingering.

This well-respected work is actually published today under the names Kaplan and Sadock. THE COMPREHENSIVE TEXTBOOK covers a wide spectrum of subjects that may arise in criminal cases, and is certainly a compendium well worth knowing.

Id. at 3285.

Id. at 3285, 3289.


Id. at 122.

Page 150.

Id. at 150.

Introduction, p. xvi.

At page 4.

Grisso deals with this issue at p. 25 of his 1988 pamphlet.

The comments made in the foregoing paragraph are based on Dr. Grisso's writings in EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2d ed.) at pp. 10-11. Readers should be aware that the writer of this piece has mixed his own commentary with that of Dr. Grisso, who may not view the foregoing text as representative of his thinking.

Id. at 79.

Id. at 79-80.

Page 81.

Id. beginning at 89.

See the compendium of recent literature produced the MacArthur Adjudicative Competence Study updated through May 2004 at www.macarthur.virginia.edu. For understandable reasons, however, at least some of the emphasis of the MacArthur work, which has included well known mental health experts such as Drs. Bonnie, Monahan, Poythress, Otto, and others focus on the interests of the group of mental health experts who have worked together on, among other things, the MacArthur competence assessment tools such as the MacCAT-CA.

A number of mental health professionals will not share a competence assessment tool, or any other kind of an instrument, with a lawyer whose case is pending, and whose client may be “briefed” or otherwise impacted by the lawyer's acquired understanding of the materials reviewed. That said, a number of qualified mental health professionals are more than willing either during training sessions, or on a one-on-one basis, to brief lawyers with whom they are working for any number of valid and useful reasons.

The author thanks Michael Burt, his periodic co-author, and occasional co-counsel, and a well-recognized capital case defender from San Francisco for pointing out Dr. Lawrence's work.

Supra, 104, F.Supp.2d 663.


Id. at 592-94.

See U.S. v. Bighead, 128 F.3d 1329, 1330 (9th Cir. 1997).


community." On a Class A misdemeanor, the defendant will almost surely spend 10-12 months in the hospital. The average stay on a Class C felony is 46-48 months. After release from the hospital, the defendant will likely be placed in a locked group home, continued under PSRB supervision and returned to the hospital if there is a failure to comply with all conditions.

13. A GEI adjudication is not a conviction: It does not trigger mandatory fines and it does not count as a prior conviction for the sentencing guidelines. State v. Saunders, 195 Or App 357 (2004); OAR 253-09-002. However, a GEI adjudication will trigger sex offender registration because ORS 181.594(5)(b) specifically includes within the definition of "sex offender" a person who "has been found guilty except for insanity of a sex crime."

For more on GEI, see Chapter 4.

III. Some Common Ethical Issues

A. The Suicidal Client

The issue: Suppose that your client tells you she’s planning to commit suicide. Is it unethical to do something about it?

1. Confidentiality

a. Is it confidential? Oregon Rule of Professional Conduct (ORPC) 1.6 states, "A lawyer shall not reveal information relating to the representation of a client unless . . . [an exception applies]." So the question is not whether the information is confidential. The question for this rule is whether the information "relates to the representation" of your client. It could be argued that a statement regarding a future act does not relate to the representation on the client’s criminal case. However, this term should be interpreted very broadly. If the information is gained in the course of an attorney-client interview on the criminal case, then it is related to the representation. First, this broad reading is supported by the fundamental principle that confidentiality and trust are at the core of the attorney-client relationship. If a client can’t trust that his words will be kept close by the attorney, this will have a chilling effect on the whole relationship. Clients will be afraid to open up and say anything for fear that it could be passed on to the authorities. Second, the very first exception to the confidentiality rule is the authority to disclose a client's future intent to commit a crime. If the rules intended that such information not be included within the scope of confidentiality then there would be no reason to have an exception.

b. Can it be disclosed under Rule 1.6(b)(1), which states, "A lawyer may reveal information relating to the representation to the extent the lawyer reasonably believes necessary: (1) to disclose the intention of the lawyer’s client to commit a crime"?

Here, the answer would clearly seem to be "no." First, suicide is no longer a crime in this or any other state. Second, there is a more appropriate section dealing with potential harm: Rule 1.6(b)(2).

c. Can it be disclosed under Rule 1.6(b)(2), which states, "A lawyer may reveal information relating to the representation to the extent the lawyer reasonably believes necessary: (2) to prevent reasonably certain death or substantial bodily harm."? Note
that in order to disclose information, the lawyer must (a) reasonably believe it to be necessary to prevent substantial bodily harm, and (b) believe that the likelihood of the harm is "reasonably certain." Presumably this is to hold back a squeamish attorney who believes it would be necessary to disclose an uncertain potential for harm. Note also that reasonably necessary limits the amount of information that may be released: i.e., the minimum possible to accomplish the goal. So, is a threat of suicide reasonably certain to lead to substantial bodily harm? First, the attorney must assess whether the client is reasonably certain to follow through on the threat. This is a real problem. Suicide assessment is tricky and should be left to a clinician.

So, the first step should probably be to contact a psychologist or therapist you know and ask them to help you do an assessment. That said, some objective factors that a person is likely to follow through on a threat of suicide include past suicide attempts, an actual plan, access to the means to carry out the plan, hopelessness, an independent psychiatric diagnosis, and a lack of support like family or friends. It would have to be a really clear-cut case to rise to the level of "reasonable certainty" that the person would follow through. Second, even if the person follows through on their threat, it doesn't mean that an attempt will actually result in death or substantial bodily harm. The plain language of the rule would seem to want attorneys to be reasonably certain about the degree of harm. The more appropriate and moral reading, however, would be that if you're reasonably certain that there will be an attempt to cause substantial bodily harm then you can break confidentiality to the extent necessary to stop it, even if you have no way of knowing whether the attempt is likely to be successful.

d. If you are reasonably certain that great bodily harm will occur if you don't divulge information, then are you required to do something? The clear answer here is "no." Rule 1.6 is a permissive rule. It sets out the situations in which an attorney may break confidentiality. It says nothing about when an attorney must act. It seems to say that even if you are sure that your client will murder someone, if you don't act, you still don't have to do anything.

2. Current Client Conflict

Rule 1.8(b) states, "A lawyer may not use information relating to representation of a client to the disadvantage of the client" without informed consent. Presumably, if you actually save the client's life, then no result would be a disadvantage compared to death. But what if the client wasn't going to attempt suicide? What if your actions cause the client to get locked up in a hospital and have his freedom taken from him? A loss of freedom would certainly be a disadvantage. As would the stigma associated with an implication of mental illness or instability. Since there are no exceptions to this rule, it's not entirely clear how one gets through this ethical puzzle.

B. The Incompetent Client

1. Why is competency an ethics issue?

a. There are certain decisions that the client must make that the attorney is not ethically allowed to make on behalf of the client. If the client is unable to make those decisions due to a grossly diminished decisional capacity, then the case is at a standstill until the defendant becomes fit. ORPC Rule 1.2(a) states, "A lawyer shall abide by a client's
decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” Rule 1.4(b) requires the lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The upshot of these rules is that the client gets to make the decision to exercise or waive his constitutional rights to trial, to a jury and to remain silent. The attorney may not waive constitutional rights and make those decisions for the client. In fact, the attorney is ethically bound to explain a matter to whatever extent is necessary to allow a client to make the requisite decisions.

b. Defendants have a basic constitutional due process right to be competent in a criminal case. This right is so strong that the Ninth circuit recently reversed a case where a judge did not, sua sponte, revisit a competency decision he had already made when the client’s behavior should have triggered concerns. Maxwell v. Roe, ___ F3d ___, 2010 WL 1997700 (9th Cir. May 20, 2010). Knowingly violating a client’s due process by proceeding with the case while the client lacks the capacity to be a defendant would clearly be a current client conflict under rule 1.8(b). That having been said, there are close calls. If the client seems able to make a decision and understands the ramifications of the decision, then the fact that the client is also extremely ill is relevant but not conclusive. For example, a client is in jail on a misdemeanor, wants to get out and there’s a time-served offer that doesn’t involve probation. Assuming the client already has a criminal record, there isn’t much in the way of downstream dangers in taking the plea. So the level of required competency would not be as high as in a more serious or complex case in which there would be serious risks of either going to trial or of pleading guilty.

c. Does an attorney’s duty of candor toward the tribunal (Rule 3.3) require the attorney to divulge to a judge an attorney’s competency related concerns? Perhaps. While it is undisputed that a trial court judge has the affirmative duty to hold a competency hearing whenever he or she should reasonably doubt a defendant’s competency (see Maxwell, supra), the defense lawyer’s duty is less clear. Rule 3.3 certainly does not specifically address the question of a duty to raise the issue of competency. Some courts have held that the attorney, like the judge, indeed has such a duty whenever competency is reasonably in question. See, e.g., In re Fleming, 16 P 3d 610, 617 (Wash Sup Ct 2001) (“When defense counsel knows or has reason to know of a defendant’s incompetency, tactics cannot excuse failure to raise competency at any time so long as such incapacity continues”); United States v. Jackson, 2006 US App LEXIS 12387 at *32 (6th Cir 2006) (lawyer was “discharging his professional duty” in failing to raise the issue when he had a good-faith doubt as to his client’s competency).

However, a 2008 law review article by Professor John D. King argues that the defense lawyer’s unique duty of zealous representation should trump the duty of candor toward the tribunal. King takes the position that an attorney is not required to raise doubts about client competency to the court, arguing “to the contrary, that the dignity and moral authority of the criminal justice system is best served by a defense lawyer being free to operate solely in the interest of her client.” John D. King, “Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant,” 58 Am. U. L. Rev. 207, 214 (2008). King acknowledges that
“most commentators place upon the defense attorney an obligation to raise the issue of competency of the defendant any time that the attorney believes that his client may not be competent.” *Id.* at 235. But he argues that “such an approach is not justified by history, necessity, or logic and undermines the integrity of the attorney-client relationship and, therefore, the integrity of the criminal justice system.” *Id.* King’s ultimate advice to defense attorneys is: “In the absence of a rule specifically requiring disclosure of a lawyer’s doubts about her client’s competency to proceed, the appropriate conclusion for a lawyer or a court to draw is that the lawyer’s duties of confidentiality and zeal prohibit her from revealing such doubts if they are adverse to her client’s interests.” *Id.* at 262.

2. Isn’t it a violation of confidentiality to tell a judge that the client is incompetent?

Rule 1.14 deals specifically with this issue:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

Rule 1.14 states that a lawyer may break confidentiality to the limited extent necessary to protect a client with diminished capacity who is at risk of substantial harm and cannot act in his own interest. A serious violation of the client’s due process rights would be a substantial harm; as are the potential consequences of a criminal case. So if the client cannot act in his own interest (i.e., he’s incompetent), then an attorney may break confidentiality to tell the judge and start the process of regaining the client’s competency. This assumes, of course, that there are no other options. If it is possible to regain the client’s competency in the community without telling the judge, then it is not “necessary” to break confidentiality in that way.

C. The Marginally Competent Client

1. The Issue

Can the attorney bring up the issue of mental illness at trial even in the face of his client’s explicit wishes not to bring it up? What often happens when a client is treated until fit is that the most acute symptoms will disappear, like disorganization and hallucinations, but the client will still lack self-awareness regarding the illness. This lack of “insight” will often guide the client’s decision-making. A similar issue arises when all of the symptoms
resolve except a fixed delusion. Such clients understand the issues and are decisionally competent in that they can weigh options, integrate legal advice and decide between the options. But where the client’s overriding concern is to get the factfinder to agree with the delusion or the absence of a clearly documented illness, the ethics rules fall short. Criminal defendants have certain decisions that are theirs and theirs alone to make. If a marginally competent client wants to take a terrible plea for absurd reasons, it’s the attorney’s duty to assist the client in making the plea. It is the client’s right to make disastrous choices. However, the attorney has a duty to make the final decisions regarding the means by which such decisions and objectives are carried out. Rule 1.2. The attorney must consult with the client and keep the client informed but, ultimately, the attorney is in charge of the strategy. Rules 1.2, 1.4. The attorney may take such action as is impliedly authorized to carry out the representation. Rule 1.2. And the attorney may disclose such information as is impliedly authorized by representation. Rule 1.6. Finally, the attorney has a duty to competently represent the client. Rule 1.1.

2. Argument against the attorney being able to introduce evidence of mental illness against the client’s wishes.

The most compelling argument in favor of this position is that neither an action nor a disclosure can be impliedly authorized if it’s explicitly barred. Thus, for example, Rule 1.6 says that all information relating to the representation is confidential information. That information can be released if it’s impliedly authorized in order to carry out the representation. One could argue that release of the best evidence in favor of innocence is impliedly authorized by the client’s decision to go to trial and objective to win at trial. However, it’s hard to see how the client could have impliedly authorized the release of information when she has explicitly asked that it not be released.

3. Argument for the attorney being able to introduce evidence of mental illness against the client’s wishes.

The lawyer is in charge of strategy and means. When the client decides to go to trial and sets the objective of winning, the client has impliedly authorized all strategies and means to get the job done. Obviously, the client should be consulted and, in most cases, the attorney will defer to the client’s wishes regarding strategy. But, ultimately, it’s the attorney’s call. This can be seen when one considers that while a client’s disastrous choice regarding settlement is the client’s to make, a client’s disastrous choice regarding strategy will fall on the attorney’s shoulders. Perhaps more importantly, if the client were able to decide exactly what confidential information could be released at trial, the strategy would be almost entirely in the hands of the client. Confidential information includes all information relating to the representation. By controlling the release of confidential information, the client could decide which questions could be asked, which witnesses could be called, which motions could be made, etc. There would be little point in dividing between strategy and objectives because virtually everything would be in the hands of the client.

4. My Resolution

I believe, as a matter of personal ethics, that it is important to have a client-centered practice where the client is given free will to make as many decisions as possible and is involved in all of the strategy. If a client has particular concerns or wishes regarding the case, I will do my best to follow those concerns and wishes. However, I also believe that
I'm ultimately responsible for all the strategic decisions. If I defer to the client's wishes and he's convicted as a result, that happened because of my decision, not the client's. It follows that a client's decision to go to trial is an implied authorization to employ whatever strategies and use whatever information I believe will best succeed in getting that job done. Thus, I will have a frank discussion with a client prior to trial about the idea that deciding to go to trial puts the responsibility to choose strategy and means on my shoulders. I also say that I will do my best to follow whatever his wishes are in that regard. However, if issues come up we will need to meet them head on. We can't let the DA get away with implying one thing when we know the opposite is true. Trials are all about attack and counterattack and it's impossible to anticipate what information will need to be used until we get to trial.

D. Candor to the Tribunal

1. Issue: Can you put a delusional client on the stand to present testimony that you know to be false?

2. It's not suborning perjury because the client is telling the truth from the client's perspective. A material element of perjury is that the person making the statement must know it to be false.

3. It could be an issue of "candor to the tribunal." Rule 3.3 states, "(a) A lawyer shall not knowingly... (3) offer evidence that the lawyer knows to be false." Rule 3.3(a)(3) also states, "A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." To summarize, a criminal defense attorney may not and must offer the testimony of a defendant which is known to be false. These contradicting statements follow from the dueling issues of candor and due process, but they are utterly unhelpful in our situation.

IV. Laying a Foundation on Direct

There are two goals when laying a foundation on direct examination. The first is to make sure the evidence is admitted and that the expert is acknowledged as an expert. The second is to establish a convincing aura of scientific reliability.

On direct examination, it is very important for both attorneys and clinicians to take a slow, baby step-by-baby step approach that carries the judge and jury along and doesn't leave anyone behind. To that end, it's vital that the expert answer the question asked, not the question they believe will be asked next. Most experts, particularly those with a PhD, are able to think two or three steps ahead. Experts should be advised to resist the temptation to jump directly to the greater point of the question. The main problem is that the greater point only makes sense if the expert builds up to it. The steps in between the question and the ultimate point are crucial for basic understanding. Thus, the answer will either seem disjointed, pompous or, on cross, even hostile. Of course, experts should give a complete answer to open-ended questions.

The defense attorney should go through at least the following four steps with every expert prior to testimony: