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Reconceptualizing Competence: An Appeal

Mae C. Quinn

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RECONCEPTUALIZING COMPETENCE:
AN APPEAL

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I. Introduction

Our jails and prisons - referred to as the “new asylums” in this country\(^1\) - are currently filled with the mentally ill.\(^2\) Yet they provide woefully inadequate mental health services for the incarcerated impaired, operating merely as “warehouses” for those rejected by society.\(^3\) Many have argued for reforms relating to the criminal justice system’s treatment of the mentally disabled.\(^4\) For instance, some have pressed for the creation of specialized trial-level mental health courts,\(^5\) which would divert impaired defendants from standard prosecution to court-ordered mental health treatment.\(^6\) Others, including the Task Force of the

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\(^3\) See HUMAN RIGHTS WATCH, supra note at 3 (“The penal network is . . . serving as a warehouse for the mentally ill.”); see also id. at 1 (“[A]cross the nation, many prison mental health services are woefully deficient, crippled by understaffing, insufficient facilities, and limited programs.”); W. David Ball, Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recidivism, available at http://ssrn.com/abstract=977247 (last visited Sept. 21, 2007) (“Prisons fail to adequately screen inmates for mental illness during intake, fail to offer special programming or housing, [and] fail to provide basic treatment for many prisoners.”); see also Editorial, Treating Mentally Ill Prisoners, N.Y. TIMES, Oct. 22, 2004, at A22.

\(^4\) See Bonnie J. Sultan, The Insanity of Incarceration and the Maddening Reentry Process: A Call for Change and Justice for Males with Mental Illness in United States Prisons, 13 GEO. J. ON POVERTY L. & POL’Y 357 (2006) (“[O]ur current prison environment is an inhumane placement for [the mentally ill].”); see also Brent Staples, supra note 2 at A26 (“[M]entally ill people often enter the criminal justice system for offenses and aberrant behaviors related to their illness.”); W. David Ball, supra note 3 at ___ (“The poor treatment of California’s mentally ill prisoners burdens the judicial system, drains the state’s budget, and causes needless inmate suffering.”).


\(^6\) See Fisler supra note 5 at ___; Derek Denkla & Greg Berman, Rethinking the Revolving Door: A Look at Mental Illness In the Courts (Center for Court Innovation 2001), at http://www.courtnnovation.org _uploads/documents/ rethinkingthe revolvingdoor.pdf; see also Editorial, Treating Mentally Ill Prisoners, N.Y. TIMES, Oct. 22, 2004, at A22 (“The optimal solution would be to extend public health services right into the jails and prisons, so inmates can begin drug and therapy regimens the moment they walk into custody.”). Many argue that such institutions merely perpetuate
ABA Section of Individual Rights and Responsibilities (ABA-IRR Task Force), have urged prohibition of the execution of mentally impaired death row inmates.

Conversations about the incarcerated mentally ill have failed, however, to address another important problem facing the criminal justice system – the effect of defendant impairment on the appellate process. That is, few have examined how mental incapacity may undermine the ability of defendants – in death penalty cases or otherwise – to challenge past convictions on appeal and whether the criminal appellate processes should be reexamined as a result. Historically, although defendant competence for purposes of trial has received significant attention in case law and elsewhere, the problem of defendant incompetence on appeal has been largely ignored.

This article seeks to fill this void. Specifically, it argues that criminal laws, standards, and practices have misapprehended this issue. Many defendants
on appeal do suffer from serious mental illness and such impairment can undermine the fairness of the appellate process. Thus, this article makes an appeal -- seeking reconceptualization of the concept of defendant competence to, among other things, account for instances where defendant capacity may be essential to the direct appeal proceedings. Towards this end, it urges creation of a more comprehensive and coherent set of ABA Criminal Justice Mental Health Standards. These new Standards can help to better contextualize the concept of client competence during the criminal process and foster client-centered representation for defendants. Such standards would be invaluable not just during trial, but on appeal and beyond.

This article proceeds in Five Parts. Part II describes the constitutional framework announced in Dusky v. United States, state statutory schemes, and current American Bar Association (ABA) Criminal Justice Mental Health Standards that work to protect mentally incompetent defendants at trial. It also explains how contemporary trial-level processes and defense lawyering practices facilitate discovery of impairment. Lower court decisions have also worked to firmly root the Dusky trial-level competence standard.

Part III notes that the Supreme Court has said little about mentally impaired defendants on appeal. It looks at the limited, misguided ABA Standards on this topic. Contrasting present day appellate-level processes and representation norms with those relating to trial, it also sheds light on how the former contributes to the invisibility of criminal appellant mental impairment issues. It further outlines the history of lower courts ignoring the problem of appellate-level incompetence by relying on the ABA Mental Health Standards.

Part IV urges the deconstruction of the Dusky framework as legal monolith to permit for a more contextualized approach to competence throughout the criminal process – including direct appeals. It begins by critiquing the lower court trend that ignores the significance of appellant impairment and highlights an important counter-trend that offers a more nuanced approach to the question of competence in criminal cases. These cases, including the Seventh Circuit’s decision last year in Holmes v. Buss, correctly acknowledge that in many instances appellate-level client competence is essential to due process of law as well as provision of effective assistance of counsel. It also suggests that the Supreme Court’s significant decision earlier this year in Indiana v. Edwards has finally opened the door for development of a more individualized approach to the concept of competence, one that more appropriately takes account of the context in which questions of competence arise.

Part V calls for reconceptualization of competence in criminal matters, beginning with redrafting of the ABA’s Criminal Justice Mental Health Standard. In rethinking the idea of competence across all parts of the criminal process the Standards should not only properly recognize the right to competence during direct appeals, but propose a procedural model to be used to address such incompetency claims and meaningful remedial scheme for incompetent appellants.
in light of the context of the proceedings. It concludes by offering some general thoughts and considerations for the redrafting of the Standards to improve criminal justice practices relating to mentally ill prisoners in this country.

II. Trial Level Competence: A Recognized and Protected Right

A. Dusky v. United States: Constitutional Competence Touchstone

Nearly fifty years ago the Supreme Court first recognized the inherent unfairness of having seriously mentally impaired criminal defendants stand trial in *Dusky v. United States*.\(^{10}\) In this one-page decision, the Court announced a two-part inquiry for determining whether a defendant was so impaired as to render him incompetent, holding that if an accused was found to lack competence he could not be subjected to the rigors of trial.\(^{11}\) This now well-known test requires a defendant to have, first, sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and, second, a rational as well as factual understanding of the proceedings against him.\(^{12}\) The first part of the test, thus, focuses on a defendant’s ability to communicate with and assist his lawyer.\(^{13}\) The second part deals with the defendant’s comprehension of concepts like the nature of the charges against him and the possible outcomes of the prosecution.\(^{14}\)

Notably, while seemingly straight-forward and rooted in common-sense,\(^{15}\) neither prong of the test finds its genesis in medical or mental health literature. Rather, the Court announced the standard without any scientific support to explain why this measure of capacity would be appropriate in the trial context, or how to gauge the concepts of understanding or rationality.\(^{16}\)

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11  *Id.* at 402-03.
12  *Id.* at 402.
13  *Id.* at 402-03; *See* *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (holding that the defendant’s competence includes “the capacity...to consult with counsel, and to assist in preparing his defense”); *see also* John T. Philipsborn, *Searching for Uniformity in Adjudications of the Accused’s Competence to Assist and Consult in Capital Cases*, 10 Psychol. Pub. Pol’y & L. 417, 422 (2004) (“[C]ompetence inquiries involve a number of elements, including careful assessment of the accused’s ability to interact with counsel.”).
14  *Dusky*, 362 U.S. at 402-03; *See* *Drope*, 420 U.S. at 171 (holding that the defendant must have “the capacity to understand the nature and object of the proceedings against him”).
16  *Dusky* at ___; *see also* Maroney *supra* note ___ at ___ (the *Dusky* standard “is also highly unpredictable in application, in large part because the task of implementing *Dusky* generally falls to forensic experts, to whom courts defer heavily but to whom firm guidance as to the legal standard is seldom given”).
Since *Dusky*, the Court has explained that based on common law principles defendant competence is “fundamental to an adversarial system of justice” and essential to due process of law. At trial a defendant will need to make certain choices requiring reasoned decisions in light of possible consequences, such as whether to testify, waive a jury, or raise certain defenses. These kinds of tactical determinations require some level of capacity to ensure basic fairness at trial – otherwise a defendant would be forced to make important decisions without understanding the risks. The Court also has noted that defendant competence is “rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel.” Thus, an attorney’s effectiveness at trial may be limited if his client cannot convey what happened at the time in question, the circumstances of the alleged incident, or who might be needed as a witness at trial, and potential areas of cross-examination for the prosecutor’s witnesses.

According to the Court, trial judge have an affirmative duty to monitor defendant competence regardless of what counsel say or do. Trial courts have been warned to remain alert to signs suggesting a defendant may be impaired, such as odd demeanor in the courtroom, irrational behavior, or past medical evidence of mental illness, and take action to protect a defendant’s rights at the time questions

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17 Drope, 420 U.S. at 172; see also Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (holding Oklahoma competency standard unconstitutional); Medina v. California, 505 U.S. 437, 455 (1992) (holding that a state may require a defendant to prove incompetence by a preponderance of the evidence); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that states cannot indefinitely detain defendants to determine competency); Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding that the defendant was constitutionally entitled to a competency hearing).

18 See Godinez, 509 U.S. at 398 (“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.”); see also ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.1 (Commentary) (1988) (“[D]efendants require a minimal understanding of the nature of the criminal proceedings, the importance of presenting available defenses, and the possible consequences of either conviction or acquittal.”).

19 See Cooper, 517 U.S. at 364 (“With the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a ‘fundamental component of our criminal justice system’ – the basic fairness of the trial itself.”); see also Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel’s Unavoidably Difficult Position in Ethical Problems Facing the Criminal Defense Lawyer* (ABA Criminal Justice Section 1995) (arguing that competence relates to the “client’s ability to interact with counsel, process information, participate appropriately in court, and make informed decisions”).

20 Drope, 420 U.S. at 171-72; see also Cooper, 517 U.S. at 354 (discussing the longstanding history of the competence standard).

21 See ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.1 (Commentary) (1988) (“Because the fundamental purpose of the rule is to promote accurate factual determinations of guilt or innocence by enabling counsel to evaluate and present available defenses to factfinders, defendants should have at least the intellectual capacity necessary to consult with a defense attorney about factual occurrences giving rise to the criminal charges.”).
regarding competence arise. \(^{22}\) This duty lasts throughout the trial as a defendant who appears competent at the outset of proceedings may later manifest signs of incompetence. \(^{23}\)

When defendant incompetence becomes an issue, some meaningful method of determining whether the defendant meets the *Dusky* standard must be afforded by the trial court. A defendant is entitled, therefore, to a competence hearing at which competing experts may be called to testify about the defendant’s fitness to proceed in light of the *Dusky* standard. \(^{24}\) Absent such a hearing, a questionably competent defendant is denied his constitutional right to a fair trial. \(^{25}\)

Found incompetent to stand trial, in our system of justice a defendant may be hospitalized or treated until such time as he attains competence for purposes of trial. \(^{26}\) Such hospitalization prior to a finding of guilt may not be indefinite, however. \(^{27}\) Rather, the Court established in *Jackson v. Indiana* that such detention, absent civil commitment proceedings, may extend only for some reasonable period of time to permit a determination of whether the defendant “will attain . . . capacity in the foreseeable future.” \(^{28}\) If it is established that the defendant likely will not become competent in any foreseeable period of time, the state must either institute civil commitment proceedings to seek to continue the hospitalization or release the defendant and dismiss the charges. \(^{29}\) Thus, defense attorneys may seek dismissal of charges after some reasonable period of time where it appears clients are so ill that they likely can not ever meaningfully assist in the defense or appreciate the nature of the proceedings against them.

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\(^{22}\) *Drope*, 420 U.S. at 180-81 (“[E]vidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required.”).

\(^{23}\) *Drope*, 420 U.S. at 181 (“Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.”); *see, e.g.*, *State v. Douglas*, No. COA06-1396, 2007 WL 2034129 at *4 (N.C. Ct. App. Jul. 17, 2007) (acknowledging a trial court’s duty to *sua sponte* conduct a competency hearing if it has serious doubts about a defendant’s competence to stand trial).

\(^{24}\) *See* *Pate v. Robinson*, 383 U.S. 375, 377 (1966) (holding that petitioner did not waive claim of incompetency when defense counsel repeatedly raised the issue at trial).

\(^{25}\) *Id.* at 385.

\(^{26}\) *See* *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that states cannot indefinitely detain defendants when incompetency is the sole reason for detention).

\(^{27}\) *Id.* at 738; *see also* *Jones v. United States*, 463 U.S. 354, 368 (1983) (holding that a defendant found guilty of committing a criminal act, but “insane” at the time, could be hospitalized until he regained “sanity” – even if that meant a period of hospitalization longer than the maximum potential prison sentence the act carried).

\(^{28}\) *Jackson*, 406 U.S. at 738.

\(^{29}\) *Id.*
B. Statutory Schemes

Every state has now adopted statutory schemes to conform with the Court’s constitutional framework and ensure that no one is forced to stand trial while incompetent.30 For instance, in New York an entire chapter of the Criminal Procedural Law – Article 730 – deals with the issue of criminal defendant competence.31 Article 730 sets forth a comprehensive framework to determine competence, including having a defendant examined by mental health experts and holding a hearing for a final judicial determination on the issue.32 Article 730 also requires trial judges to order competency exams whenever they question a defendant’s capacity, regardless of the positions of defense counsel or the prosecution, so that the issue can be meaningfully addressed in a timely fashion.33

30 See, e.g., ALA. CODE § 15-16-20 (2005) (“If any person other than a minor in confinement, under indictment . . . appears to be insane, the judge of the circuit court of the county where he is confined must institute a careful investigation, call a respectable physician and call other credible witness.”); ALASKA STAT. § 12.47.070 (2005) (“[If there] is reason to doubt the defendant’s fitness to proceed, or there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court shall appoint at least two qualified psychiatrists or two forensic psychologists . . . to examine and report upon the mental condition of the defendant.”); CAL. PENAL. CODE § 1368 (West 2007) (“If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.”); COLO. REV. STAT. § 16-8-110 (2005) (“If the Judge has reason to believe that the defendant is incompetent to proceed, it is his duty to suspend the proceeding and determine the competency or incompetency of the defendant.”); GA. CODE ANN. § 17-7-130 (West 2007) (“Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant’s mental competency to stand trial to be tried first by a special jury.”); 725 ILL. COMP. STAT. 5/104-11 (2005) (“The issue of the defendant’s fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial.”); OKLA. STAT. ANN. tit. 22, § 1175.2 (West 2007) (“No person [is] subject to any criminal procedures after the person is determined to be incompetent.”); TENN. CODE. ANN. § 33-7-301 (2007) (“When a defendant charged with a criminal offense is believed to be incompetent to stand trial . . . [the judge may] order the defendant to be evaluated on an outpatient basis); VA. CODE ANN. § 19.2-169.1 (2006) (“If at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds . . . that there is probable cause to believe that the defendant . . . lacks substantial capacity to understand the proceedings . . . the court shall order that a competency evaluation be performed.”); WYO. STAT. ANN. § 7-11-302 (2007) (“No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to [understand the proceedings].”); see also 18 U.S.C. § 4244 (federal trial-level competence statute). Some states, like New York, had competency statutes on the books already. See People v. Valenino, 78 Misc.2d 678 (Co. Ct., Nassau Co. 1974)(discussing the history of the law of competency to stand trial in New York, dating back to the 1840’s).

31 N.Y. CRIM. PRO. LAW § 730.10-730.70 (Gould 2007).

32 Id.

33 Id.
If the court finds a defendant incompetent trial is suspended.\textsuperscript{34} The remedy is that the defendant is hospitalized or “retained” for a period of observation until he regains his capacity to stand trial.\textsuperscript{35} For instance, in New York when a defendant does not become fit to proceed within a period of time equal to two-thirds of the maximum sentence possible on the top-count charged, the indictment is dismissed.\textsuperscript{36} And significantly, Article 730, typical of other modern state statutes, provides that the issue of competence may only be raised “before imposition of sentence.”\textsuperscript{37} Thus, the parties and the court are without power to seek defendant evaluation or a competency determination after sentencing and trial-level proceedings have concluded.

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} N.Y. CRIM. PRO. LAW § 730.50(3) (Gould 2007). Interestingly, New York’s statutory maximum period of hospitalization (equal to 2/3 of the maximum sentence) for purposes of establishing pre-trial competence pre-dated the Court’s decision in Jackson. See Jackson, 406 U.S. at 733-34 n.13 (“New York has recently enacted legislation mandating release of incompetent defendants charged with misdemeanors after 90 days of commitment, and release and dismissal of charges against those accused of felonies after they have been committed for two-thirds of the maximum potential prison sentence.”). The wisdom of such a non-scientifically based, arbitrary numeric cap may be in doubt. See, e.g., David Mossman, Predicting Restorability of Incompetent Criminal Defendants, 35 J. of Am. Acad. of Psychiatry & L. 34 (2007).
\textsuperscript{37} N.Y. CRIM. PRO. LAW § 730.30 (1) (Gould 2007) (emphasis added); See also ALASKA STAT. § 12.47.100 (2007) (“A defendant who is incompetent . . . may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists.”); ALASKA STAT. § 12.47.060 (2007) (“A [competency] hearing must be held on the issue at or before the sentencing hearing.”); CONN. GEN. STAT. § 17a-566 (West 2007) (“[A]ny court prior to sentencing a person of an offense . . . may order the commissioner to conduct an examination of the convicted defendant by qualified personnel of that division.”); DEL. CODE ANN. TITLE 1 § 405 (2007) (“Whenever the court is satisfied that a prisoner has become mentally ill after conviction but before sentencing . . . the court may order the prisoner to be confined and treated in the Delaware Psychiatric Center.”); IND. CODE § 35-36-3-1 (2007) (“If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant [is incompetent], the court shall immediately fix a time for a hearing to determine whether the defendant has the ability [to proceed].”); KAN. STAT. ANN. § 22-3302 (2007) (“Any time after the defendant has been charged with a crime and before pronouncement of sentence, the defendant, the defendant’s counsel or the prosecuting attorney may request a [competency hearing].”); MONT. CODE ANN. § 14-14-103 (2007) (“[Mental incapacity prevents a defendant from being] tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.”); PA. STAT. ANN. § 50-7402 (West 2007) (“A defendant may be deemed incompetent to be tried, convicted or sentenced so long as such incapacity continues.”); VA. CODE. ANN. § 19.2-169.1 (2007) (competence issue may be raised “before the end of the trial”); WYO. STAT. ANN. § 7-11-302 (2007) (“No person who is incompetent shall be tried, sentenced or punished for the commission of an offense.”); Cf. People v. Freyre, 76 Misc.2d 210 (Sup. Ct., N.Y. Co. 1973)(Code of Criminal Procedure Sections 658-662, applicable in the 1950s, entitled “Inquiry into the Insanity of the Defendant Before or During the Trial, or After Conviction”).
C. Comprehensive ABA Standards

Not only have each of the individual states created statutory mechanisms for protecting the rights of impaired defendants facing trial, but in 1986 the ABA House of Delegates published its Criminal Justice Mental Health Standards to guide to policymakers, practitioners, and courts on the issue of defendant incapacity, among other things.\(^{38}\)

Specifically, Part IV of this over 500-page volume is a 100-page chapter titled “Competence to Stand Trial.”\(^{39}\) That chapter details and expands on the requirements of \textit{Dusky} and its progeny through a variety of recommendations.\(^{40}\) The ABA urged trial judges to fulfill their duty separate from counsel – to monitor the competence situation at trial and to take action to protect the defendant’s rights if the issue arises.\(^{41}\) The ABA Standards also propose detailed procedures for practitioners seeking to advance the issue of present mental capacity at trial. It deals with some of the complicated ethical situations that may arise in such situations.\(^{42}\) Examples include discussion of what actions an attorney should take if he believes it is not in his client’s interest to raise the issue of competency, or if his client opposes the issue being raised.\(^{43}\)

D. The Trial Setting: Incapacity Readily Revealed

Trial court norms and practices also afford counsel and judges with various opportunities to discover defendant incapacity. For instance, most defendants see an attorney each time they appear before the court and often in

\(^{38}\) \textit{ABA Criminal Justice Mental Health Standards} xvi-xvii (1988) (Introduction) (the ABA’s Criminal Justice Mental Health Standards Project formally began in 1981 and its “ninety-six black-letter standards were approved by the Association’s House of Delegates on August 7, 1984”); \textit{see also id. at xv} (Preface)(most of the Mental Health Standards were first published in 1986 and that new standards relating to competence and capital punishment were added in 1987).

\(^{39}\) \textit{Id.} (Part IV).

\(^{40}\) \textit{Id.} at 164 (Introduction) (“The standards first address the definitional criteria for a finding of incompetence, incorporating almost without change the test set forth in the case of \textit{Dusky v. United States}.”)

\(^{41}\) \textit{Id.} at 176 (Standard 7-4.2) (“The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to stand trial at any time the court has a good faith doubt as to the defendant’s competence, and may raise the issue at any stage of the proceedings on its own motion.”).

\(^{42}\) ABA \textit{Criminal Justice Mental Health Standards} 7-4.2 (Commentary) (1988) (recognizing defense counsel face ethical quandaries when representing an individual he fears my be incompetent, as counsel “has an independent professional responsibility toward the court and the fair administration of justice, as well as an allegiance to the client”).

\(^{43}\) Rodney Uphoff, \textit{The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel’s Unavoidably Difficult Position, in Ethical Problems Facing the Criminal Defense Lawyer} 30 (Rodney Uphoff, ed., ABA Criminal Justice Section 1995).
meetings prior to such appearances to prepare for the proceedings. The Sixth Amendment to the Constitution requires free representation for indigent defendants during all critical stages of the trial process – from initial presentment, preliminary hearing, to suppression hearings, to trial, to sentence. Beyond this, ethical rules and defense attorney practice guidelines reinforce the importance of attorney interaction with defendants during the representation, thereby providing defense attorneys with many chances to gauge client capacity to assist in the defense and understand the proceedings.

Trial judges, similarly, have numerous opportunities to engage defendants throughout the pendency of trial. From arraignment on, a defendant appears in person before the court. Judges speak with defendants, informing them of the nature of the charges against them, bail conditions, and the like. Courts also converse with defendants during guilty plea colloquies to determine whether they are waiving their right to trial knowingly, intelligently and voluntarily. Allocution at sentencing is a further instance when courts engage the defendant.

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44 See Model Rules of Prof’l Conduct R. 1.2 (a) (2007) (“[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 . . . 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.”).

45 See Rothgery v. Gillespie County, ___ U.S. ___ (2008). Only this year did the Court expand the right to counsel rule to initial presentments, resulting in such proceedings now being considered a formal part of the prosecution process.

46 See U.S. Const. amend. VI (“In all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic.”])

47 See Model Rules of Prof’l Conduct R. 1.4 (a)(2) (2007) (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”); see generally National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense Representation (1997).

48 See Fed. R. Crim. P. 10(a)(1-3) (“An arraignment must be conducted in open court and must consist of: (1) ensuring that the defendant has a copy of the indictment or information; (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then (3) asking the defendant to plead to the indictment or information.”).

49 See U.S. Const. amend. VI (“In all criminal prosecutions . . . the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.”); Fed. R. Crim. P. 5.1(a) (“If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing.”).

50 See Fed. R. Crim. P. 11(b)(1) (“Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court.”); See also Fed. R. Crim. P. 23(a)(1-3) (“If a defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.”).

51 Fed. R. Crim. P. 32(ii)(4)(a)(ii) (“Before imposing sentence, the court must: . . . address the defendant personally in order to permit the defendant to speak or present any information to mitigate
And, of course, defendants’ presence in courtrooms, even when not speaking, allows trial judges the opportunity to observe their affect, demeanor, grooming and other physical characteristics which may shed light on their mental health status.52

Thus, not only do Supreme Court’s pronouncements, legislative enactments, and ABA’s Standards all work to protect the rights of mentally impaired criminal defendants during the pendency of a trial, but the very nature of the trial process lends itself to discovering the possibility of defendant incapacity.

E. Application and Entrenchment of Dusky

This transparency at trial has allowed for claims of trial-level incompetence to be meaningfully litigated on appeal. Reported decisions are filled with descriptions, based on the records from the proceedings below, of unusual defendant demeanor, odd interactions with the court, and inability to assist counsel, to which Dusky is then applied. Often such cases result in reversal for a review of the question of trial competence.53

However, the impressive body of law that has developed in the nearly fifty years has also worked to entrench the Dusky framework as the touchstone for competence in criminal cases.54 Indeed, despite its apparent lack of grounding in modern scientific or medical evidence, the two-part test has become a legal mantra on the questions of competence. It is often uttered with little thought about what it might really mean to be competent for purposes of trial -- including any consideration of the specific circumstances at hand and the situation facing the individual defendant.55 For instance, even when defendants have been
unrepresented at trial, courts have repeatedly considered Dusky’s second-prong relating to their ability to communicate with counsel.\textsuperscript{56}

Similarly as part of the mantra includes focus on the term “trial” when considering defendant capacity, it appears that little thought has been given to whether at other times during the criminal process defendant capacity might be essential. Indeed, the criminal justice system has been relatively unconcerned with defendant capacity to participate in legal proceedings outside of the trial court setting. Thus, in stark contrast to the situation in trial courts, defendant incompetence historically has been considered a non-issue during the direct appeal process.

III. Appellate-Level Mental Impairment: A Problem Long Ignored

As this next Part explains, under the ABA’s Criminal Justice Mental Health Standards and state statutory schemes, seriously impaired appellants are not afforded the same rights relating to competence as they might be at trial. Rather, despite possible significant mental disabilities, the defendants are expected to be able to pursue their direct appeals. Sadly, the appellate process likely contributes to the invisibility of defendant impairment during the direct review. And in light of the lack of guidance from the Supreme Court, appellate courts have relied largely on the ABA’s Criminal Justice Mental Health Standards to ignore defendant incapacity on appeal. Rather, attorneys for impaired defendants historically have been instructed to stand in the shoes of their clients and prosecute direct appeals on their behalf.

A. Lack of Constitutional Protections and Framework

In stark contrast to defendants involved in criminal trials, those with pending criminal appeals generally are not afforded competency protections and procedures. This is true although many defendants may suffer from severe mental impairment during the direct appeal stage of the criminal process.\textsuperscript{57} In fact, the Supreme Court has never addressed whether a defendant has a continuing right to competence to participate in the appellate process or extended the Dusky standard to defendants who undertake direct appeals from conviction.\textsuperscript{58}

\textsuperscript{56} See, e.g. Muhammad v. McDonough, 2008 WL 818812 (M.D.Fla. 2008).

\textsuperscript{57} See, e.g., Panetti v. Quarterman, 127 S. Ct. 2842, 2845 (2007) (acknowledging that “all prisoners are at risk of deteriorations in their mental state,” even when there are no earlier signs of mental illness); see generally ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (Human Rights Watch, 2003) (“Persons with mental illness are disproportionately represented in criminal institutions.”).

\textsuperscript{58} See United States v. Gigante, 996 F. Supp. 194, 196 to 200 (E.D.N.Y. 1998) (discussing the history and contours of the Dusky standard and its application to only the trial and sentencing phases of a criminal proceeding).
The Supreme Court has, however, looked at defendant “competence” beyond the trial court phase in two limited situations within the capital punishment. In the first set of cases the Court examined whether defendants were capable of understanding the consequences of forgoing post-judgment proceedings entirely and volunteering for execution. In *Rees v. Peyton*, the landmark case on this issue, the Court considered whether a capital defendant with mental health issues should be permitted to withdraw a certiorari petition he had previously consented to filing, challenging the denial of federal habeas relief, and accept his death sentence. In doing so, the Court crafted what appears to be a somewhat different standard from *Dusky* for assessing capacity to “volunteer” for execution. It asked the trial court to determine whether the petitioner “has capacity to appreciate his position and 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.” This standard, too, was announced without any reference to basis in medical science or mental health literature or reference to what kind of mental disorder might result in an incompetence finding.

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59 384 U.S. 312 (1966). For an excellent, in-depth analysis of the *Rees* decision and the Court’s subsequent unusual treatment of Rees’s case see Phyllis L. Crocker, *Not to Decide is to Decide: The U.S. Supreme Court’s Thirty-Year Struggle with One Case About Competency to Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885 (2004).

60 Crocker, supra note 59, at 885. (“Nearly one month after his petition had been filed, Rees directed his counsel [Monroe Freedman] to withdraw the petition and forgo any further legal proceedings. Counsel advised this Court that he could not conscientiously accede to these instructions without a psychiatric evaluation of Rees because evidence cast doubt on Rees mental competency.”).

61 Some have suggested that the tests for competence set forth in *Dusky* and *Rees* are essentially identical. See, e.g., Corcoran v. Buss, 483 F. Supp. 2d 709, 730 (N.D. Ind. 2007) (“We are constrained to say we find little if any difference between the standards enunciated in *Dusky* and *Rees.*”); C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL’Y & L. 1109, 1113 (2004) (indicating that the *Rees* test follows the *Dusky* standard); J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 168 (2006) (“In the context of volunteering, the controlling case is *Rees v. Peyton*, which follows *Dusky* in holding that the appropriate test is whether a defendant has ‘capacity to appreciate his position and 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.’ “); see also Godinez v. Moran, 509 U.S. 389, 398 n.9 (1993) (“We have used the phrase ‘rational choice’ in describing the competence necessary to withdraw a certiorari petition, *Rees v. Peyton*,...but there is no indication in that opinion that the phrase means something different from ‘rational understanding.’ “). This author believes there is some difference between these two standards which in some cases could be significant. See Awkal v. Mitchell, 174 Fed. Appx. 248, 250-51, 2006 WL 559370 (6th Cir. 2006) (Gilman, J., concurring and dissenting in part (recognizing a difference between the *Rees* test and the trial-level competency test). The difficulty in discerning the contours of these rules is one of the problems with current competency jurisprudence and practice, which is discussed infra Part ___.

62 *Id.* at 313.

63 In subsequent reported decisions where defendants volunteered for death, either by waiving direct appeals or collateral attacks on their convictions, the Court was faced with individuals seeking
In the second category of capital cases in which post-judgment competence was an issue, the Court looked at the question of post-judgment competence for purposes of execution.\textsuperscript{64} \textit{Ford v. Wainwright} involved a defendant who “began to manifest gradual changes in behavior” after spending over a decade on death row and developed a severe mental disorder that caused psychotic and highly delusional thought processes.\textsuperscript{65} The Court reversed the denial of Ford’s request for habeas corpus relief and remanded for an evidentiary hearing on “the question of his competence to be executed” explaining that “[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”\textsuperscript{66} However, it did not offer a standard for incompetence, as had been done with incompetency for trial under \textit{Dusky} or incompetence to volunteer for death under \textit{Rees}.\textsuperscript{67} Nor did it outline specific procedures for states to follow to ascertain whether a death row inmate lacks the capacity necessary for execution.\textsuperscript{68}

The “incompetence for execution” rule was expanded in \textit{Atkins v. Virginia} to preclude under the Eighth Amendment the imposition of death as a sentence for mentally retarded defendants.\textsuperscript{69} Again, however, it left open the question of what


\textsuperscript{65} \textit{Ford}, 477 U.S. at 401-05 (1986).

\textsuperscript{66} \textit{Id.} at 410, 417-18.

\textsuperscript{67} \textit{Id.} at 409 (noting that the “Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane,” but failing to set forth a specific competence-for-death standard); \textit{see id.} at 422 (J. Powell, concurring)(“I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it”); \textit{see also id.} at 422 (J. Marshall, concurring)(the Eighth Amendment precludes carrying out the death sentence upon “one whose mental illness prevents him from comprehending the reasons for the penalty”); \textit{see also Panetti v. Quarterman, ___ U.S. ____ , ___ S.Ct. ____} (“The opinions in \textit{Ford}, it must be acknowledged, did not set forth a precise standard for competency.”).

\textsuperscript{68} \textit{Id.} at 416 (“We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitution restriction upon its execution of sentences.”); \textit{see also Panetti v. Quarterman, ___ U.S. ____ , ___ S.Ct. ____} (noting that \textit{Ford} suggested basic minimum processes).

\textsuperscript{69} \textit{Atkins}, 536 U.S. at 304 (holding that the execution of mentally retarded convicted defendants amounts to “cruel and unusual punishment” under the Eighth Amendment).
would count as retardation to preclude a finding of incompetence for execution.\textsuperscript{70}  This led to a great deal of confusion and disparity in the treatment of retardation claims across jurisdictions.\textsuperscript{71}

Last year in Panetti v. Quarterman the Court attempted to offer some further guidance to lower courts faced with Eighth Amendment Ford claims of incompetence for purposes of execution.\textsuperscript{72}  It confirmed that states must provide some meaningful process to permit such claims to be presented once adequately raised, including an opportunity to be heard and present expert or other evidence.\textsuperscript{73}  Failure to do so violates constitutional procedural due process requirements.\textsuperscript{74}  Yet the Court again declined to provide a standard for measuring incompetency for purposes of execution, which has led to further criticism about the lack of guidance provided to courts and practitioners on this issue.\textsuperscript{75}

B. Statutory Silence

Beyond the Supreme Court’s failure to weigh in on the issue of defendant incompetence during non-capital appeals, no state legislature has created a statutory mechanism for dealing specifically with the issue of appellate-level defendant incompetency if it should arise.  Rather, state competency statutes that seek to codify the Dusky framework focus on the trial process, with some explicitly restricting the ability to seek evaluation and hearing up until the time a sentence has been pronounced.\textsuperscript{76}  For example, as already noted, in New York, the issue must be raised prior to the time sentence is imposed.\textsuperscript{77}

\textsuperscript{70}  Id.

\textsuperscript{71}  See Van Tran v. Tennessee, 128 S.Ct. 532 (2007)(denying writ of certiorari on petitioner’s claim that Tennessee statutory law and procedure precluded proper finding of petitioner’s retardation under Atkins).  Professor Penny White and the University of Tennessee Death Penalty Clinic drafted Mr. Van Tran’s certiorari petition.

\textsuperscript{72}  See Panetti, 127 S. Ct. at 2856;

\textsuperscript{73}  Panetti. at 2856-58.

\textsuperscript{74}  Id. (“In light of this showing, the state court failed to provide petitioner with the minimum process required by Ford.”).  In any event, such claims usually are not cognizable until the eve of execution, once all appeals and post-conviction proceedings have concluded.  See Bonnie, supra n.____ at 1178; see also Herrera, 506 U.S. 390 (1993).

\textsuperscript{75}  Panetti, (the Court explained that defendants who “cannot reach a rational understanding of the reason for the execution” can not be put to death, but “[did] not attempt to set down a rule governing all competency determinations.”); see also Michael Perlin, Insanity is Smashing Up Against My Soul: Panetti v. Quarterman and Questions that Won’t Go Away, (May 8, 2008) at http://ssrn.com/abstract=1130890; Developments in the Law: The Law of Mental Illness, 121 Harv. L. Rev. 1114, 1158 (2008).

\textsuperscript{76}  See, e.g. CAL. PENAL CODE § 1367 (Deering 2007) (“A person cannot be tried or adjudged to punishment while that person is mentally incompetent.”); CAL. PENAL CODE § 1368 (Deering 2007) (providing for inquiry into defendant’s mental competence when doubts arise “prior to judgment”);
It is only in the death penalty arena that the question of post-adjudication competence has been covered expressly by state statute. Again, however, the focus has been on the mental capacity for purposes of having a death sentence carried out - not on the ability to competently engage in a challenge of such sentence.78

77 N.Y. CRIM. PRO. LAW § 730.30 (1) (Gould 2007).

78 See, e.g., CAL. PENAL CODE § 1367 (West 2007) (“A person cannot be tried or adjudged to punishment while that person is mentally incompetent.”); CAL. PENAL CODE § 1368 (West 2007) (“[W]hen an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined.”); FLA. STAT. ANN. § 922.07 (West 2007) (requiring the governor to stay an incompetent person’s execution if the person appears to be insane); GA. CODE ANN. § 17-10-61 (West 2007) (“A person under sentence of death shall not be executed when . . . the person is mentally incompetent.”); IND. CODE ANN. § 35-36-9-6 (West 2007) (providing that the state must dismiss a mentally retarded person’s death sentence); N.C. GEN. STATE. ANN. § 15A-2005 (West 2007) (“If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty against the defendant.”); NEB. REV. STAT. § 29-1822 (2007) (stating that Nebraska cannot execute a mentally incompetent person until the person recovers from their incompetency); TENN. CODE ANN. § 39-13-203 (West 2007) (“[N]o defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.”); TEX. PENAL CODE ANN. § 46.05 (a) (Vernon 2007) (“A person who is incompetent to be executed may not be executed”); WASH. REV. CODE ANN. § 10.95.030 (West 2007) (“In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed.”).

Prior to Atkins, some states had already enacted statutes prohibiting execution of the mentally retarded. See James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues at 4, available at http://www.aamr.org/Reading_Room/pdf/state_legislatures_guide.pdf (“All states that have capital punishment should pass legislation that protects people with mental retardation from the death penalty.”).
C. ABA’s Limited Standards

The ABA’s Criminal Justice Mental Health Standards do expressly address the question of defendant competence for purposes of non-capital appeals. However, as compared to the 100 pages of material dedicated to the issue of competence at the trial level, the issue of competence on the non-capital appeal level is addressed in a single ABA Standard entitled “Mental competency at the time of non-capital appeal” – which takes up less than four pages of text.79 The black-letter rule at Standard 7-5.4 indicates that “a defendant is incompetent at the time of appeal in a non-capital case if the defendant does not have sufficient present ability to consult with defendant’s lawyer with a reasonable degree of rational understanding, or if the defendant does not have a rational as well as factual understanding appropriate to the nature of the proceedings.”80 This is, essentially, the Dusky standard.81

ABA Standard 7-5.4 goes on to state, however, that even if an attorney has doubts as to a non-capital defendant’s competence during an appeal, “counsel for the defendant should proceed to prosecute [it] . . . despite the defendant’s incompetence and should raise . . . all issues deemed by counsel to be appropriate.”82 This is because, the ABA asserts, “[c]onvicted defendants do not participate directly in appellate proceedings [as] review is based exclusively on trial records and appellate courts do not redetermine fact issues.”83 The Standard also points out that “counsel are not bound by the Constitution to follow their clients’ demands” regarding what issues should be included in the brief.84 Moreover, and perhaps most significantly, the ABA further claims that “concerns about mental competence to undergo trial . . . have no close counterpart as far as appellate proceedings are concerned.”85

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79 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.4 (1988).
80 Id.
81 Compare id. (stating that the test for incompetency during appeal of a noncapital case is whether “the defendant does not have the sufficient present ability to consult with” his lawyer and whether “the defendant does not have a rational as well as factual understanding appropriate” to the proceedings) with Dusky v. United States, 362 U.S. 402, 402 (1960) (stating that the test for competency is whether the defendant has the “sufficient present ability to consult with his lawyer . . . and whether he has a rational as well as factual understanding of the proceedings”).
82 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.4(b)(ii) (1988).
83 Id. (Commentary).
84 Id. (Commentary); see also Jones v. Barnes, ______.
85 Id. (Commentary) (emphasis added).
The only action the ABA says should be taken by a lawyer with some doubt as to his client’s capacity is to “make such doubt known to the court and include it in the record.”86 This is not, however, so an evaluation can take place or the appellate court can take action to protect the defendant’s rights. Rather, the ABA Standard indicates that it “does not go into . . . procedures to advance questions about appellants’ present mental capacity . . . because [it does not see] orders for evaluation, evaluation reports, evaluation hearings, and dispositional orders as a responsibility of appellate courts.”87 The Standard and its commentary instead conclusorily state that “spread[ing] on the record” questions as to capacity will allow the defendant in a later proceeding – such as federal habeas applications – to raise issues that may not have been raised because of incompetency.88

Interestingly, there is no counterpart to ABA Criminal Justice Mental Health Standard 7-5.4 for death penalty appeals. Currently, the ABA Standards offer no specific guidance for representing impaired defendants during the direct appeals process in capital cases or for courts’ handling of such cases. Rather, an addendum to Part V of the Standards entitled “Competence and Capital Punishment” merely addresses the question of whether sentenced death row inmates who suffer from mental impairment may have their sentences carried out.89

The addition of this part in 198790 following the Supreme Court’s decision in Ford v. Wainwright,91 reflected the ABA’s concern with the possible development by individual states of problematic procedures to ascertain whether a defendant was incompetent for purposes of the death penalty.92 The ABA took a pro-active role following Ford, offering specific recommendations for legislation

87 Id. (Commentary) (emphasis added).
88 Id. (Commentary).
89 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.5 (1988) (post-conviction determination of mental competence in capital cases); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.6 (1988) (currently incompetent condemned convicts; stay of execution); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.7 (1988) (evaluation and adjudication of competence to be executed; stay of execution; restoration of competence); see also supra Part III-A.
90 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS at xv (Preface)(noting most of the Mental Health Standards were first published in 1986 and that new standards relating to competence and capital punishment were added in 1987); see also supra Part II-C.
92 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS at 287-288 (Introduction to Addition to Part V).
and steps that should be taken by state courts to evaluate sentenced death-row inmates who were believed to be incompetent.\textsuperscript{93} It further outlined procedures for hearings to consider the results of such evaluation, including allocation of the burdens of proof, issuance of stays of execution for inmates found to lack competence, and reconsideration of such stays if competence is restored.\textsuperscript{94}

The ABA acknowledged that the proposed rules might be “more painstaking than what appears to be the constitutionally accepted minimum under \textit{Ford},” but that with more than 1,700 prisoners on death row the development of fair procedures surrounding administration of the death penalty was extremely important.\textsuperscript{95} The recommendations represented “an attempt to balance the interests of both the convict and society in preventing the execution of any individual who is currently incompetent, with the interest of the criminal justice system in expeditious resolution of disputes about the convict’s current mental condition.”\textsuperscript{96} Yet, such concerns did not extend to offering guidance for representing the same impaired capital defendants during the direct appeal process, which generally takes place years before an impending execution.\textsuperscript{97}

D. The Appellate Setting: Incapacity Obscured

Despite the ABA’s limited guidance and Standards for dealing with the issue of defendant incompetence during appellate proceedings, it is clear that each year in this country defense lawyers represent a great many seriously mentally ill defendants on appeal. The pervasive and well-documented mental health problems of our nation’s inmates – including the Supreme Court’s recognition that defendants often decompensate mentally during incarceration – provide compelling proof that many persons with criminal cases pending before our nation’s appellate courts may be seriously impaired.\textsuperscript{98} For some of these defendants the issue of competence was raised during trial-level proceedings. For others, it may not have been, either because the issue was not properly identified by defense counsel or others at trial, or because at that time the defendant was not

\textsuperscript{93} ABA\textsc{criminal justice mental health standards} 7-5.5, 7-5.6, and 7-5.7 (1988).

\textsuperscript{94} ABA\textsc{criminal justice mental health standards} 7-5.5, 7-5.6, and 7-5.7 (1988).

\textsuperscript{95} ABA\textsc{criminal justice mental health standards} at 287-288 (Introduction to Addition to Part V).

\textsuperscript{96} ABA\textsc{criminal justice mental health standards} at 288 (Introduction to Addition to Part V).

\textsuperscript{97} See, \textit{e.g.}, Panetti v. Quarterman, 127 S.Ct. 2841 (2007) (petitioner’s claim of incompetence for execution purposes was not considered ripe until nearly a decade after his direct appeals).

\textsuperscript{98} See Panetti, 127 S. Ct. at 2845 (stating that “[a]ll prisoners are at risk of” mental deteriorations).
seriously impaired. Regardless, the appellate lawyer is often asked to provide representation to a client whose mental capacity may be in issue.

Unfortunately, present appellate court practices often work to obscure the extent of this problem. First, many trial attorneys automatically file notices of appeal without conferring with the client in order to preserve the client’s right of review. However, this is a stage of the criminal process where a defendant should be meaningfully engaged as the defendant has the final say, constitutionally, whether to seek any appellate review.\textsuperscript{99} It is at this time that defense attorneys are supposed to explain the pros and cons of challenging the conviction. Moreover, in some instances these same lawyers failed to seek competency evaluations of their clients during trial. Thereafter, the case moves into the appellate court setting, where it could be months before appellate counsel begins to look at the case or communicate with the client.

Unlike trial court processes, appellate courts and their procedures are largely unconcerned with individual litigants – particularly criminal defendants.\textsuperscript{100} Incarcerated defendants generally are not seen by appellate judges, do not attend court proceedings, and are never engaged by the court.\textsuperscript{101} Not only are criminal appellants seldom observed by the very court deciding their cases, a good many never get to meet the lawyers who are supposed to be representing them before such courts.\textsuperscript{102} Some of the least literate individuals in our country\textsuperscript{103} are forced to communicate with their attorneys through written

\textsuperscript{99} Christopher Johnson, \textit{The Law’s Hard Choice: Self Inflicted Injustice or Lawyer-Inflicted Dignity}, 93 Ky. L.J. 39, 70 (2004-2005)(describing whether to pursue an appeal as one of the fundamental decisions constitutionally allocated to the criminal defendant over the lawyer).


\textsuperscript{101} See Amy D. Ronner & Bruce J. Winick, \textit{Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance}, 24 Seattle U. L. Rev. 499 (2000)(“Appellate courts can . . . be more effective by being good listeners . . . there are ways to let individuals know that they have been heard, and let individuals know that their arguments have been fairly and fully considered”); see also David B. Wexler, \textit{Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer}, 17 St. Thomas L. Rev. 743, 767 (2005).

\textsuperscript{102} See Everett, \textit{supra} note ___ at 849-50(“Though it may well possible to provide ‘effective assistance of counsel’ to an appellate criminal client without visiting the prison house, that does not make it ethical.”); Wexler, \textit{supra} note ___ at 766-767 (suggesting a greater level of communication than presently takes place between most appellate attorneys and their clients).

correspondence. Even telephone calls to counsel, which often must be made collect to court appointed counsel, may be a rarity. Therefore, given their limited interactions with people outside of prisons, many more appellate defendants than currently realized may be seriously mentally impaired. The problem of appellant incapacity is rendered invisible by current appellate norms and processes.

E. Perpetuation of the Problem by Lower Courts

In light of this backdrop, it is not surprising that not a single reported decision to date has found a defendant incompetent to participate in appellate level court proceedings. Rather, there exists a strong history of appellate courts denying defendants the right to assert incapacity for purposes of appeal. Frequently invoking the ABA’s limited Criminal Justice Standards for appellate-level competence, most cases have found no right to be competent for defendants during direct appeals, much less provided for processes or remedies that follow in the wake of a valid claim of trial-level incapacity.

For instance, over two decades ago in People v. Newton, the Michigan Court of Appeals described appellant’s claim that he was incompetent to assist with his pending appeal as a “novel issue supported by neither statute nor case law,” and conclusorily stated “it would be unwise to require that defendants on appeal be competent to assist counsel in preparing their appeal.” Thus, the defendant’s request for forensic exam and stay of the appellate-level proceedings for regaining capacity was denied.

http://www.rasch.org/rmt/rmt101a.htm (reporting that two-thirds of inmates do not have “the literacy skills needed to function in society”).

See Everett, supra note ___ at 847 (“exclusive reliance on written correspondence with an inmate client is problematic” because “[m]any individuals in a prison population cannot comfortably and effectively express themselves in writing”).

See Everett, supra note ___ at 847.


Id. at 466.
Five years later, in *State v. White*, the Arizona Supreme Court held that a mentally impaired capital defendant was not entitled to competency evaluation during appeal or stay of the proceedings to permit competence to be attained. Referring to ABA Criminal Justice Mental Health Standard 7-5.4 for non-capital appeals, the court found it was not a denial of due process of law to require a mentally incompetent death row inmate to proceed with a direct appeal.

Also relying largely on the ABA Criminal Justice Mental Health Standards for non-capital appeals, the Oklahoma Court of Criminal Appeals found in *Fisher v. State* that a death-sentenced inmate did not need to be competent during the direct appeals process. It held “existence of a doubt as to an appellant’s present mental competency should not serve as a basis to halt state appellate proceedings.” Referring to the ABA Standards for non-capital appeals, the majority opined that once the appellant attained competence, he could try to have any issues he failed to raise on direct appeal reviewed by way of a post-conviction collateral challenge. In doing so the appeals court also refused to evaluate appellant’s present competence, yet noted the burden would be on appellant to make a “threshold showing relating to mental incompetence” before being able to later claim he had been incompetent during his appeal.

Similarly, in 1992, the Supreme Court of California held in *People v. Kelly* that even if a death row inmate had become incompetent following trial, if he was represented by “able counsel” his direct appeal could proceed. The court noted that while “a defendant has a constitutional right not to be tried while

110 Id. at 878.
111 Id.
113 Id. at 1277.
114 Id.
115 Id. at 1277 (relying on ABA Criminal Justice Mental Health Standard 7-5.4 and commentary).
116 Id. at 1277. Notably, one Justice, the opinion writer, would have remanded the case for an evidentiary hearing to determine immediately if it seemed some claim could not be raised due to the defendant’s present incompetence. Id. at 1278, n.4.
118 Id.
incompetent. . . no case has extended this right to the appeal.”119 Moreover, “the considerations that prohibit an incompetent from being tried do not apply after the judgment.”120 Citing to the ABA Criminal Justice Mental Health Standards for non-capital appeals, the court indicated that appellant could raise additional claims in later proceedings if they could not be raised presently due to incompetence.121

Somewhat ironically, the Kelly court acknowledged that while appellant’s impairment was a non-issue for appellate purposes, such impairment could pose a problem during a subsequent post-conviction review.122 That is, while the defendant could be forced to pursue action in the appellate court while seriously mentally impaired, a later post-conviction court might find that his disability precluded the ability to meaningfully challenge his conviction.123

In fact, several death penalty cases have found that a defendant’s right to be competent extends to post-conviction litigation – civil collateral challenges to convictions which ordinarily follow direct appeals.124 Perhaps the leading case in

119  Id. at 414.
120  Id. at 414.
121  Id. at 414.
122  Id. at 414.
123  Id. at 414.
124  See Peede v. State, 955 So. 2d 480, 489 (Fl. 2007) (applying Dusky standard to determine competence during post-conviction proceeding); Rohan ex rel. Gates v. Woodford, 334 F.3d 803, 813 (9th Cir. 2003) (“[I]f meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to the meaningful assistance of counsel, it follows that Congress’ mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent.”); Carter v. State, 706 So.2d 873, 875-76 (Fl. 1997) (“a judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant’s input”); People v. Owens, 564 N.E.2d 1184, 1189 (Ill. 1990) (holding that the defendant must show a greater degree of incompetence for post-conviction proceedings); see also Martiniano ex rel. Reid v. Bell, 454 F.3d 616 (6th Cir. 2006)(upholding district court’s stay of execution for purposes of a hearing on the question of petitioner’s competence to participate in post-conviction litigation); Council v. Catoe, 597 S.E.2d 782 (S. Car. 2004) (in case of first impression in South Carolina, court adopts a “default rule” that post-conviction review matters “must proceed even though a petitioner is incompetent” but that court may stay review of fact-based challenges until petitioner regains competency); People v. Simpson, 792 N.E.2d 265, 277 (Ill. 2001) (“If a defendant is competent to communicate allegations of constitutional violations to counsel, that defendant is competent to participate in post-conviction proceedings.”). But see Commonwealth v. Haag, 809 A.2d 271 (Pa. 2002)(in matter of first impression in Pennsylvania, held that post-conviction proceedings in death penalty case should proceed despite petitioner’s incompetence given appointment of “next friend”); Ex Parte Mines, 26 S.W.2d 910 (Tx. 2000)(“In light of the absence of legislative action, the statutory context, and the differences in the nature of the rights and procedures at trial and in post conviction proceedings, we find no justification in inferring a statutory requirement that the applicant be mentally competent for habeas corpus proceedings in the way that a defendant must be mentally competent for trial.”)
this line is *Rohan ex rel. Gates v. Woodford*, which aptly described the issue presented in a federal habeas proceeding as one “that falls somewhere between these two lines of authority: not competence to stand trial or competence to be executed, but competence to pursue collateral review of a state conviction in federal court.” Writing for the court, Judge Kozinski found federal habeas corpus provisions impliedly provide a right to be competent during such proceedings. That is, because death row prisoners challenging state convictions in federal court have a right to appointed counsel, they must be able to effectively assist their counsel. Otherwise, the statutory provision of an attorney would be meaningless.

IV. Beginning of a Blueprint: Deconstructing Dusky to Reconceptualize Competence Throughout the Criminal Process

Urging a more nuanced approach to capacity in the criminal process, this Part challenges the criminal justice system’s current attitude towards defendants who may be suffering from mental impairment during their direct appeals. Critiquing the lower court trend ignoring the mental status of appellants, this Part discusses an important counter-trend that recognizes the significance of defendant capacity during appellate proceedings. It goes on to suggest that the Supreme Court’s recent decision in *Indiana v. Edwards* also points the way to a more appropriate approach to competence considerations throughout all parts of criminal proceedings. Building on these developments it urges a fundamental reconceptualization of the idea of competence for criminal processes. Redrafting of the ABA’s Criminal Justice Mental Health Guidelines would go a long way in assisting in this movement. These important Guidelines should be revised in their entirety to take into account not just legal rules but the views of mental health experts on the idea of competence. In doing so, they can guide the bench and bar to ensure a more comprehensive, contextualized, and client-centered approach to defendant incapacity throughout all stages of a criminal case – including direct appeals.

125 Rohan ex rel. Gates v. Woodford, 334 F.3d at 810.

126 Rohan ex rel. Gates v. Woodford, 334 F.3d at 812-817.


128 Rohan ex rel. Gates v. Woodford, 334 F.3d at 813. Note, however, that while such defendants have a protected right to effectively assist counsel they do not have a constitutional right to effective assistance of counsel in such proceedings. See Coleman v. Thompson, 501 U.S. 722 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987); see also Murray v. Giarratano, 492 U.S. 1 (1989).

129 Rohan ex rel. Gates v. Woodford, 334 F.3d at 813. Without deciding the issue, the court also suggest that due process of law would preclude a statutory system of collateral attack that required petitioners to access the system while incompetent. Id.
A. Trouble with the Lower Court Trend

Beyond the obvious problem of repeatedly applying an ABA standard intended for non-capital cases to death penalty matters, the Newton line of cases and its absolutist approach to incompetence during an appeal fails to account for the significance and realities of such litigation. As the ABA Standards indicate, appeals are different from trials in that the former generally deal with correction of errors and resolution of legal issues based on the record below. And perhaps more fundamentally, although the accused enjoys a constitutional right to trial, he does not have the constitutional right to appeal his conviction. Rather, individual states have chosen to confer that right to convicted defendants.

The Supreme Court has held, however, that once a state does confer the right to appeal, it must provide a system that is fundamentally fair and provides due process for “adequate and effective” review of a defendant’s claims. Thus,

130  ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARD 7-5.4; ABA STANDARDS FOR CRIMINAL JUSTICE 21-1.2(a)(i-iii) (1988) (“The purposes of the first level of appeal in criminal cases are: (i) to protect defendants against prejudicial legal error in the proceedings leading to conviction and against verdicts unsupported by sufficient evidence; (ii) authoritatively to develop and refine the substantive and procedural doctrines of criminal law; and (iii) to foster and maintain uniform, consistent standards and practices in criminal process.”).

131  See Jones v. Barnes, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal.”); Ross v. Moffitt, 417 U.S. 600, 611 (1974) (“While no one would agree that a state may simply dispense with the trial stage of the proceedings without a criminal defendant’s consent, it is clear that the State need not provide any appeal at all.”); see also Cynthia Yee, The Anders Brief and The Idaho Rule: Its Time for Idaho to Reevaluate Criminal Appeals After Rejecting the Anders Brief, 39 Idaho L. Rev. 143 (2002).

132  See Barnes, 463 U.S. at 751 (discussing state’s requirement to provide counsel for an indigent appellant on his first appeal as of right); see also Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (“All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.”); Sean Doran et al, Rethinking Adversariness in Nonjury Criminal Trials, 23 Am. J. Crim. L. 1, 44, n.185 (1995) (acknowledging that every state provides some right to appeal in criminal cases); but see Joseph Weisberger, Appellate Courts: The Challenge of Inundation, 31 Am. U. L. Rev. 237, 240 (1982) (“In some states that lack an intermediate court, review of all or certain classes of cases has been made discretionary. In Virginia and West Virginia, the supreme court has discretionary power to entertain or reject most appeals.”).

133  Griffin, 351 U.S. at 13, 20 (holding that a state may not “consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . deny adequate appellate review to the poor while granting such review to all others; [it must] afford[] adequate and effective appellate review to indigent defendants.”); see also Smith v. Robbins, 528 U.S. 259, 276 (2000) (citing Griffin v. Illinois, 351 U.S. 12 (1956) (“Our case law reveals that, as a practical matter, the [Equal Protection Clause and Due Process Clause] largely converge to require that a State’s procedure ‘affor[d] adequate and effective appellate review to indigent defendants.’”)); Shipman v. Gladden, 453 P.2d 921 (Or. 1969) (“the state’s criminal process would be found lacking in fundamental fairness if it permitted the deprivation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the impaired right.”).
to ensure equal protection of the law, indigent persons seeking to take a first, direct appeal in such states must be provided with a free and effective attorney.\footnote{Anders v. California, 386 U.S. 738, 744 (1967) (“The constitutional requirement of substantial equality and fair process can only be attained where counsel [on appeal] acts in the role of an advocate in behalf of his client, as opposed to that of amicus curiae.”); Douglas v. California, 372 U.S. 353, 357-58 (1963) (“There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.”); \textit{see also} People v. Stultz, 810 N.E.2d 883, 884 (N.Y. 2004) (recognizing defendant’s right to effective assistance of appellate counsel).}

Many of the same constitutional, right-to-counsel protections that are provided during trial, therefore, must be provided to defendants on appeal.\footnote{See Penson v. Ohio, 488 U.S. 75, 85 (1988) ("The need for forceful advocacy does not come to any abrupt halt as the legal proceeding moves from the trial to appellate stage").} It is from these same protections that the Supreme Court has largely derived the constitutional right to competence.\footnote{See Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (stating that competence to stand trial is a defendant’s fundamental right, and denying defendants this fundamental right violates due process); \textit{Cf.} Indiana v. Edwards, ___ U.S. ___ (2008) (Docket No. 07-208 – argued March 26, 2008).}

However, some defendants are not represented on appeal.\footnote{See Holmes v. Buss, 506 F.3d 576, 578 (7th Cir. 2007) ("[T]he presence or absence of counsel is [but] a detail."); see also Indiana v. Edwards (07-208)(argued March 26, 2008).} Thus, a defendant’s due process right to meaningful appellate proceedings can not be rooted entirely in the right to counsel. For the appellate process to be fundamentally fair, a defendant must have the capacity to do what is necessary to avail himself of the appellate process.\footnote{See, \textit{e.g.}, In re Kevin S., 113 Cal.App. 97 (2003)("Regardless of the lack of absolute theoretical certitude of the Supreme Court's precise analysis, it is clear the due process and equal protection principles articulated the \textit{Griffin} plurality and \textit{Douglas} majority opinions require that as a practical matter a criminal defendant be provided with effective merits-related appellate review.").} Therefore, a defendant should have a constitutional right to competence during a criminal appeal – a process used as a check on improprieties of the trial system including wrongful convictions, prosecutorial overreaching, ineffectiveness of trial counsel. Indeed, appeals have long been viewed as an integral feature of our adversarial system of justice.\footnote{See Drope v. Missouri, 420 U.S. 162, 171-72 (1975) (noting that the “prohibition against trying incompetent defendants] is fundamental to an adversary system of justice”); \textit{see also} Garen v. Kramer, 2008 WL 2704342 (C.D. Cal., 2008)(“competency issues can implicate both procedural and substantive due process”).}

Beyond this, the ABA Standards and courts that have followed them are somewhat misguided in claiming the concerns underlying defendant competence

at trial have “no close counterpart” on appeal.\textsuperscript{140} As a case leaves the convicting court and moves to the appellate context, just like at trial, defendants may need to make important strategic decisions that affect the outcome of the case. They may also be called upon to provide information such that their capacity to do so is essential to providing effective representation. Thus, clients of criminal defense lawyers, in many instances, do need to have at least some level of competence to have a meaningful appeal. Indeed, at least two different practice scenarios demonstrate this need – (1) risk assessments on the appellate level; and (2) reconstruction and other hearings ordered in connection with the appeal.

The ABA Standards are correct that in most cases the attorney decides what issues to include in an appellate brief. As a constitutional matter, that is a decision – unlike whether a defendant will testify at trial or whether to appeal in the first instance – that belongs to the lawyer.\textsuperscript{141} As an ethical matter, however, frequently the defendant \textit{will} need to make the final decision as to whether a certain issue should be included.\textsuperscript{142} This occurs when the issue to be raised may present some kind of “risk” to the client.\textsuperscript{143} Such risk situations are often presented in plea cases – where a client pleaded guilty to a reduced charge for a reduced sentence.\textsuperscript{144} The guilty plea might be one that could be challenged on

\textsuperscript{140} ABA Criminal Justice Mental Health Standard 7-5.4 (commentary).

\textsuperscript{141} See \textit{Jones v. Barnes}, 463 U.S. 745, 751 (1983) (“Neither \textit{Anders} nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.”); see also \textit{Anders v. California}, 386 U.S. 738, 744 (1967) (“[The lawyer’s] role as advocate requires that he support his client’s appeal to the best of his ability.”); see also Christopher Johnson, \textit{supra} n. ____ at 70.

\textsuperscript{142} See \textit{Everett}, \textit{supra} note ___ at ___ n.7; see also \textit{Model Code of Prof’l. Responsibility} DR 7-101 (B)(1) (1980) (“[A] lawyer may . . . exercise his professional judgment to waive or fail to assert a right or position of his client.”); \textit{Model Rules of Prof’l. Conduct} R. 1.4 (b) (2005) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); see also ABA \textit{Criminal Justice Defense Function Standard} 4-8.2 (1991) (“Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal.”).

\textsuperscript{143} See \textit{United States v. Graves}, 98 F.3d 258, 260 (7th Cir. 1996) (“Challenging a plea of guilty involves the additional consideration that if the challenge succeeds the defendant may well end up with a heavier sentence (for the sentence imposed pursuant to the plea may have reflected a ‘good’ plea bargain compared to the results of a trial), and this is a risk of which the defendant must be made aware before the appeal is taken.”); see also \textit{Holmes v. Buss}, 506 F.3d 576, 579 (7th Cir. 2007).

\textsuperscript{144} See Julian A. Cook, \textit{All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Defendants}, 75 U. of Col. L. Rev. 863, 866 n.17 (2004)(noting the criminal justice system’s “vast dependency” on guilty pleas; in 2000, 95% of federal defendants were convicted by way of plea); see also \textit{Clarke & Neuhard, supra} note ___ at 15 (“trials and courtroom battles, let alone not guilty verdicts, make up a very small percentage of workload moving through American courts”); William J. Stuntz, \textit{Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law}, Harvard Public Law Working Paper No. 120, available at \textit{http://ssrn.com/abstract854284}.\textsuperscript{145}
appeal. Successfully attacking the plea, however, would place the client in pre-plea posture, where he would face the higher sentence that he faced prior to the plea. Such risks are not limited to the guilty plea context, however. In the case of a trial where the jury simply failed to resolve certain higher-level counts, seeking reversal of conviction on the lower-level counts might place the defendant in jeopardy of retrial on those higher-level counts — and, potentially, a higher sentence than presently being served. Such risks are particularly acute when an avoided sentence of death is possible again after a successful reversal. In both of these situations, ethically speaking, the client is the one who needs to decide whether he is willing to take the risk of challenging his conviction. Thus a client must have some ability to understand the proceedings, apprehend his options, and make some kind of reasoned choice.

If a lawyer were to follow the suggestion of ABA Standard 7-5.4 there is a very real possibility that the lawyer could cause the client serious harm. Apparently, the ABA Standard would allow the attorney to raise any issue he might “deem appropriate,” regardless of the risk. Thus, the lawyer could pursue a plea withdrawal issue in order to win the appeal. But, as a result, the client might find himself in a worse situation without ever consenting to it. On the other hand, the lawyer might assume the client does not wish to take the risk and as a result fail to pursue a valid claim. This, then, raises more than an ethical concern, implicating constitutional concerns as well. A defendant’s fundamental right to decide whether to pursue or abandon the appeal is potentially abrogated under the ABA’s Guidelines approach.

Somewhat ironically, however, such risks generally do not present themselves if a defendant has already been sentenced to execution as defendants generally do not plead guilty in exchange for a sentence of death. If a death sentence were imposed following a guilty plea, it is hard to imagine how seeking to challenge the plea on appeal would place the client at any greater risk – a sentence of death being the worst any defendant could ever receive. Thus, in most capital cases client incapacity would not trigger this particular concern.

See Graves, 98 F.3d at 260-61 (“If there is some reason to believe that [the defendant] was incompetent to assess the risk [presented by challenging a guilty plea], a determination of competence should be made before the appeal is allowed to proceed.”).

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.4(b)(ii) (1988) (“Counsel for the defendant should proceed to prosecute the appeal on behalf of the defendant despite the defendant’s incompetence and should raise on such appeal all issues deemed by counsel to be appropriate.”).

See Jones v. Barnes, 463 U.S. 745 (1983); ABA Criminal Justice Standards: Criminal Appeals Standard 21-2.2 (Trial Counsel’s Duties With Regard to Appeal)(“While [trial] counsel should what is needed to inform and advise defendant whether to appeal, like the decision whether to plead guilty must be the defendant’s own choice.’); see also Christopher Johnson, The Law’s Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Dignity, 93 Ky. L.J. 39, 70 (2004-05)(describing whether to pursue an appeal as one of the fundamental decisions constitutionally allocated to criminal defendants rather than their lawyers).
Similarly, although most appeals simply result in affirmance or reversal of a conviction, in a variety of instances an appeals court might hold a review in abeyance and return the matter to the trial court for further proceedings—usually a hearing of some sort.\(^{149}\) When that occurs the defendant generally has a right to participate in those further proceedings.\(^{150}\) The defendant’s input might be essential to efficacy of the process - for instance if there is a need for the defendant’s testimony or he alone is aware of events that took place outside of the record that are essential to the hearing. Proceeding without such input, as the ABA Guidelines suggest, could also work to harm the interest of the defendant.

What is more, an unusual chasm now exists in criminal competence law. Although there is no constitutional right to counsel during post-conviction proceedings, which are generally viewed as civil in nature, a defendant with a statutory right to counsel in post-conviction litigation may have a greater right to be competent than a defendant who has a constitutional right to counsel during a direct appeal.\(^{151}\) This anomaly is all the more confounding given that even the Supreme Court did not distinguish between competence for abandoning direct appeals as compared to collateral attacks in death volunteer cases.\(^{152}\)

\(^{149}\) See, e.g., United States v. Thomas, 303 F.3d 138, 140 (2d Cir. 2002) (remanding for a supplemental record to be made and trial court to issue findings on Batson challenge, but retaining jurisdiction over the appeal); United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994) (“Precedent thus allows us to seek supplementation of the record while retaining jurisdiction.”); People v. Hussari, 5 A.D.3d 697, 697 (N.Y. App. Div. 2004) (holding appeal in abeyance for trial court to hold retrospective hearing as to defendant’s competence at the time of trial).

\(^{150}\) For example, in one case in which this author was involved, the Appellate Division held an appeal in abeyance for the trial court to hold a hearing as to whether the defendant should have been permitted to withdraw his guilty plea – something the trial court failed to do in the first instance. To meaningfully prepare for that hearing, we met with our client and were provided with important details about what took place at the time of the initial guilty plea that likely we could not obtain elsewhere and that allowed us to meaningfully prepare for the hearing. Indeed, we were able to gather significant information, including names of additional witnesses who supported our client’s claims. Our client’s assistance to us was necessary so that we could properly assist him. See People v. Earp, 7 A.D.3d 538, 539 (N.Y. App. Div. 2004) (holding appeal in abeyance for trial court to hold hearing on defendant’s motion to withdraw guilty plea).

\(^{151}\) Interestingly, the right to competence has also been found to apply to extradition proceedings based upon a defendant’s right to counsel. Pruett v. Barry, 696 P.2d 789, 792-94 (Colo. 1985) (standard for determining whether an inmate was competent to participate in extradition proceedings is whether he has sufficient present ability to consult with his lawyer and has a rational as well as factual understanding of the proceedings against him; rejecting standard that defendant must be “totally unable to assist counsel” for finding of incompetence for extradition purposes); Kostic v. Smedly, 522 P.2d 535, 539 (Ala. 1974) (adopting Dusky standard for use in ascertaining “whether appellant, as a result of mental disease, lacks the ability to aid his counsel and comprehend the nature of the habeas-corpus extradition-proceedings with a reasonable degree of rational understanding”).

\(^{152}\) See supra note ____.
Although there is a statutory right to appointed counsel during federal habeas proceedings in death cases, there is no accompanying right to effective assistance of counsel.\(^{153}\) Thus, there is also little quality control on the representation provided by such attorneys. What is more, some jurisdictions do not provide for appointment of counsel at all in state post-conviction review proceedings, even in capital cases.\(^{154}\) Counting on post-conviction collateral litigation, therefore, to be a stop-gap measure where incompetent appellants can count on having their prior unraised claims identified and addressed seems folly\(^{155}\) – particularly when there will be a need to retrospectively prove incompetence years after the appeal.\(^{156}\) Similarly problematic is the case of the impaired defendant who prevails on an appellate claim resulting in a new trial. This would then leave the new trial attorney in the situation of trying to grapple with a defendant who did not consent to having the claim raised, due to incompetence, and determining what steps to take in the trial court setting to somehow address the appellate lawyer’s misstep.

Finally, and perhaps most fundamentally, the ABA’s current suggestions for attorneys for handling appeals where a defendant may suffer from mental incapacity are out of touch with the concept of client-centered representation.\(^{157}\)

\(^{153}\) See supra Part IVA, footnote ___ and accompanying text.

\(^{154}\) See, e.g., Alabama Post-Conviction provisions. See supra Part IIIA, footnote ___ and accompanying text. My thanks to William Montross of the Southern Center for Human Rights for greatly informing my thinking about this and the other points made in this section.

\(^{155}\) See Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 Cornell L. Rev. 679, 693 (2007)(in suggesting defendants should wait to raise ineffective assistance of trial counsel claims until after direct appeal and during collateral review when there is no constitutional right to counsel during such proceedings, the Supreme Court “effectively told defendants that they would have to reinvestigate their cases and supplement their trial court records from inside their prison cells”); see also id. at 704 (the decision to locate certain challenges within the collateral proceeding context rather than direct appeal undermines the ability of appellate counsel from serving a check on the fairness of the proceedings).

\(^{156}\) See Nancy J. King, Habeas Litigation in the U.S. District Courts, available at [http://ssrn.com/abstract=999389](http://ssrn.com/abstract=999389) (noting that federal habeas petitions, on average, are filed 7.4 years following state judgment and non-capital cases are filed 6.3 years on average after state-court proceedings have ended).

\(^{157}\) I have previously described the development of the “client-centered” lawyering trend, led largely by practitioners, as compared to the somewhat related but distinct and more amorphous therapeutic jurisprudence movement. Quinn, An RSVP to Professor Wexler’s Warm TJ Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged, 48 B.C. L. Rev. 539 (2007); see Dennis Roderick & Susan Krumholz, Much Ado About Nothing?: A Critical Examination of Therapeutic Jurisprudence, 1 S. New Eng. Roundtable Symposium L.J. 201 (2006); see also Cait Clarke & James Neuhard, Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve, 17 St. Thomas L. Rev. 781 (2005)(noting that therapeutic jurisprudence “stems from the legal academy,” while client-centered problem-solving lawyering “stems from practitioners”).
There is some debate about what, exactly, is encompassed by the term client-centered lawyering. At its core, however, it is concerned with discerning and advancing the interests, objectives, and desires of the client.\textsuperscript{158} The lawyer’s role is shaped by, and does not eclipse, the client’s role in the representation.\textsuperscript{159} Examination of this kind of attorney-client relationship has occurred largely on the trial-level, but its goals and application are equally relevant and important to appellate and post-conviction representation.\textsuperscript{160} Suggesting that appellate

The concept of client-centered lawyering was made popular nearly three decades ago by Professors David Binder and Susan Price in their 1977 book, \textit{LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH}. See Katherine R. Kruse, \textit{Fortress in the Sand: The Plural Values of Client-Centered Representation}, 12 Clinical L. Rev. 369, 369-370 (2006). However, debate continues about what kind of representation, exactly, is encompassed by this term. For instance, Professor Kruse has noted that the client-centered approach to representation was initially intended to supplant “treat[ing] clients impersonally as bundles of legal issues . . . without exploring a client’s actual values,” but that it has grown to encompass “problem-solving . . . holistic lawyering approach[] that reach[es] beyond the boundaries of the client’s legal case to address a broader range of connected issues in the client’s life.” \textit{Id} Others who are considered more “traditional” advocates also describe themselves as client-centered in that “[t]he traditional model of devotion to a client’s legal rights and interests is fundamentally client-centered, in the sense that it places fidelity to clients at the center of the lawyer’s professional duties.” \textit{Id.} at 397-398, n.126; see also Abbe Smith, \textit{The Difference in Criminal Defense and the Difference it Makes}, 11 Wash. U. J. L. & Pol’y 83, 88 (2003).


\textsuperscript{159} See ABA Model Rules of Professional Responsibility (2002) (Preamble)(a lawyer’s responsibilities including serving as a legal advisor, legal advocate, negotiator, and evaluator for clients); ABA Model Rules of Professional Conduct, Rule 1.4: Communication (Commentary)\textquotesingle\textquotesingle“The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so . . . . For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.”); ABA Criminal Justice Standards \textsuperscript{\textdagger}, (role of defense counsel is “complex, involving multiple obligations . . . including furthering the defendant’s interest to the fullest extent of the law”).

\textsuperscript{160} See ABA Criminal Justice Standards; Criminal Appeals Standard 21-3.2 (Counsel on Appeal) discussing the need for appellate counsel to generally respect the decisions of an appellant); Primus, \textit{supra note \textdagger} at 722 (“it is important to avoid overstating the distinction between trial and appellate attorneys, since there is substantial overlap in the skills required”); Peter B. Knapp & David Beneman, \textit{Indigent Defense} 45 (July 2003)(noting that quality of appellate representation received little attention compared to trial representation); Amy D. Ronner & Bruce J. Winick, \textit{Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance}, 24 Seattle U. L. Rev. 502 (2000)(“Appellate lawyers can be more effective and can produce greater client satisfaction by making certain that they understand their client’s stories and what it is their client’s wish to convey.”); see also People v. Stultz, 810 N.E.2d 883, 888 (N.Y. 2004)(“it is inapt to have one standard for trials and another for appeals” when adjudging ineffective assistance of counsel claims).
attorneys should make assumptions about client goals and objectives may, in a
given case, comport with minimum legal standards. However, it may also
perpetuate a hierarchical and paternalistic form of lawyering that many modern
defense attorneys reject and believe to be professionally irresponsible.

B. Emergence of a Counter-Trend: Grappling with the Grays

Fortunately, bucking this historic trend, several courts have departed from
the absolutist position to analyze appellate-level incapacity in a way which more
accurately reflects the complex realities of criminal practice. This body of law,
consistent with the critique offered above and concerned with protecting the rights
of the impaired, begins to offer a more nuanced approach to post-judgment
competency law. Although this counter-movement offers important insights,
helping move towards more sensible criminal mental health jurisprudence, some
significant issues require further discussion and development.

In 1994, the Wisconsin Supreme Court looked at the consolidated post-
judgment incompetence claims of two mentally impaired defendants in State v.
Debra A.E. and Nesja. Both defendants appealed trial court decisions denying
competency evaluation requests that related to their ability to participate in lower
court post-conviction relief proceedings. Thus, the specific question to be

161 My thanks to Keith Findlay, appellate counsel for Debra A.E., for sharing his insights on
the importance of respecting client objectives. See Appellate Brief in Debra A.E (on file with
author); see also Jones v. Barnes, 463 U.S. 745, 759 (1983)(“the function of counsel under the Sixth
Amendment is to protect the dignity and autonomy of a person on trial by assisting him to make
choices that are his to make, not to make choices for him”); see also Cooper, 517 U.S. at 364 & n.18
(there are “myriad smaller decisions” that a defendant can share in).

162 NLADA Performance Guidelines for Criminal Defense Representation, Guideline 1.1 Role
of Defense Counsel (commentary)(“Actions or inactions that do not meet the test of ineffective
assistance of counsel in a given case may still constitute poor representation.”); see Quinn, An RSVP
supra note ___ at ___, Timothy H. Everette, supra note ___ at ___ (“what often does not matter to
lawyers is asking whether there is anything more that matters to the appellate client. There is more
that matters to most clients. Many clients simply would like their attorneys not to look past them.”); see also NLADA Performance Guidelines, Guideline 9.2: Right to Appeal (“Counsel’s advice to the
defendant should include an explanation of the right to appeal the judgment of guilty and, in those
jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.”); ABA
Criminal Justice Defense Standard 4-8.2: Appeal (“Defense counsel should give the defendant his or
her professional judgment as to whether there are meritorious grounds for appeal and as to the
probable results of an appeal. Defense Counsel should also explain to the defendant the advantages
and disadvantages of an appeal.”); ABA Criminal Justice Standards: Criminal Appeals 21.2.2
(“Defense counsel should advise a defendant on the meaning of the court’s judgment, of defendant’s
right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing.
Counsel should also advise of any posttrial proceedings that might be pursued before or concurrent
with an appeal.”).


164 523 N.W.2d 727, 729.
addressed in Debra A.E. was the appropriate role of the trial court “when counsel requests a competency determination for a defendant during post-conviction relief proceedings.”165 Given Wisconsin’s somewhat unique post-sentence processes, however, Debra A.E. necessarily implicated the issue of competence for purposes of appeal as well.166

The court acknowledged that in the course of Wisconsin’s post-conviction relief proceedings a defendant likely will be called upon to “make the decision to proceed with or forego relief, . . . decide whether to file an appeal and what objectives to pursue” in that appeal.167 She might also need to provide counsel with factual information relevant to the post-conviction relief proceedings as well as claims on direct appeal.168 The court thus found that the defendant had a right to competence in post-conviction relief proceedings.

In terms of the standard of competence to be applied, the court held that such defendants would need to be informed by the specific circumstances at hand and the tasks they might need to undertake.169 “Based on the tasks that might be required of defendants seeking post-conviction relief, . . . a defendant is incompetent to pursue post-conviction relief . . . when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding.”170 This standard appears to fall somewhere between the standards announced in Dusky and Rees.

165    Id. at 731

166    Wisconsin’s post-conviction relief procedures are distinct from post-conviction review proceedings, which generally would follow direct appeal. Id. at 730, n. 2. A request for post-conviction relief, in Wisconsin, is required prior to challenging a conviction or sentence on direct appeal. Id. at 731 (outlining the kinds of post-conviction relief that may be sought under Wisconsin Code section 809.30 including mistrial based upon improper jury instructions, a denial of which can later be combined with the claims on direct appeal). Generally this request is made while the case is still under the control of the trial court, with a new attorney appointed for indigent defendants for purposes of the post-conviction relief and appellate proceedings. Id. at 730, 731, n. 4 (“Both defendants completed SM-33 Information on Post-conviction Relief forms at the conclusion of their sentencing hearings.”).

167    Id. at 732.

168    Id. at 732.

169    Id. at 732 (“Competency is a contextualized concept; the meaning of competency in the context of the legal proceedings changes according to the purpose for which the competency determination is made. Whether a person is competent depends on the mental capacity that the task at issue requires.”).

170    Id. at 732 (referring to post-conviction relief proceedings under sec. 809.30, Stats. 1991-92).
Beyond announcing a contextualized competence standard based on where the defendant was in the proceedings, the Debra A.E. court outlined a process for evaluating post-judgment incompetence claims that in many ways mirrors the constitutionally-mandated procedures developed in the trial context. That is, when a good faith doubt about a defendant’s competence post-judgment is raised, either by the parties or the court, the defendant should be evaluated. The court thereafter must hold a hearing or engage in some other meaningful method of determining whether the defendant is competent to proceed. Therefore the court must contemporaneously rule on the question of defendant’s competence -- not only to determine what action should be taken at the time -- but to “create[] a record of a defendant’s mental capacity, thus eliminating the difficulty of attempting to measure that capacity months or years after the period in question.”

Under the Debra A.E. framework, if the court finds a defendant is incompetent for purposes of pursuing post-conviction relief, a variety of remedies are available depending upon the particular circumstances. First, although defense counsel should move forward to the extent feasible with the post-conviction relief proceedings where no risk of harm to the defendant exists, where an accused’s input or decision-making is necessary to the process the court may grant a defense continuance. Alternatively, if it appears the defendant is unable to make necessary decisions on his own behalf, defense counsel may seek appointment of a guardian ad litem “to instruct defense counsel whether to initiate post-conviction relief and, if so, what objectives to seek.” Finally, after regaining competency, a defendant would be permitted to raise issues that were not raised earlier due to his incapacity. Given that an actual determination as to competence would have been made previously, the defendant would be well-positioned to demonstrate reason for failing to pursue the issues earlier. Thus,

172 Debra A.E., 523 N.W.2d at 734-35.
173 Debra A.E., 523 N.W.2d at 734-35.
174 Id at 735.
176 Debra A.E., 523 N.W.2d at 735-36.
177 Id. at 736.
178 Id.
179 Id.
unlike in the trial context with its one-size-fits-all approach under *Dusky* and its progeny, the *Debra A.E.* contemplates a more contextualized remedy structure for post-judgment incompetence inquiries. With this framework outlined, the *Debra A.E.* case was remanded to the trial court for further proceedings not inconsistent with the decision.

In 1996 the Seventh Circuit was more squarely faced with the question of whether a defendant had the capacity to pursue a direct appeal in *United States v. Graves*. Dale Graves was a 61-year-old who had no prior criminal record. After suffering a severe stroke affecting his speech and gait, Graves committed armed robberies on three different dates at the same bank in Peoria, Illinois while undisguised. He pleaded guilty in all three cases and was sentenced to nearly 10 years prison. His appointed lawyer filed only an *Anders* brief on appeal. The Court of Appeals directed the attorney to look into two potentially viable issues relating to certain representations made to Graves at the time of his plea. These apparently incorrect statements undermined the knowing and voluntary nature of his plea. After counsel filed the new brief addressing the misrepresentations, the court *sua sponte* raised the question of whether Graves was even competent to move forward with his appeal.

Writing for the court, Chief Judge Posner identified the perilous risk noted herein, that following a successful appeal in a guilty plea case a defendant may face a heavier sentence than currently serving once placed in pre-plea posture. Thus, the court *sua sponte* held “[i]f there is reason to believe that [the defendant]...
was incompetent to assess the risk, a determination of competence should be made before the appeal is allowed to proceed."\textsuperscript{191}

The \textit{Graves} court went on to question, however, whether Graves was competent to enter the plea in the first place. In the end, the court avoided answering several important questions, including whether Graves was competent for purpose of appeal, what standard of competence would apply at the appellate level, what procedures would be followed to determine competence on the appellate-level, and what remedy would flow from an incompetence finding. Rather, the court remanded the case for a determination of Graves’ competency for purposes for pleading guilty in the first instance.\textsuperscript{192} This, it suggested, would “most likely make the question of his competence to challenge his guilty plea on appeal moot.”\textsuperscript{193}

Finally, last year the Seventh Circuit explained the issue of post-judgment competence in \textit{Holmes v. Buss}.\textsuperscript{194} In that case, a mentally impaired death row inmate appealed the denial of federal habeas corpus relief. The Court addressed as a matter of first impression the question of whether a defendant has a right to competence during district court habeas corpus proceedings and habeas appeals.\textsuperscript{195} In holding that petitioner did have such a right, the Court adopted the rule set forth by the Ninth Circuit in \textit{Rohan}.\textsuperscript{196} \textit{Buss} went further, however, by attempting to bring greater coherence to criminal mental health law and suggesting that defendants should have the right to competence throughout all stages of the criminal process – trial, direct appeals, post-conviction review, and appeals from post-conviction proceedings.

Concerned that the law of competence as it relates to various settings – for instance, competence for trial versus competence to be executed – had become overly complicated, the Court announced a “unitary” rule for competence determinations.\textsuperscript{197} That is, “[w]hatever the nature of the proceeding, the test should be whether the defendant (petitioner, appellant, etc.) is competent to play whatever role in relation to his case is necessary to enable it to be adequately

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 262.
\textsuperscript{194} Holmes v. Buss, 506 F.3d 576 (7th Cir. 2007).
\textsuperscript{195} Id. at 577-578.
\textsuperscript{196} Id. at 578.
\textsuperscript{197} Id.
presented.” As an example, the court explained that if a defendant on appeal can raise claims that would result in “a heavier sentence than the one appealed from, the defendant will need a higher level of mental functioning to be able to make a rational decision of whether to pursue or forgo the appeal.” However, remanding the case for further proceedings including the possibility of further hearings to help determine if the defendant was competent to assist in either his district court habeas corpus proceedings or habeas appeal, the Court of Appeals did not outline specific processes that should be followed when a claim of appellate incompetence is raised. Nor did it suggest particular remedies if such a finding is to be made.

These cases begin to sketch a more coherent approach to competence across all criminal proceedings. This new approach recognizes defendant capacity during direct appeals as at other phases of the prosecution may be essential to the efficacy of the proceedings. The Supreme Court advanced this approach in Indiana v. Edwards, underscoring the need for examination of the proceedings-based circumstances facing defendants to determine if, and to what degree, their mental disability may undermine the efficacy and fairness of the criminal process.

C. Supreme Court Embraces Individualization: Indiana v. Edwards

In Indiana v. Edwards a state trial court found the defendant mentally competent to stand trial as defined by Dusky, but not mentally competent to conduct the trial himself. Upholding the trial court’s decision to prohibit the mentally impaired defendant from proceeding pro se, the Court recognized the limits of Dusky as a unitary competence standard. Largely focused on a defendant’s ability to assist his attorney during trial, the Court noted the Dusky standard lacks utility when a court is called upon to consider other kinds of defendant “mental-illness-related limitation(s).” Connecting the medical and scientific issue of defendant impairment and the legal concept of competence in a way Dusky failed to do, the Court explained “mental illness itself is not a unitary

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198 Id. at 579 (“The test is unitary but its application will depend on the circumstances. They include not only the litigant’s particular mental condition, but also the nature of the decision that he must be competent to make.”).
199 Id. at 579.
200 Id.
202 Id. at ___.
203 Id.
204 Id.
concept” but one that “varies in degree [and] can vary over time,” “interfere[ing] with an individual’s functioning at different times and in different ways.” The Court recognized the need for different measures of capacity depending on the situation presented. It embraced a more nuanced approach to the concept of competence during the criminal process than the monolithic standard afforded by Dusky. Competence determinations, it held, may need to be “more fine-tuned” and “tailored to the individual circumstances of a particular defendant.”

D. A Call for More Comprehensive, Coherent, and Client-Centered Criminal Justice Mental Health Standards

In light of the foregoing, it is clear the time has come to take the next step in the development of criminal mental health law – fundamental reconceptualization of the concept of competence across all stages of the criminal process. The ABA Criminal Justice Mental Health Standards – now nearly two decades old - can serve as an important locus for this reform movement. As it did following the Supreme Court’s decision in Ford v. Wainwright, the ABA should seize upon this opportunity to take a pro-active role in the wake of Indiana v. Edwards to offer specific recommendations for properly contextualizing the concept of competence throughout all phases of criminal case. And in doing so, it can also draw lessons from insights offered in Debra A.E., Graves, and Buss.

This rewriting should not occur in piece-meal fashion, however, as with the recent important but narrowly-focused work of the ABA-IRR Task Force on Mental Disability and the Death Penalty. It should take place with all facets of the criminal process in mind. Consideration of appeals, that have been largely ignored by the Guidelines until now, can serve as a linchpin bridging the concept of competence across the criminal process.

The new Guidelines also should find their support not just in law but science. In this way, the ABA’s Criminal Justice Mental Health Guidelines can offer more coherent rules and procedures for dealing with competency questions.

205 Id.
206 Id.
208 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS at 287-288 (Introduction to Addition to Part V).
209 See supra note ___ and accompanying text.
210 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.5, 7-5.6, and 7-5.7 (1988).
across all stages of a criminal case, leading the way for legislatures, courts and practitioners. Obviously, a number of significant questions will need to be considered by drafters, including the appropriate standards, procedures and remedies in different kinds of competence cases. As a starting point, this section offers some thoughts for consideration about thinking through these questions as they relate to the appellate stage of the criminal process.

1. Standards

An over-arching framework like the one announced by Buss -- such as “whether the defendant (petitioner, appellant, etc.) is competent to play whatever role in relation to his case is necessary to enable it to be adequately presented” -- offers a useful lens for considering the concept of competence in criminal cases. Grounding the inquiry in this way allows the bench, bar, and others to become more intentional in their thinking about the important role of defendants and their objectives during the criminal process. This would be a significant development in appellate litigation where the voices and concerns of the accused historically have been ignored not only by appellate courts, but often by the very lawyers who represent them.

Similarly, Buss’s concern for the actual tasks that might face the defendant depending on where he is in the criminal process is instructive. It recognizes that different tasks during a prosecution may require of a defendant different levels of understanding, rationality, communication, and the like. For instance, a defendant called upon to decide during an appeal whether to undertake a significant risk, as in Graves, a relatively high level of reasoning and comprehension is likely required – perhaps more so than during a trial.

Adoption of a unitary flexible competence rule is also attractive because it avoids creation of individualized standards for every conceivable scenario during the criminal process. It is true that the multiple individual tests that have developed over time in a piecemeal fashion have confounded courts and practitioners. As the Buss court wisely noted, “[t]he multiplication of rules and

211 ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.5, 7-5.6, and 7-5.7 (1988).

212 Buss, 506 F.3d at ___.

213 See John Bray and Byrn Lichstein, The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School’s Remington Center, 75 Miss. L.J. 795, 815-816 (2006) (describing how the Remington Center uses a client-centered approach in criminal appeals cases, which is relatively unusual in appellate practice and above and beyond what is required to provided effective assistance of counsel under the Sixth Amendment); Everett, supra note ___ at ___ (“It is not difficult to see why appellate attorneys perceive little need for direct personal contact with appellate clients and why many prefer written contact with clients.”).

214 Compare Dusky (competence for trial test); Rees (competency to volunteer for death test); Ford (competence for execution test); see also Indiana v. Edwards.
standards, carrying in its train as it does endless debate over boundaries, is one of the banes of the American legal system, a source of appalling complexity.\textsuperscript{215}

Despite these benefits, however, adopting the \textit{Buss}’s general rule as the single competence standard in criminal cases without further guidance or parameters presents significant problems. First, the amorphous \textit{Buss} test leaves tremendous discretion with judges to measure competence as they see fit. This is particularly troubling given that judges generally do not have the scientific and medical expertise necessary to any meaningful measure of capacity. The comparative level of mental functioning required for a defendant to play this role versus that – or to make this decision over that - is likely beyond the ken of members of the bench and bar. Indeed, the problem of failing to provide adequate guidance in the context of claims of incompetence for execution has resulted in a lack of uniformity and great disparity in cases where courts have been left to grapple with the meaning of retardation.\textsuperscript{216}

Beyond this, delving too deeply into the specific tasks that a defendant may be called upon by counsel to undertake in a particular case may present another set of problems. Disclosing the specifics of these communications runs the risk of breaching the confidentiality of the attorney-client relationship and permitting courts to involve themselves in defense strategy.\textsuperscript{217} Thus, while it may be time to permit the competence lens to move to different junctures within the criminal process beyond trial, it likely should not be allowed to focus too closely on the particulars of the specific choices and decisions facing the defendant.

Therefore, in ascertaining the exact measure of competence necessary for the task at hand, drafters may be well served to consider the various phases in a criminal case where a defendant is called upon to make decisions, assist, or otherwise play a role in the proceedings. From these snapshots – such as the likelihood that a defendant will need to consider a risk – a more specific competence standard for that phase of the process can be generated. Thus, it may be that two or three or more specific standards might need to be outlined. But in so outlining the ABA’s Guidelines can do a better of job of comparing the various tests so that practitioners and judges understand the subtle distinctions between them and how these various tests interact.


\textsuperscript{216} See Van Tran \textit{supra} note ___; \textit{see also} Report of the Task Force on Mental Disability and the Death Penalty (2005) (calling for adoption of the definition for retardation recommended by the American Association of Mental Retardation); Kate DeBose Tomassi, \textit{The Fight to Define Mental Retardation}, The American Lawyer (Sept. 2005); Philipsborn, \textit{supra} note ___ at 417.

\textsuperscript{217} I am most grateful to my colleague, Jennifer Hendricks, for raising this concern.
In addition, rather than developing abstract legal standards to drive the determination of experts, it might be time for lawyers to allow scientific expertise to begin to drive the creation of the legal standards. For instance, in the 21st Century, Dusky’s common-sense but relatively naïve approach to mental capacity leaves much to be desired, particularly for the very mental health experts who are called upon to use it as a measure in practice. The same could be said for the standards set forth in Rees, as well as Debra A.E. Thus, the ABA should begin to hear from mental health experts about how they might measure such capacities. Thus, scientific literature could suggest specific meaningful measures for courts to use when called upon to assess defendant capacity in a given situation. An example of such expert-driven competence measures can be seen in the area of juvenile practice, where the batter of tests developed by Dr. Thomas Grisso have become the standard for determining whether a child has sufficient capacity to waive his Miranda rights.

2. Procedures

The ABA should also revise the suggested procedures for addressing the question of competence when it is raised post-judgment. Dusky and its progeny provided a procedural framework for trial court practitioners and judges that included defendant evaluation, evidentiary hearing, and court ruling, which the ABA Standards presently mirror. No similar process is outlined for appeals – non-capital or capital – or post-conviction proceedings. Unfortunately, Debra A.E., Graves, and Buss fail to offer much meaningful guidance on this score. Both Graves and Buss simply resulted in remands, where trial courts were left to grapple with what procedures should be followed to ascertain whether the defendants in question lacked capacity. Debra A.E. went further by outlining required procedural steps very much like those used in the trial competence setting - competency evaluation, evidentiary hearing, and court ruling. This was in the context, however, of Wisconsin’s somewhat unusual post-judgment litigation structure, where defendants generally undertake post-conviction relief efforts in the trial court as a first step in the appeal process.

Nevertheless, the Debra A.E. court aptly suggested these procedures should be followed whenever a good faith doubt about the defendant’s post-judgment competence is raised - even if the case has already moved out of the trial

218 See Maroney supra note ___ at ___.

219 See Maroney supra note___ at ___; Philipsborn supra note ___ at ___; See also Perline supra note ___ at ___; Bonnie supra note ___ at ___;

220 See Thomas Grisso, Forensic Evaluations of Juveniles (1998); see also Maroney supra note ___ at ___.

221 Debra A.E., 523 N.W.2d at 729.
court and into an appellate venue. An immediate evaluation in the very court where the problem of possible incompetence arises serves multiple purposes. Not only will an incompetence finding possibly trigger some action other than mere processing of the case, it allows for a contemporaneous determination that could be important in later litigation to show cause for failing to pursue certain claims earlier. Such a process seems far superior to the current ABA suggestion that counsel simply inform the appellate court of the possibility of client incompetence, leaving for another day – or possibly another year – evaluation of that claim.

Admittedly, these procedures might seem unusual on appeal as most reviewing courts are not set up to oversee mental health evaluations and conduct evidentiary hearings. In this era of rethinking the roles of courts through problem-solving functions and otherwise, it is not outside of the realm of possible appropriate actions for appellate courts to order competency evaluations by experts and to review such findings. Adjunct appellate court staff, like referees or special masters, might be able to serve as the arbiters of such matters to prevent them from being remanded to lower courts for such assessments. The delay and complication involved with remand could further muddy the waters of addressing an issue that calls out for contemporaneous consideration.

222 See id. at 734 (“We conclude that after sentencing, if state or defense counsel has a good faith doubt about a defendant’s competency to seek postconviction relief, counsel should advise the appropriate court of this doubt on the record and move for a ruling on competency.”).

223 Id.

224 Id.

225 Nancy J. King, supra note ___ at ___; see also Bonnie, supra note ___ at 1178.

226 See, e.g., Tex. Penal Code § 46.05(b)(expressly providing that the trial court retains jurisdiction for purposes of resolving claims of competence to be executed).

227 Indeed it is somewhat ironic that the Conference of Chief Justices (CCJ), representing the Chief Judges from each state’s highest court of review, is one of the entities driving the problem-solving court movement, which urges trial courts to rethink their roles and traditional case processing methods. See, e.g., CCJ Resolution 22 (outlining the findings and suggestions of a Chief Justices Task Force, to encourage perpetuation of the problem-solving court model).

Moreover, there may be real value in having appellate courts more closely involved rather than operating at arm’s length from the litigation. Historically, appellate courts have remanded cases to trial courts whenever there was a need for creating an additional record relating to an issue on appeal. Where the issue to be considered actually relates to the efficacy of the appeal, there would seem to be very little reason to involve the trial court. It has no interest in whether the appellate process is meaningful. Having the appellate court interact with the individual whose competence is in question not only works to shed light on the extent of the defendant’s condition as in trial courts, it is simply more respectful. Having appellate counsel involved in such hearings, thereby requiring greater interaction with clients through in-person visits and otherwise, is also consistent with client-centered lawyering. This is a feature that is sorely missing from current appellate practice.

3. Remedies

Finally, in redrafting the Standards, the ABA should outline a variety remedial courses in light of the context in which incompetence arises in the criminal process. Specific guidance in commentary would be important for practitioners and courts considering the implications of the various avenues of relief. For instance, the ABA might suggest that a stay should be requested by defense counsel during an appeal only where it seems most appropriate given the possible issues that might be raised in a given case, the length of the sentence involved, and other relevant non-confidential factors. For a client who is sentenced to death, holding off for one year or more would likely be seen as valuable by that individual. But for a defendant who is serving a relatively short jail sentence that might expire before he regains competence, staying proceedings might do more harm than good in advancing his interests.

229 See Primus supra note ___ at 696 (“When a panel of appellate judges reads the trial court record in a case and addresses the legality of the defendant’s conviction, it is more efficient for that panel to address and resolve of the potential issues at the same time.”)

230 Cf. People v. Stultz, 810 N.E.2d at 888 (in assessing ineffective assistance of appellate counsel claims, “[a]ppellate courts are uniquely suited to evaluate what is meaningful in their own area”).

231 See supra Part ___.

232 See Debra A.E. at ___.

233 See Debra A.E. at ___; see also United States v. Boigergrain, 155 F.3d 1181 (10th Cir. 1998). Similarly, the Standards should also address when the appointment of a second lawyer, next friend, or guardian might be appropriate post-judgment. However, given the concerns about abiding by the objectives and goals of a client, it seems that such relief seldom would be sufficient in and of itself.
One important possible avenue of relief for incompetence on appeal has not been discussed in case law or otherwise. That is the possibility of dismissal of the charges or, ultimately civil commitment, after a stay on appeal where it appears a defendant is not likely to regain competence. Borrowing a page from *Dusky* and its progeny, a stay for purposes of reestablishing defendant capacity may not be indefinite.\(^{234}\) Rather, under *Jackson v. Indiana* continuance of the proceedings, absent civil commitment proceedings, may extend only for some reasonable time period to ascertain whether the defendant “will attain . . . capacity in the foreseeable future.”\(^{235}\) If it appears the defendant likely will not become competent in any foreseeable period of time, the state must either initiate civil commitment proceedings or release the defendant and dismiss the charges.\(^{236}\) The same, it would appear, should hold true for sentenced defendants pending appeal. Thus, the ABA’s Criminal Justice Mental Health Standards could make a similar recommendation when dealing with appellants who fail to regain competence in a reasonable period of time. This could have a particularly significant impact in the death penalty arena. The criminal justice system gives lavish attention to competence of defendants facing death, but far less attention to the very same defendants while involved in direct appeals. The effects of new ABA recommendations would provide a more coherent framework for courts and attorneys dealing with mentally ill defendants who have killed.\(^{237}\) The appropriate ultimate action to be taken in such matters if competence cannot be restored would be civil commitment.

Again, in keeping with client-centered principles, whatever remedies sought by defense counsel should be as consistent as possible with the role and discernable goals of the client, and should not work to disclose client confidences or defense strategy. It is also important that remedies not be used for punitive purposes and that reforms do not make a bad situation even worse for impaired defendants. Thus, prosecution requests for suspension of the proceedings for the appellant to regain competence -- if even permitted on appeal -- should be carefully scrutinized.\(^{238}\) This is particularly true if such a stay would likely result

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\(^{234}\) *Id.* at 738; *see also* *Jones v. Unites States*, 463 U.S. 354, 368 (1983) (holding that a defendant found guilty of committing a criminal act, but “insane” at the time, could be hospitalized until he regained “sanity” – even if that meant a period of hospitalization longer than the maximum potential prison sentence the act carried).

\(^{235}\) *Jackson*, 406 U.S. at 738.

\(^{236}\) *Id.; see generally* Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. of Am. Acad. of Psychiatry & L. 34 (2007)(suggesting that defendants with histories of lengthy in-patient and irremediable cognitive disorders, like mental retardation, are not likely to ever attain competence).

\(^{237}\) *But see Bonnie supra* n. ___ at 1182, n. 67 (suggesting a reduction in sentence to life imprisonment as the appropriate remedy – even on appeal).

in completion of sentence during this rehabilitative period prior to review of legal claims. There are other potential downsides, too, with these proposals. However, these suggestions are intended as a starting point for a larger conversation about improving practices for impaired appellants on appeal.

V. Conclusion

The current conventional wisdom that stresses competence of defendants during trial but ignores the incompetence of defendants on direct appeal makes little sense. The assumptions underlying this approach are inconsistent with reality, the law, and ethical defense practices. This appeal is offered as a starting point for further, in-depth evaluation necessary to make a coherent competence framework a reality in criminal cases. True reform of the criminal justice system’s approach to warehousing the mentally ill is an even more difficult task, one that extends beyond merely rewriting the ABA’s Criminal Justice Mental Health Standards. Although these changes will not happen over night, with the above suggestions for rewriting the ABA’s Standards we can at least begin to untangle the mess that has become United States system of criminal mental health law and policy. While we wait for the day that the mentally ill in this country are not punished for their impairments, we can at least work to ensure that such defendants have their day in appellate court.

No. 07/08-30 Available at SSRN: http://ssrn.com/abstract=1120891 (considering the therapeutic jurisprudential implications of the question of trial competence being raised by the prosecutor or the judge, rather than by defendant or his lawyer). My thanks also to Bruce J. Winick for raising this important issue.

239 For instance, my colleague Maurice Stucke has appropriately noted that opening up this avenue of rights and remedies during the appellate process may result in a movement to restrict the right to direct appeal altogether.