

MENTAL CAPACITY: REEVALUATING THE STANDARDS

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I. INTRODUCTION

Ensuring that a defendant is competent to stand trial is essential for a fair justice system. The criteria for determining a defendant's mental competence to stand trial has long been a contentious issue in the jurisprudence of both the United Kingdom and the United States. As it is impossible to see into a person's mind and unjust to allow a mentally incompetent defendant to stand trial, the determination of mental incompetence has been left to the court.¹

This Note takes the position that, like the United Kingdom has already done, the United States should be re-evaluating its outdated standard in determining competence to stand trial and its implications for self-representation. This Note will first discuss and evaluate the background and history of the standards used to determine whether a defendant is fit to enter a plea and competent to stand trial in the U.K. and U.S. Second, this Note will discuss the U.K. Law Commission's Unfitness to Plead Consultation Paper and its rationale for changing the current standard. Third, this Note will analyze and discuss problematic court interpretations of *Dusky v. United States* and the negative impacts of that case on the U.S.'s judicial system, especially in regard to self-representation. Finally, this Note will argue that adopting the decision-making capacity test set forth in the U.K.'s Consultation Paper would be a positive and practical step towards bringing U.S. competency evaluation in line with modern psychiatry and the modern trial process.

II. CURRENT COMPETENCE EVALUATION STANDARDS

On August 16, 2013, a U.K. court decided that sterilization was in a mentally disabled man's (DE) best interests.² In reaching this controversial decision, the court extensively evaluated DE's capacity and best interests, taking into account context and circumstances under the Mental Capacity Act of 2005 (MCA).³ Factors such as the history of DE's disability,⁴ the

¹ JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 611 (5th ed. 2009) (stating that the issue of incompetency is ordinarily considered at the defendant's initial appearance before a magistrate, but may be raised at any time during the proceedings or during the trial).

² *NHS Trust v. DE*, [2013] EWHC (Fam) 2562 [2].

³ Mental Capacity Act 2005, c. 9 (U.K.).

⁴ *NHS Trust v. DE*, [2013] EWHC (Fam) 2562 [2].

nature of his disability, his local disability services,⁵ DE's personality,⁶ his wishes and feelings,⁷ and the consequences of a further pregnancy from DE's longtime girlfriend on DE's life⁸ were taken into account for his competency evaluation. The MCA gives extensive direction on how to determine whether a person lacks capacity in order to ensure that a just decision is made.⁹

Since its passage in 2005, the MCA has been hailed as welcome and progressive legislation.¹⁰ Due to the MCA's general success in determinations regarding capacity in non-criminal contexts, the U.K. Law Commission¹¹ decided to research and issue a formal Consultation Paper that suggests a new legal test for fitness to plead in criminal cases based on Section 3 of the MCA.¹² This resulted in a proposal to Parliament to extend the MCA's test to the criminal realm.

The U.K. Law Commission's Consultation Paper highlights the problems resulting from a vague standard for evaluating a defendant's mental competence and fitness to plead. The U.K.'s current standard is based on an outdated case from 1836, *R v. Pritchard*.¹³ The *Pritchard* standard states that a defendant is fit to plead if the defendant "is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defen[s]e—to know that he may challenge any of you to whom he may object—and to comprehend the details of the evidence."¹⁴ Due to problematic and varying interpretations of this standard, the U.K. Law Commission's submitted a formal paper calling for changes to the *Pritchard* standard so that it is consistent with "modern psychiatric thinking and with the modern trial process."¹⁵

⁵ *Id.*

⁶ *Id.* ¶ 36.

⁷ *Id.* ¶ 42.

⁸ *Id.* ¶ 63.

⁹ Mental Capacity Act, *supra* note 3, at Part 1.

¹⁰ THE GOVERNMENT'S RESPONSE TO THE HOUSE OF LORDS SELECT COMMITTEE REPORT ON THE MENTAL CAPACITY ACT 2005, VALUING EVERY VOICE, RESPECTING EVERY RIGHT: MAKING THE CASE FOR THE MENTAL CAPACITY ACT, 2014, Cm. 8884, at 3 (U.K.).

¹¹ The U.K. Law Commission is an independent legislative body created by the Parliament.

¹² U.K. LAW COMMISSION, *Unfitness to Plead* (Consultation Paper No. 197,780, 2010), available at http://lawcommission.justice.gov.uk/docs/cp197_Unfitness_to_Plead_consultation.pdf.

¹³ *R v. Pritchard*, [1836] 173 Eng. Rep. 135.

¹⁴ *Id.*

¹⁵ U.K. LAW COMMISSION, *supra* note 12, ¶ 1.15.

The U.S. fitness/competency standard is comparably vague. The U.S.'s competence to stand trial standard comes from *Dusky v. United States*, which states that evaluation of competence is based on “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceeding against him.”¹⁶

This standard has caused confusion and varying interpretations, especially in regards to self-representation and waiver of counsel.¹⁷ Due to these conflicting interpretations, some have called for a “revamping” of jurisprudence regarding waiver of counsel.¹⁸ Others call for a modification of the *Dusky* standard for clarification and guidance.¹⁹

III. COMPETENCY TO STAND TRIAL: A HISTORY OF TWO NATIONS

A. Capacity in a Just Judicial System

“To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.”²⁰ This quote from *Holloway v. United States*, stands for the proposition that there is an inherent fairness issue in allowing an incompetent defendant to stand trial. In the U.S. and the U.K., the law is clear that a criminal defendant has a fundamental right not to be tried, convicted, or sentenced while incompetent.²¹ This follows from the rationale that everyone is entitled to and deserves a fair trial.²²

¹⁶ 362 U.S. 402 (1960).

¹⁷ Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO ST. J. CRIM. L. 391, 398 (2009) (contending that “the barebones *Dusky* test leaves much unanswered.” For example, the test does not specify the degree or type of communication necessary to meet the standard for capacity.).

¹⁸ *Id.* at 410.

¹⁹ Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 347 (2009).

²⁰ *Holloway v. United States*, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

²¹ See generally *Godinez v. Moran*, 509 U.S. 389 (1993); *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *R. v. Pritchard*, [1836] 173 Eng. Rep. 135; Criminal Procedure (Insanity) Act 1964 §§ 4 and 4A, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

²² U.S. CONST. amend. VI.

1. *Current Fitness to Plead Standard—United Kingdom*

The current legal test for fitness to plead in the U.K. comes from the 1836 case of *R v. Pritchard*.²³ This case involved a deaf and mute defendant charged with bestiality.²⁴ The jury was directed to find the defendant unfit to plead if they found that there was no realistic form of communication that would allow the prisoner to clearly understand the trial and be able to properly make a defense to the charge.²⁵ *R v. Davies*²⁶ added to the *Pritchard* doctrine by stating that the accused must also be able to instruct counsel.²⁷ Together *Pritchard* and *Davies* set forth the following criteria to evaluate the question of fitness: “the ability to plead to the indictment, to understand the course of the proceedings, to instruct a lawyer, to challenge a juror and to understand the evidence.”²⁸

The Criminal Procedure (Insanity and Unfitness to Plead) Act of 1991 added that a judge may find an accused unfit to plead; however, a jury will still be required to decide whether the defendant “did the act or made the omission charged against him as the offen[s]e.”²⁹

2. *Current Competence to Stand Trial Standard—United States*

The common law standard in the United States for determining competency to stand trial is largely governed by a few landmark Supreme Court cases. The most important, *Dusky v. United States*, provides the two-prong test that has been adopted by the majority of jurisdictions.³⁰

Under the *Dusky* standard, a defendant is generally found to be incompetent to stand trial if he or she does not have sufficient present ability to consult a lawyer “with a reasonable degree of rational understanding” and if he or she does not have a “rational as well as factual understanding” of the proceedings against him or her.³¹ If the parties disagree that the defendant is incompetent, the judge will usually appoint one mental health professional to

²³ 173 Eng. Rep. at 303.

²⁴ *Id.*

²⁵ *Id.*

²⁶ [1975] 1 QB 691.

²⁷ Helen Howard, *Unfitness to Plead and the Vulnerable Defendant: An Examination of the Law Commission’s Proposals for a New Capacity Test*, 75 J. CRIM. L. 194, 195 (2011).

²⁸ U.K. LAW COMMISSION, *supra* note 12, ¶ 2.46.

²⁹ Howard, *supra* note 27, at 195.

³⁰ 362 U.S. 402 (1960).

³¹ *Id.*

examine the defendant.³² A state may assume that defendants are competent to stand trial and require them to prove incompetency based on a preponderance of evidence.³³

In 1993, the Supreme Court added to the competency jurisprudence in *Godinez v. Moran*,³⁴ holding that the competency standard for pleading guilty or waiving the right to counsel is “the same as the competency standard for standing trial: whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him,”³⁵ otherwise known as the *Dusky* standard.

In 2008, the Court clarified its position on waiver of counsel in *Indiana v. Edwards*,³⁶ holding that the U.S. Constitution “permits states to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”³⁷ In essence, *Indiana v. Edwards* contradictorily held that the standard for competency to stand trial was separate from the standard for competency to represent oneself. Critics of the *Edwards* decision, such as criminal law professor Joanmarie Davoli, argue that instead of acknowledging that the competency to stand trial standard is “woefully inadequate,” the Court carved out an exception.³⁸ This exception allows a criminal defendant to be found competent to stand trial, waive counsel, or enter a guilty plea, but still be found incompetent to represent himself at trial.³⁹ Although only eight states have adopted the *Dusky* standard verbatim, the majority of jurisdictions in the U.S. have adopted a similar version of the two prong *Dusky* test.⁴⁰

Dusky is still at the forefront of competency jurisprudence but its vagueness and overbreadth result in problematic interpretations.

³² See MODEL PENAL CODE § 4.05.

³³ *Medina v. California*, 505 U.S. 437, 452 (1992).

³⁴ 509 U.S. 389 (1993).

³⁵ *Id.* at 389.

³⁶ 544 U.S. 164 (2008).

³⁷ *Id.* at 178.

³⁸ Davoli, *supra* note 19, at 323.

³⁹ *Id.*

⁴⁰ Alan R. Felthous, *Competence to Stand Trial Should Require Rational Understanding*, 39 J. AM. ACAD. PSYCHIATRY L. 19, 22 (2011) (stating that “by far the most common [competency] standard in the United States is the two-pronged [*Dusky*] common law standard”).

IV. U.K. LAW COMMISSION'S FORMAL CONSULTATION PAPER—UNFITNESS TO PLEAD

The U.K. Law Commission is the statutory independent body created by Parliament to review laws and to “recommend reform where it is needed.”⁴¹ The Law Commission aims to ensure that the law is “fair, modern, simple, and as cost-effective as possible.”⁴² So far, Parliament has implemented more than two-thirds of the Commission’s law reform recommendations.⁴³

In 2010, the U.K. Law Commission published a formal consultation paper titled “Unfitness to Plead.” This 268-page paper critiqued the current fitness to plead standard found in *R v. Pritchard* and called for its reform.⁴⁴ The paper makes a historical, practical, and scientific argument for reform and then strongly suggests the adoption of a new decision-making capacity evaluation⁴⁵ based on the Mental Capacity Act 2005. The next section of this Note will discuss the Commission’s consultation papers, the Commission’s recommendation that the *Pritchard* standard should be replaced, and what the new standard should be.

A. Why the U.K. Law Commission Wants to Replace the Pritchard Standard

The Commission began by stating that the purpose of this formal consultation paper is to “address the law on unfitness to plead and make proposals for reforming the law in a way which is consistent with modern psychiatric thinking and with the modern trial process.”⁴⁶ The main reasons the U.K. Law Commission want to replace the Pritchard standard are: (i) the high threshold for fitness; (ii) reliance on low intellectual ability; (iii) lack of a capacity requirement; and (iv) the lack of effective participation.

1. The High Threshold for Unfitness

After providing some initial legal and historical background, the U.K. Law Commission addresses recent problematic interpretations of the

⁴¹ LAW COMMISSION, *About us*, <http://www.lawcom.gov.uk/about> (last visited Oct. 13, 2014).

⁴² *Id.*

⁴³ LAW COMMISSION, *Implementation of Our Reports*, <http://www.lawcom.gov.uk/our-work/implementation> (last visited Oct. 13, 2014).

⁴⁴ U.K. LAW COMMISSION, *supra* note 12.

⁴⁵ *Id.* ¶ 3.13.

⁴⁶ *Id.* ¶ 1.15.

Pritchard criteria. One main critique posits that *Pritchard* sets too high a threshold for a finding of unfitness. A study done by Dr. Tim Rogers and others found that a “startlingly low” number of defendants are found to be incompetent to stand trial.⁴⁷ One author has asserted that an estimated 3,000 to 3,700 prisoners needed to be in a psychiatric hospital.⁴⁸ Once in prison, many of these defendants are so severely mentally ill that they may require an immediate National Health Services (NHS) transfer.⁴⁹ Dr. Rogers’s study suggests that the low number of unfit findings results from the lack of a uniform procedure for the screening of defendants.⁵⁰ His study also found five key difficulties in the assessment of fitness to plead.⁵¹ These issues were summarized by the U.K. Law Commission. The first difficulty is the inconsistent application of the legal criteria for being unfit.⁵² The second stems from the fact that “fitness changes over time.” Consequently, the accused might have been fit at the time of the assessment but was no longer fit at the time of trial.⁵³ The third comes from the fact that psychiatrists tend to assess young defendants differently than adult defendants.⁵⁴ Psychiatric assessments without consideration of legal standards constitutes the fourth difficulty. Therefore, Dr. Rogers’s study suggested that a more collaborative approach is needed.⁵⁵ The last difficulty comes from the potential for clients to deceive their lawyers by feigning illness.⁵⁶

Dr. Rogers’s study also found that many lawyers voiced concerns over problematic omissions in the *Pritchard* criteria that affect the “practicalities of the trial process.”⁵⁷ These omissions include reference to memory capacity because memory is often affected by many mental disorders.⁵⁸ Other omissions of concern involve the lack of reference to decisional competence.⁵⁹ One lawyer stated, “[i]t is a very difficult situation to have

⁴⁷ Tim Rogers et al., *Reformulating the Law on Fitness to Plead: A Qualitative Study*, 20 J. FORENSIC PSYCHIATRY & PSYCHOL. 815, 816 (2009).

⁴⁸ DORA RICKFORD & KIMMETT EDGAR, TROUBLED INSIDE: RESPONDING TO THE MENTAL HEALTH NEEDS OF MEN IN PRISON 2 (2005).

⁴⁹ Rogers et al., *supra* note 47, at 817.

⁵⁰ *Id.* at 816.

⁵¹ U.K. LAW COMMISSION, *supra* note 12, ¶ 2.63.

⁵² *Id.* ¶ 2.64.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 2.65.

⁵⁸ *Id.* ¶ 2.65(3).

⁵⁹ *Id.* ¶ 2.65(4).

someone who cannot understand what is good for them, even after advice . . . they are at great risk of alienating the jury, alienating the judge or being convicted where they might not otherwise be.”⁶⁰ According to the lawyers in the Rogers study, another troubling omission is the *Pritchard* test’s failure to consider the cultural background of a defendant.⁶¹ For example, one attorney-participant gave an example of this failure:

One young man that raised anxiety in my mind was seventeen, from Eastern Europe and had seen his parents murdered. He had literally lived on his own from the age of eleven, on a hillside tending goats. He got an A for intelligence, was deemed fit to plead but there was a huge vacuum in his cultural understanding . . . he could not give evidence because either his answers or the questions asked were being misconstrued.⁶²

2. *Reliance on Low Intellectual Ability*

The consultation paper states that one of the principal problems with *Pritchard* is that it focuses on the intellectual abilities of the accused as opposed to his or her capacity to make decisions.⁶³ This results in a disproportionate emphasis on cognitive ability. The U.K. Law Commission reports that there has been a “good deal of academic criticism” of this failing of the *Pritchard* criteria.⁶⁴ One U.K. law review article argues that “these nineteenth century criteria, which associate intellectual ability with insanity, were fundamentally flawed from the beginning, blurring what had been a well-recognized distinction between mental deficiency and madness.”⁶⁵

The U.K. Law Commission was also concerned that the *Pritchard* standard’s emphasis on ability to understand meant that it failed to take capacity and participation into account as part of the legal test.⁶⁶

⁶⁰ *Id.*

⁶¹ *Id.* ¶ 2.65(7).

⁶² *Id.*

⁶³ *Id.* ¶ 2.70.

⁶⁴ *Id.* ¶ 2.70.

⁶⁵ *Id.* (citing Donald Grubin, *What Constitutes Fitness to Plead*, 1993 CRIM. L. REV. 748).

⁶⁶ *Id.* ¶ 2.72.

3. *Lack of a Capacity Requirement*

In an example case given by the U.K. Law Commission, an appellant charged with murder and later found to be suffering from schizophrenia and psychopathic disorders, was deemed fit to plead after being able to instruct his representatives at the time.⁶⁷ The U.K. Law Commission argues that there is a “strong case” that this defendant should have been found unfit to plead because his mental disorder meant that he lacked the “capacity to assess the strengths and weaknesses of his or her legal position, even though his or her understanding of the law and of legal process may be very good.”⁶⁸ However, under the current standard for fitness, if the accused has an understanding of the law, then they are fit to plead.⁶⁹ Another example, *Murray*,⁷⁰ was discussed by the Commission for the purpose of illustrating the anomaly occurring when an accused person can have a serious degree of mental deficiency yet still be considered fit to plead. In *Murray*, the law did not “make sufficient allowance for the fact that the defendant’s memory of her thoughts and emotions at the time of the killing were such that she did not wish to discuss them with anyone and simply wished to be punished for what she saw as ‘murder.’”⁷¹ The Commission claims that the problem is that the system does not have “any regard for the *process* by which a defendant comes to the decision to plead guilty.”⁷²

4. *Lack of Effective Participation*

Another problematic issue that arises in the context of capacity is whether or not a defendant is able to participate effectively in his or her trial. The Commission relies on Article 6 of the European Convention on Human Rights, which guarantees the right of an accused to participate effectively in a criminal trial.⁷³ The European Court of Human Rights’ cases provides examples of effective trial participation. For example, an accused must be able to consult with his or her lawyers and give them information sufficient to conduct a defense.⁷⁴ From this premise, the U.K. Law Commission

⁶⁷ *Id.* ¶ 2.75.

⁶⁸ *Id.* ¶ 2.78.

⁶⁹ *Id.*

⁷⁰ [2008] EWCA (Crim) 1792.

⁷¹ U.K. LAW COMMISSION, *supra* note 12, ¶ 2.81.

⁷² *Id.*

⁷³ *Stanford v. United Kingdom*, 282 Eur. Ct. H.R. (Ser. A) at 26 (1994).

⁷⁴ U.K. LAW COMMISSION, *supra* note 12, ¶ 2.102.

derived the principle that effective participation is “active involvement on the part of the accused rather than just a passive presence.”⁷⁵

Participation is particularly important for those the Commission describes as “vulnerable defendants.”⁷⁶ The Commission indicated that it is the court’s duty to ensure that these defendants, who are less effective participants due to impairment, are analyzed and assessed correctly to make sure that a fair trial is received.⁷⁷ Specifically, the Commission recommends: (1) that there be a greater coherence between effective participation and special measures; and (2) a reformation of the legal test for unfitness to plead.⁷⁸

In sum, the Commission proposes that a new legal test should be developed to replace the current standard for fitness to plead.⁷⁹

B. What the Pritchard Standard Should be Replaced with

1. The Decision-Making Capacity Test

The U.K. Law Commission believes the *Pritchard* standard should be replaced with the decision-making capacity test. This is the test used by the U.K.’s civil courts pursuant to the Mental Capacity Act of 2005.⁸⁰ This alternative test takes a “functional approach” to capacity.⁸¹ The test involves analyzing a person’s ability to make a decision at a particular point in time, not just the person’s ability to make decisions in general.⁸²

The test as promulgated in the Mental Capacity Act looks at four different factors: (1) can the defendant understand the information relevant to the decisions that he or she will have to make in the course of his or her trial; (2) can the defendant retain that information; (3) can the defendant use or weigh that information as part of the decision-making process; and (4) can the defendant communicate his or her decisions.⁸³ This evaluation is “issue specific” meaning that a litigant could have multiple capacities regarding

⁷⁵ *Id.*

⁷⁶ *Id.* ¶ 2.103.

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 2.106.

⁷⁹ *Id.*

⁸⁰ Mental Capacity Act, *supra* note 3.

⁸¹ U.K. LAW COMMISSION, *supra* note 12, ¶ 3.4.

⁸² *Id.* ¶ 3.1.

⁸³ Mental Capacity Act, *supra* note 3, § 3.

different subjects.⁸⁴ The concept of proportionality is also generally applied to the capacity evaluation in civil contexts.⁸⁵ The Commission believes that this functional approach is preferable to a status⁸⁶ or outcome⁸⁷ approach to capacity.

The Commission indicates that the decision-making capacity test encompasses effective participation and that it would ensure that the defendant in a criminal trial would be fairly evaluated. Although the U.K. Law Commission does not believe every aspect of the civil system should be adopted,⁸⁸ for the most part it would fit within the criminal standard for fitness to plead.

2. *Provisional Proposals*

a. *Meaningful Participation*

The U.K. Law Commission believes that in order for the accused to be able to meaningfully participate in his or her trial, he or she must be able to participate effectively.⁸⁹ This is where a capacity-based test could help. The concept of capacity is based on the ability to “do something.”⁹⁰ The decision-making capacity test could be formulated broadly enough to cover a

⁸⁴ For example, a litigant may have the capacity to get married but lack the capacity to consent to a medical procedure.

⁸⁵ U.K. LAW COMMISSION, *supra* note 12, ¶ 3.8 (stating that by “proportionality,” the Commission means that the threshold of capacity varies depending on the decision which has to be made. The more serious the possible consequences of the decision or the more complex the issue which is the subject of that decision, the higher the threshold of capacity required.).

⁸⁶ A status approach to capacity determination is based on whether or not the defendant is diagnosed with a mental disorder or disability. If the defendant has a disorder, then he or she is deemed to be unfit. If not, then they are fit. *Id.* ¶ 3.6.

⁸⁷ An outcome approach is based on an assessment of the defendant’s decision and whether that decision is inconsistent with conventional values or otherwise irrational. *Id.*

⁸⁸ The U.K. Law Commission does not recommend that the principle of proportionality in the civil system should be adopted in the criminal system for three reasons: (1) lack of certainty in the procedure, (2) the method of dealing with a case once a person has been found to lack capacity or to be unfit to plead differs in civil and criminal law, and (3) civil law and criminal law are fundamentally different because of the role of sentencing in criminal law. *Id.* ¶ 3.9.

⁸⁹ *Id.* ¶ 3.35.

⁹⁰ *Id.* ¶ 3.36.

variety of issues.⁹¹ This could help rectify prior problematic U.K. cases such as *R v. Moyle*,⁹² *R v. Diamond*,⁹³ and *R v. Murray*.⁹⁴

Although those cases in particular refer to defendants with very severe mental illnesses, the Commission suggests that the capacity-based test of fitness should be broad enough to cover reasoning difficulties that can stem from causes other than cognitive deficiency or mental illness.⁹⁵ Psychiatric professionals and legal scholars support this proposition.⁹⁶ In an article written by executives from the Mental Health Act Commission, the authors suggest that a “sophisticated capacity test” must look beyond the question of cognitive capacity and, “address the interplay between cognition (knowing), emotion (evaluating) and volition (acting).”⁹⁷ The article notes that a person’s impairment of decision-making ability is often a result of diminished or absent emotion such as embarrassment, sympathy and guilt.⁹⁸

After considering these factors, the Commission submits “Provisional Proposal 1,” which states: “The current *Pritchard* test should be replaced and there should be a new legal test which assesses whether the accused has decision-making capacity for trial. This test should take into account all the requirements for meaningful participation in the criminal proceedings.”⁹⁹ The benefits of this proposal include bringing the current U.K. fitness to plead standard up to date with modern psychiatry. It also brings the criminal test for capacity more in line with the civil test for capacity.¹⁰⁰

⁹¹ *Id.* (such as pleas, what instructions to give, or whether to give evidence).

⁹² [2008] EWCA (Crim) 3059 (stating that the defendant in this case was found fit to plead even though he had a history of psychiatric problems and diagnosis of paranoid schizophrenia at the time of trial).

⁹³ [2008] EWCA (Crim) 923 (holding that if the defendant was found at the time of trial to be fit then it is unnecessary to reexamine his mental condition, even if it is apparent to everyone else that there is an issue as to whether his decision making is materially affected by his mental condition). This is a problematic holding because a defendant could be delusional yet fit to plead because he or she has some semblance of cognitive understanding. U.K. LAW COMMISSION, *supra* note 12, ¶ 2.86.

⁹⁴ [2008] EWCA (Crim) 1792 at [5] (unreported) (stating that the evaluating psychiatrist who deemed the defendant unfit to plead stated that psychiatry and the law in relation to mentally ill defendants do not always sit together comfortably), *available at* <http://www.bailii.org/ew/cases/EWCA/Crim/2008/1792.html>.

⁹⁵ U.K. LAW COMMISSION, *supra* note 12, ¶ 3.38.

⁹⁶ *Id.* (quoting Chris Heginbotham & Mat Kinton, *Developing a Capacity Test for Compulsion in Mental Health Law*, 2007 J. MENTAL HEALTH L. 72, 78).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 3.41.

¹⁰⁰ *Id.* ¶ 3.45.

b. “Rational” Understanding

The Commission recognized that a number of legal and medical professionals believe that there should not be a requirement of rationality in the new capacity standard¹⁰¹ and noted that there is not an express requirement in the Mental Capacity Act of 2005 that a litigant’s decision has to be rational in order for a person to have the capacity to make that particular decision¹⁰² as the focus under the Mental Capacity Act is on the decision making process rather than the objective rationality of the decision.¹⁰³ The U.K. Law Commission rebuts this proposition by first noting that, aside from the fact that “rationality” is a term that is vague and lacks an agreed-upon meaning,¹⁰⁴ a decision that may not be objectively rational might be rational when the subjective context is considered.¹⁰⁵ Furthermore, the Commission believes there is too much emphasis in the U.K.’s jurisprudence on the decision itself and that there should not be a “blanket requirement” that the accused must make a “rational” decision.¹⁰⁶ Although the Commission does not emphasize rationality, it does not disregard its importance. In fact, the Commission notes that the rationality of a litigant’s decision could be relevant in the civil realm because the accused is objectively irrational decision could “trigger the need for an assessment of his or her decision-making capacity.”¹⁰⁷

However, the Commission proposes that the new test in the criminal realm “should not require that any decision the accused makes must be rational or wise.”¹⁰⁸

c. Unitary Construct v. Disaggregated Test

Once the Commission espoused the basic principles of the new, proposed capacity-test, it explained the new test’s application. Two approaches were considered: a traditional unitary construct and a disaggregated test.¹⁰⁹ Both

¹⁰¹ *Id.* ¶ 3.48.

¹⁰² *Id.* ¶ 3.50.

¹⁰³ *Id.*

¹⁰⁴ *Id.* ¶ 3.48 (citing ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 69 (1990)).

¹⁰⁵ *Id.* ¶ 3.52.

¹⁰⁶ *Id.* ¶ 3.54.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ¶ 3.57.

¹⁰⁹ *Id.* ¶ 3.59.

of these approaches stem from academic clinical literature addressing mental fitness assessment.¹¹⁰ The unitary construct test is applied at the outset of the litigation proceedings and determines the accused's decision-making capacity for all purposes in relation to trial.¹¹¹ The advantages to this comprehensive all or nothing test are its simplicity,¹¹² uniformity,¹¹³ and reliability.¹¹⁴

The disaggregated test can also be advantageous as it involves breaking down the trial into particular sections for which decision-making capacity would have to be assessed for each section.¹¹⁵ However, the Commission rejects the disaggregated approach in favor of the unitary construct approach.¹¹⁶

The main reasoning for the rejection stems from the complex, time-consuming nature of the disaggregated test.¹¹⁷ Further, the Commission believes that the traditional unitary construct is broad enough to consider the range of abilities a defendant must possess for fair litigation.¹¹⁸ According to the Commission, a "revised unitary test" would be sufficiently wide to account for the possible variety of tasks required as part of trial.¹¹⁹ The Commission proposes that the new legal test

should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test, an accused would be found to either have or to lack decision-making capacity for the criminal proceedings.¹²⁰

¹¹⁰ *Id.*

¹¹¹ *Id.* ¶ 3.60.

¹¹² *Id.* ¶ 3.63.

¹¹³ *Id.* ¶ 3.62 ("A clear delineation of the threshold would mean less divergence in clinical opinion as to whether it is met.").

¹¹⁴ *Id.* ¶ 3.61 (stating that there is a theoretical advantage to the unitary construct because any form of unfitness to plead due to a defendant's mental or physical condition may render a criminal trial inappropriate).

¹¹⁵ *Id.* ¶ 3.64.

¹¹⁶ *Id.* ¶ 3.64–82.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* ¶ 3.9–80.

¹²⁰ *Id.* ¶ 3.99.

d. Proportionality

As mentioned previously, a major concern with applying the current civil standard in criminal cases is the issue of proportionality. If proportionality is adopted as the criminal standard a defendant's fitness to plead would depend mostly on the "nature of the charge and complexity of the proceedings."¹²¹ Due to potential practical difficulties translating this civil standard into criminal law, the Commission does not believe that proportionality¹²² should be adopted as the criminal fitness to plead standard for the following reasons: (1) the potential uncertainty in the results yielded from a proportionality standard; (2) the problem of reconciling inherent differences between civil and criminal jurisdictions; and (3) the different roles of civil and criminal sentencing.¹²³

The Commission opines that the main problem with the application of the civil proportionality standard is that applying proportionality in criminal proceedings can lead to uncertain results. The threshold for capacity under the proportionality approach depends on the "circumstances surrounding and consequent to the particular decision," based in part on the gravity and complexity of the proceeding.¹²⁴ However, it can be difficult to objectively measure these circumstances especially in a criminal trial. The Commission points out that "what is serious for one person may not be serious for another."¹²⁵

The second problem in applying the proportionality standard to a criminal context is found in the inherent differences of litigant capacity in civil versus criminal litigation.¹²⁶ For example, unlike in criminal law where the emphasis is entirely on individual accountability, a civil litigant or defendant who lacks capacity can still litigate via his or her litigation guardian.¹²⁷ In criminal law, if the defendant is found to lack capacity, "the trial shall not proceed" and the focus of the litigation will shift towards figuring out the defendant's capacity and whether she had or had not done the act in question.¹²⁸

¹²¹ *Id.* ¶ 3.83.

¹²² See *supra* note 85 for the legal definition of proportionality in the context of U.K.'s civil system.

¹²³ *Id.* ¶ 3.89.

¹²⁴ *Id.* ¶ 3.87.

¹²⁵ *Id.* ¶ 3.90.

¹²⁶ *Id.* ¶ 3.94.

¹²⁷ *Id.*

¹²⁸ *Id.*

The third major issue is the role sentencing plays in civil versus criminal litigation. Sentencing, a major part of the criminal process, does not have a role in the civil context.¹²⁹ The Commission argues that, unlike in a civil trial, where a person could potentially have the capacity to litigate and accept an award but not have the capacity to later administer that award, separating questions of sentencing from a criminal trial is not as simple.¹³⁰

3. Commission's Conclusions

In sum, the U.K. Law Commission proposes that the decision-making capacity test should be the new legal test.¹³¹ It is a unitary test and should take place at the outset of the proceedings.¹³² Although this proposal has been met with some criticism, it has mostly been well received.¹³³ Some critics are skeptical of completely replacing the current standard. In particular, R.D. MacKay, a legal scholar in the area of mental condition and criminal law, stated his hesitation to abandon the *Pritchard* criteria.¹³⁴ He worries that if this new standard were adopted, a cognitive evaluation would no longer exist in U.K.'s evaluation of fitness to plead.¹³⁵ However, the Commission does not suggest abandonment of cognitive evaluation. It simply states that in addition to cognitive deficiency, the law would also account for reasoning difficulties.¹³⁶ The Commission states that under this test, "an accused would be found to either have or to lack decision-making capacity for all purposes in relation to his or her trial."¹³⁷ It also concluded that proportionality should not have any role in the new decision-making capacity test, due to the concerns of the unworkable differences between criminal procedure and civil procedure.¹³⁸

¹²⁹ *Id.* ¶ 3.95.

¹³⁰ *Id.* ¶ 3.96.

¹³¹ *Id.* ¶ 3.105.

¹³² *Id.*

¹³³ See generally U.K. LAW COMMISSION, UNFITNESS TO PLEAD: CONSULTATION RESPONSES (2013), available at <http://www.lawcommission.justice.gov.uk/areas/unfitness-to-plead.htm>; see also Howard, *supra* note 27, at 203 (concluding that the new legal capacity test proposal goes a "substantial" way towards remedying the problems connected to the current law on fitness to plead).

¹³⁴ R.D. Mackay, *Unfitness to Plead – Some Observations of the Law Commission's Consultation Paper*, 6 CRIM. L. R. 433, 445 (2011).

¹³⁵ *Id.* at 445.

¹³⁶ U.K. LAW COMMISSION, *supra* note 12, ¶ 3.38.

¹³⁷ *Id.*

¹³⁸ *Id.*

V. PROBLEMS WITH THE *DUSKY* STANDARD AND THE MENTALLY ILL IN THE U.S.

As discussed previously in Part II, competency to stand trial in the U.S. is governed by the standard set forth in *Dusky v. United States*.¹³⁹ This vague standard has caused problematic and conflicting interpretations of how a defendant should be evaluated for competency, especially in the realm of self-representation.¹⁴⁰ Instead of acknowledging the current standard's shortcomings, courts have tried to bend the *Dusky* standard in order to reach just holdings. This has only caused more problems and has negatively impacted U.S. jurisprudence in this area.

A. *Confusing Interpretations in the Context of Self-Representation*

The variable application of *Dusky* and the contradictory holdings in two major self-representation cases (discussed below) have caused inconsistent treatment of pro se mentally ill defendants.¹⁴¹

The U.S. Supreme Court stated in *Godinez v. Moran* that the *Dusky* standard is supposed to be a traditional, unitary construct.¹⁴² Specifically, the *Godinez* Court stated that the standard for measuring a criminal defendant's competency to plead guilty or waive counsel is not higher than, or different from, the competency standard for standing trial.¹⁴³

After *Godinez*, the Supreme Court revisited the issue of mentally ill defendants in *Indiana v. Edwards*.¹⁴⁴ In *Edwards*, the Court held that the Constitution permits judges to take into account and decide whether or not a particular defendant is mentally competent enough to conduct his own defense.¹⁴⁵ Therefore, the court decided that the Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial, but who are incompetent to conduct trial proceedings by

¹³⁹ 362 U.S. 402 (1960).

¹⁴⁰ Tiffany Frigenti, *Flying Solo Without a License: The Right of Pro Se Defendants to Crash and Burn* – People v. Smith, 28 TOURO L. REV. 1019 (2013).

¹⁴¹ *Id.* at 1019–21 (listing a number of severely mentally ill defendants who were allowed to represent themselves and noting that the ramifications of self-representation support the need for a greater restriction on the right and standardization of procedures to provide guidance for courts).

¹⁴² 509 U.S. at 407.

¹⁴³ *Id.* at 397.

¹⁴⁴ 544 U.S. 164 (2008).

¹⁴⁵ *Id.* at 178.

themselves.¹⁴⁶ *Edwards* failed to reconcile the inherent conflict between its holding and the Court's holding in *Godinez*.

Legal scholars argue that the reasoning behind the *Edwards* decision was based on the Court's fear of embarrassing trials¹⁴⁷ where a clearly incompetent defendant chooses to represent himself at trial.¹⁴⁸ Professor Davoli, professor of criminal law at Florida Coastal School of Law, states that, "startlingly, the *Edwards* Court acknowledged its discomfort with the spectacle of mentally ill criminal defendants representing themselves, as well as the inherent flaws of the *Dusky* competency standard."¹⁴⁹ The *Edwards* court stated that the "application of *Dusky*'s basic mental competence standard" could help avoid such a result, but that *Dusky* alone may not be sufficient.¹⁵⁰ The Court should have taken this opportunity to evaluate and revise the standard for mental incompetence, but instead it chose to carve out an exception to the Sixth Amendment right to self-representation for defendants who suffer from mental illness.¹⁵¹ Professor Davoli argues that the Court thus made it "more difficult for mentally ill criminal defendants to waive counsel and represent themselves," while making it "easier for courts using the weak *Dusky* standard to declare individuals competent who may be psychotic, delusional or hallucinating."¹⁵²

B. *Flaws in the Dusky Standard*

As mentioned above, the *Edwards* court acknowledged the shortcomings of the *Dusky* standard. Some of the major issues with the *Dusky* standard are its vagueness and its criteria for a determination of incompetence. Together these two factors make the U.S. competency standard ineffective.

The *Dusky* standard states that courts must determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a

¹⁴⁶ *Id.*

¹⁴⁷ See Frigenti, *supra* note 140, at 1019–20 (discussing the trial of Colin Ferguson, the mass murderer who went on a rampage and gunned down a train on the Long Island Railroad. Ferguson chose to represent himself and conducted a defense that included questioning the victims he shot on the witness stand.).

¹⁴⁸ Davoli, *supra* note 19, at 325.

¹⁴⁹ *Id.* at 324 (quoting a portion of the *Edwards* case that referred to an amicus brief in that case, which reported one psychiatrist's reaction: "How in the world can our legal system allow an insane man to defend himself?").

¹⁵⁰ *Indiana v. Edwards*, 544 U.S. 177 (2008).

¹⁵¹ *Id.* at 182 (Scalia, J., dissenting).

¹⁵² Davoli, *supra* note 19, at 325.

reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.”¹⁵³

The requirement of “rational understanding” is one of the more problematic phrases in the above noted test. As the U.K. Law Commission’s consultation paper stated, “rationality is a term both in wide common use and without any clear and fixed, agreed-upon meaning.”¹⁵⁴ Because the term “rational understanding” is so vague, it often does not account for the contents of attorney-client communication.¹⁵⁵ This means the mere fact that communication occurs is enough to satisfy the *Dusky* test, no matter how nonsensical the communication may be.¹⁵⁶

This vagueness in the *Dusky* standard leads to problematic applications. The case of Peter J. Troy is an example of this. Troy was convicted of first degree murder and sentenced to life imprisonment after murdering a Roman Catholic priest and a parishioner in a Long Island church.¹⁵⁷ Troy was diagnosed with schizophrenia and, although his lawyer requested that he be declared incompetent, the judge blocked this request and allowed for him to continue representing himself.¹⁵⁸ The American Psychiatric Association, in its manual of mental disorders, states that those who suffer from persecutory types of delusional disorders are particularly inclined to focus on legal remedies to perceived injustices.¹⁵⁹ New York Post writer Jonathan Stanley elaborated on the case of Peter Troy, stating that people with particularly severe psychiatric disorders usually suffer from anosognosia, rendering them “incapable of assessing their [own] condition.”¹⁶⁰ In fact, Stanley, who was diagnosed with bi-polar disorder, says that he did not believe he was sick and “[n]either did nor does Peter Troy.”¹⁶¹ This is problematic because under the

¹⁵³ 362 U.S. 402 (internal quotation mark omitted).

¹⁵⁴ U.K. LAW COMMISSION, *supra* note 12, ¶ 3.48.

¹⁵⁵ Davioli, *supra* note 19, at 331.

¹⁵⁶ *Id.* at 325.

¹⁵⁷ Bruce Lambert, *Man who Killed L.I. Priest is Sentenced to Life in Prison*, N.Y. TIMES, July 31, 2003, available at <http://www.nytimes.com/2003/07/31/nyregion/man-who-killed-li-priest-is-sentenced-to-life-in-prison.html>.

¹⁵⁸ *Id.*

¹⁵⁹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 90 (4th ed. 1994) (stating that “this subtype applies when the central theme of the delusion involves the individual’s belief that he or she is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long term goals”).

¹⁶⁰ Jonathan Stanley, *The Killer and Me*, N.Y. POST, Aug. 4, 2003, available at <http://mentallillnesspolicy.org/firstperson/jon-stanley.html>.

¹⁶¹ *Id.*

Dusky standard, a defendant who clearly has a mental disorder can still be found competent. The defendant may be able to communicate in what a judge would deem “rational” way, but still lack effective communication with his or her lawyer.¹⁶²

The defendant’s factual understanding also does not add much to this vague standard. The appearance of having factual understanding is comparable to an intellectual standard. This can be problematic as shown in the Colin Ferguson trial described above.¹⁶³ During Ferguson’s trial, the New York Times described him as seeming to “savor his legal lexicon.”¹⁶⁴ Using phrases like “[l]eading question, Judge. Counsel is leading the witness,” he demonstrated a factual understanding for the criminal proceeding before him.¹⁶⁵ The practical problem with this application of a “factual understanding,” standard is that it does not account for the mere appearance of factual understanding. To outside observers of the courtroom, Colin Ferguson may have seemed functioning, but many psychologists were appalled by the judge’s decision to allow Ferguson to represent himself.¹⁶⁶

VI. PROPOSAL

Studies have shown that at least 16% of inmates in jails and prisons have a serious mental illness.¹⁶⁷ Clearly, it is necessary to revise the *Dusky* standard to make sure that defendants who are mentally ill are not deemed competent when in fact they have cognitive or reasoning deficiency.

The competency standard should be brought up to date to reflect practical realities in the modern trial world. Rather than a standard focused on the

¹⁶² See Davoli, *supra* note 19, at 332–33 (stating that a criminal defendant suffering from a delusional disorder would likely be found competent to stand trial despite being unable to meaningfully consult with his defense attorney. Davoli also states that an accused may actually withhold information due to a belief that the defense counsel is part of the conspiracy designed to destroy the defendant.).

¹⁶³ See *supra* note 147.

¹⁶⁴ Janny Scott, *A Murder Trial, Through the Looking Glass*, N.Y. TIMES, Feb. 4, 1995, available at <http://www.nytimes.com/1995/02/04/nyregion/a-murder-trial-through-the-lookin-g-glass.html>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (quoting Timothy J. White, a forensic psychologist with the Federation Employment and Guidance Service, stating “[o]bviously he’s not fit to be in the courtroom serving as his own attorney. It’s just like a mockery. What has our system come to?”).

¹⁶⁷ E. Fuller Torrey et al., *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States*, TREATMENT ADVOCACY CENTER 1 (2010), http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf.

singular concept of rationality, the *Dusky* standard should be revised to reflect the principles found in the decision-making capacity test proposed by the U.K. Law Commission. The most important principles are those that focus on the decision-making capacity of the defendant, the ability to meaningfully participate in trial, and the principle that this test should be a unitary construct as it was originally intended. These principles should be used to help correct the ambiguity of the *Dusky* standard.

A. *Decision-Making Capacity*

The competency to stand trial standard should reflect the decision-making capabilities of the defendant. The defendant should be found competent to stand trial if the defendant can understand the information relevant to the decisions needed for trial, retain that information, use or weigh that information, and communicate his or her decisions. These four specific criteria would help eliminate some of the vagueness found in lower court opinions. A clear, specific standard would give guidance to the states and inform future competency legislation. This would help alleviate some of the problems associated with *Dusky*'s vagueness.

The focus should also not be on the "rationality" of a defendant's decision. As pointed out by the U.K. Law Commission, just because a decision is objectively rational does not mean that the defendant is generally rational. Focusing more on the decision-making capabilities of the defendant, would eliminate the potential problem of judging defendants based on the appearance of a reasonable decision.

B. *Meaningful Participation*

As argued in the U.K. Law Commission's paper, capacity is based on the ability to "do something."¹⁶⁸ The decision-making capacity test proposed by the U.K. Law Commission would ensure that the test is read broadly enough so that the defendant would be able to meaningfully participate in his or her trial. The U.K. Law Commission states that under this test, the case of *R v. Moyle*,¹⁶⁹ referenced above, would be resolved more appropriately, as a defendant who was diagnosed with schizophrenia would be found to be incompetent at all trial levels. *R v. Moyle* is very factually similar to the

¹⁶⁸ See U.K. LAW COMMISSION, *supra* note 12, ¶ 3.35.

¹⁶⁹ [2008] EWCA (Crim) 3059.

Peter Troy case, as Troy was also diagnosed with schizophrenia and both were still found competent. The adoption of a decision-capacity test that recognizes meaningful participation could resolve cases where the defendant is deemed competent when they are actually severely mentally ill.

C. Unitary Construct

Finally, and most importantly, the competency standard should be a unitary construct as initially intended by *Dusky*.¹⁷⁰ The advantages to this construct include its legal simplicity, its uniformity, and its reliability.¹⁷¹ Having one test instead of splitting the capacity determination into different tests for different stages of trial makes the task of determining competency more efficient and more effective.

Not only would the uniform construct be more practical, the decision-making capacity test is broad enough to encompass all tasks necessary for trial. Courts will have one detailed determination of both competency to stand trial and competency to waive counsel.

Adopting a decision-making capacity test could be the first step in improving the system of competence to stand trial. Although there are ultimately things that would have to be adjusted based on differences in legal systems, adopting the decision-making capacity test would not be too difficult. Only standards, as opposed procedures would be changed. Under the new standards, defendants will be evaluated and then compared to the general standard to determine overall competence for all stages of the trial.

VII. CONCLUSION

There are many complex reasons why a defendant could or should be found competent or incompetent. First, judicial and legislative systems in the U.S. should ensure that competency standards are consistent with modern psychiatric standards. The U.K. Law Commission should be commended for recognizing and investing time in researching and identifying solutions to ensure fairness when determining when a defendant is fit to plead.

The U.K.'s *Pritchard* standard is comparable in vagueness to that of the U.S.'s *Dusky* standard. The U.K.'s guidelines are not necessarily nation specific, but they provide criteria that incorporate modern psychiatry with a

¹⁷⁰ See generally *Indiana v. Edwards*, 554 U.S. 164 (2008); *Godinez v. Moran*, 509 U.S. 389 (1993).

¹⁷¹ See U.K. LAW COMMISSION, *supra* note 12, ¶ 3.63.

legal standard. The *Dusky* standard has been problematic since it was first introduced in 1960. The Supreme Court's interpretations have not clarified the standard and have in fact confused the criteria for determining competency. Due to its vague and ambiguous two prong standard, *Dusky* has not provided sufficient guidance to the states and lower courts on how exactly to determine competency, resulting in conflicting decisions and opinions. If the standard in the U.S. is not changed, inconsistent applications will persist, allowing defendants who should be deemed incompetent to be found competent enough to waive counsel or stand trial.

By creating a uniform standard that details specific criteria important in making a decision on competency, the U.S. can avoid further pitfalls with an inconsistent application of *Dusky* and similar state statutes based on the *Dusky* standard. This would increase the probability that the defendants standing trial and waiving counsel are fit to do so.

