

TO: PROFESSOR SEIGEL
FROM: IVANA JACOBS
RE: RWANDA PROJECT-COMPETENCE TO STAND TRIAL

I. Introduction

Currently, as outlined in the International Criminal Tribunal for Rwanda's Rules of Procedure and Evidence, Rule 65 is the only provision available to the Tribunal for the release of an accused individual. Rule 65 states that the only way for an accused individual to be released from detention prior to trial is by order of a Trial Chamber. This release will only take place in exceptional **circumstances** and after a hearing has been conducted. Additionally, the defendant will be released only after it has been determined that he will not pose a danger to a "victim, witness or other person.,,1 Furthermore, the Trial Chamber may make the release conditional, by imposing bail bond requirements or requiring the assurance that the released individual will observe "such conditions as are necessary to ensure his presence for trial and the protection of others."² One basis for release of accused persons not addressed by these Rules is the disposition of those who are not mentally competent to stand trial.

¹ U.N. Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda. Rule 65 (B) at Part 5, section 2 (1996).

² Id at Rule 65 (B)

Most jurisdictions have established procedures governing the treatment of an individual who has been accused of committing a crime but is found not to be competent to stand trial. While the jurisprudence of the United States will be the principal focus of this paper, other law will also be discussed. In the following memo, several factors will be considered in order to assist efforts to establish procedures for the Tribunal to follow in providing judicial proceedings involving anyone who may become mentally incompetent prior to trial.

Under United States law, a person found mentally incompetent will not be tried until such time as he is found competent. To determine competence, a hearing is held at which the judge will receive testimony regarding the defendant's current mental state, as analyzed by a competent physician, past mental health, and expert or lay testimony regarding the defendant's competency. If the defendant is found competent, the trial proceeds. However, if the defendant is found not to be competent, he is transferred to an appropriate mental facility for treatment until he is competent to stand trial. Each step in this process will be discussed in the following memorandum. Additionally, information regarding the treatment of this issue by other jurisdictions will also be included.

II. STANDARDS FOR COMPETENCE TO STAND TRIAL

A. United States and Other Standards

1. United States-Two Part Standard

The first step in determining whether an individual is competent to stand trial is to establish a standard by which an accused person's competency can be measured. The United States Supreme Court addressed this situation in the case of *Dusky v. United States*.³ Prior to this case, the standard for competence to stand trial was only that "the defendant is oriented to time and place and has some recollection of events."⁴ The Supreme Court determined, however, that this standard insufficiently protected an accused individual's rights. Orientation to time and place do not necessarily mean that an accused has the ability to communicate in an effective manner with his attorney or to aid in his defense, which are both components of the right to receive a fair trial under the United States Constitution. Furthermore, this basic test of orientation and brief recollection of the facts does not necessarily mean that the individual has the mental ability to understand what is happening at trial.

The decision in *Dusky* takes into account the accused's ability to understand the trial process. The Supreme Court held that the "test must be whether [the defendant] has sufficient present ability to consult with his lawyer

³ *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788 (1960).

⁴ *Id.* at 789.

with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the proceedings against him...⁵

The first prong of this test requires that the person on trial must be able to communicate reasonably with his attorney regarding his case. This effectively ensures that the client will be able to assist his attorney in preparing his case: by explaining what the facts of the situation were, which might enable the lawyer to identify possible defenses, shortcomings in the charges, etc. This ability to communicate and aid in the preparation of his case is also a prerequisite to the defendant's ability to make an informed decision concerning entry of a guilty plea.

The second prong of this test requires that the defendant "have a rational as well as factual understanding of the proceedings against him...⁶ The test examines whether the accused will be able to understand the charges brought against him, the identity and roles of the principal participants in the case, and what is happening during trial. This prong assists in protecting an individual's due process right to a fair and adequate trial. If an individual is able to understand the charges against him, he is afforded an opportunity to provide defenses to those specific charges. Without a basic understanding of the charges, a defendant may not be able to provide his attorney with information that may mitigate those charges. A similar standard for competence to be tried

⁵Id at 789.

⁶ Id at p. 789.

in United States federal court has been established by Congress.? In federal court, the standard for determining a defendant's competence concerns whether "the defendant may be presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."s

2. Other Jurisdictions

The British have established a similar standard to that of *Dusky* for determining a defendant's competence to stand trial. In England, a person is "unfit to plead [stand trial] if by reason of his disability he is unable to understand the course of proceedings at the trial, so as to make a proper defence, to challenge a juror to whom he might wish to object, and to understand the details of evidence."g Similar concerns as to those raised by due process are addressed by this act: assisting one's counsel in establishing a defense, having the ability to confront those who accuse you and to understand the details of the case. There are differences however, for example this act does not examine what level of communicative skills are required for the defendant.

Canada has established a three part test for their standard for competency to stand trial: "1) whether the prisoner is of mute of malice or not; 2) whether he can plead to the indictment or not; 3) whether he is of sufficient

⁷ See 18 U.S.C. §4241 (a)

⁸ Id at §4241 (a)

⁹ Criminal Procedure (Insanity) Act 1964 § 4.

intellect to comprehend the course of proceedings on the trial, so as to make a proper defence-to know that he might challenge any of you to whom he may object-and to comprehend the details of the evidence.,¹⁰ This standard addresses the same concerns as that of *Dusky*, however it adds the element of malice of the accused. If malice can be shown, it is less likely that the accused will be found not competent to stand trial.

B. Constitutional Basis for this Standard

The United States Constitution is the supreme law of the land in the United States.¹¹ Many of the most important rights accorded, specifically in criminal law, in the United States are based upon guarantees in the federal constitution. The two pertinent constitutional provisions implicated by issues of competence to stand trial are the Fifth and Sixth Amendments.

The Fifth Amendment states that no person will be "deprived of life, liberty, or property without due process of the law.,¹² Because liberty is a fundamental right, an accused individual is guaranteed a fair and adequate trial.

¹⁰ Regina v. Hubach [1965] 48 C.R. 252, 259 citing to Regina v. Podola [1960] 1 Q.B. 325, 353.

¹¹ U.S. Const. Art. VI § 2 which states "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

¹² The complete language of the Fifth Amendment is as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend V. The Fourteenth Amendment extends the guarantee to protect against restrictions by the State governments as well as the federal government.

It is here where the accused has the opportunity to raise any possible defenses, offer testimony regarding these defenses or character and, if he so chooses,¹³ offer testimony in his defense. A principal reason for such preventative procedures is to ensure the accuracy of decisions made which would affect the accused's liberty. If an accused is mentally incompetent at the time of trial, he will not be able to adequately use even the opportunity of a fair trial to present his side of the case or make an informed decision as to whether to plead guilty. Consequently, "the conviction of an accused person while he is legally incompetent violates due process.,¹⁴

The Sixth Amendment also becomes relevant when analyzing whether a mentally incompetent individual can be criminally tried. The pertinent language in this Amendment is as follows: "...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...."¹⁵ Several problems arise under the specific language of the Sixth Amendment when attempting to try an individual who is mentally incompetent. First, the individual must be informed of the nature of the charges brought against him. The Supreme Court in *Dusky*

¹³ This is the privilege against self incrimination noted above in the Fifth Amendment of the United States Constitution.

¹⁴ *Pate v. Robinson* 383 U.S. 375, 86 S.Ct.836 (1966) citing *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956).

¹⁵ The complete language of the Sixth Amendment is as follows: "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence." U.S. Const.Amend. VI.

specified that the accused must not only be advised of the crimes, he must also be able to understand what those charges actually mean. Someone who is mentally incompetent will probably not be able to understand those charges, and as such will not be able to aid his counsel in preparing his defense or decide whether to enter a plea.

A second problem arising under the sixth amendment concerns the accused's right to confront any witnesses against him and to produce witnesses on his own behalf. If the accused is unable, due to some mental impairment, to communicate with his attorney "with a reasonable degree of rational understanding,"¹⁶ then he will not be able to provide his counsel with information pertinent to countering prosecution witnesses or to provide defense witnesses. Because these two procedures are constitutionally guaranteed, trying someone who can not, for reasons of mental deficiency or impairment, use these proceedings, would be unconstitutional.

C. Relationship between Competence to Stand Trial and the Insanity Defense

The issue of competence to stand trial must be distinguished from the legally unrelated, but often factually related, question of the insanity defense. The issue of mental competence to stand trial, the principal focus of this memo, concerns the current mental status of the accused, rather than his mental state

¹⁶ Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788 (1960)

at the time the crime was committed. As such, this issue can be raised during pre-trial motions, at the time of entering a plea, or during the actual trial. It must be raised, regardless of when it becomes apparent, whenever the defendant's mental ability so deteriorates that he can not meet the standards applied in the two prong *Dusky* test. The issue of competence can be raised by the defense counsel, the judge or even the prosecution.

The insanity defense by contrast, concerns the defendant's state of mind only at the time of the offense. As a defense, it can only be raised by the defendant's counsel, and will customarily be done prior to trial. Since the insanity defense examines the state of mind of the defendant while the crime was being committed, current mental state is not legally at issue. The insanity defense serves to excuse the actions of the defendant.

The consequences of a determination that the defendant has made out the defense of insanity also differ from those for a defendant who has been found not competent to stand trial. A defendant found to have been insane at the time of the offense is not guilty; he is acquitted by reason of insanity. The defendant who has been found not competent to stand trial has had no final determination of guilt; he must still stand trial when he becomes competent. A finding of not guilty by reason of insanity usually results in a period of involuntary commitment to a mental health facility in order to determine whether the individual poses an imminent risk of substantial harm to themselves or others. If there is no such danger is found, the insanity acquittee may be released.

The defendant found not competent to stand trial is treated to attain competence. He has a constitutional right to have his progress toward this goal monitored regularly by the court. This treatment may or may not be provided in a secure facility. At some point, a person who can not be rendered competent and who poses no danger to himself or to others has a right to be released.

Unlike the constitutionally-based *Dusky* standard regarding competence to stand trial, there is no one specific standard applied for the insanity defense. There is, in fact, no constitutional bar to a state's abolition of a defense of insanity.. There are currently four tests that are applied in United States courts. The first of these tests is the M'Naughten test which is applied in the majority of the jurisdictions: a defendant is not guilty by reason of insanity if „ at the time of committing of the act, the defendant was [suffering) under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was (legally) wrong.,,17 The second test, applied in the minority of jurisdictions is the "Irresistible Impulse" test, which provides that a defendant will be found not guilty by reason of insanity if:

- 1) by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his agency was at the time destroyed; and
- 2) and if at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.18

¹⁷ M'Naughten's Case, 10 Cl. & F.200, 8 Eng.Rep. 718 (H.L.1843).

¹⁸ Parsons v. State, 2 So. 854, 858 (Ala. 1886).

The third such test, which was applied in only one U.S. jurisdiction, but no longer is, provided that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.,,19 The last of these tests, that of the Model Penal Code states

"a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."20

D. Sources of Standards for Competence to Stand Trial in the United States

There are four basic sources of law regarding the standard for competence of a defendant to stand trial. The first of these is the Constitution of the United States, which is the only standard that legally binds all U.S. jurisdictions. All federal and state law must satisfy the federal constitutional standard.

Second, federal statutes govern trials which take place in Federal Court. Although these federal statutes are only binding in federal court, they often influence the development of state standards.²¹

Third, individual state constitutions and statutes can affect standards for competence. While each state may have a different criminal procedure, each must meet the federal constitutional standard.

¹⁹ Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

²⁰ Model Penal Code §4.01: Mental Disease or Defect Excluding Responsibility.

²¹ The applicable federal statutes are 18 United States Code §4241-4247.

Finally, the American Bar Association, the largest association of lawyers in the United States, has provided advisory standards for the legal system's treatment of mental health issues. These advisory standards, have no legal force, but are often used as guides when new legal issues arise.

III. ENFORCEMENT OF THE COMPETENCY STANDARD

A. Right to a Competency Hearing

1. The United States

Under the U.S. Constitution, a defendant who may be incompetent to stand trial is entitled to a hearing to determine their competence. The right to a hearing arises "where the evidence raises a 'bona fide doubt' as to the defendant's competence to stand trial... .."²² This right to a hearing arises regardless of any request or lack thereof by the defendant. The obligation to hold the hearing is the court's, it occurs whenever the "bona fide doubt" standard about the person's competence arises. Certainly, evidence presented sufficient to indicate that the defendant was mentally incompetent at the time of trial raises such a doubt.

The right to a competency hearing is part of the Fifth Amendment's right to due process and the defendant's right to a fair trial. It can be raised at any point: during pre-trial motions, the trial itself or even post-trial through a habeas corpus review. Prior to the hearing date, a psychiatric examination may be

²² Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966).

ordered to determine whether the defendant is competent to be tried. Both parties, the defense and the prosecution as well as the court, are ethically obligated to seek a competency hearing whenever a bona fide question concerning the defendant's competency arises.

The issue of competence to stand trial, as noted, can arise mid-trial. This was the situation for James Edward Drope,²³ who was denied a motion to continue his case on the basis of his mental competence. His motion was denied despite significant evidence regarding his lack of competence at the time of trial, including: 1) his psychiatric evaluation²⁴, 2) testimony from his wife regarding his mental status²⁵ and 3) his suicide attempt on the second day of his trial.

While there is no set list of factors which trigger the need for a competency hearing, the Supreme Court has held that there are several factors that a trial court in the United States should review in determining whether a sanity hearing is necessary. These include any "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence."²⁶ Emphasizing the case specific nature of the determination, the

²³ *Drape v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975).

²⁴ Id at p. 165. The report from the psychologist presented the following psychiatric evaluation: [the petitioner] "certainly needs the aid of a psychiatrist...he is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time." The evaluation also included a diagnosis of 1) Sociopathic personality disorder, sexual perversion, 2) borderline mental deficiency, and 3) chronic anxiety reaction with depression.

²⁵ Id at p. 165. Mrs. Drope presented testimony that she had left the petitioner on a number of occasions because of his sexual perversions, and described his strange behavior, including falling down flights of stairs as an attempt to gain sympathy from her.

²⁶ Id at p. 180.

Supreme Court noted that "even one of these factors standing alone may, in some circumstances be sufficient.,,27 In *Drope*, for example, the suicide attempt, as well as the description of the defendant's behavior with his wife, sufficiently indicated irrational behavior to merit a hearing.

In some cases, the evidence of irrational behavior present at the time of trial can be sufficient to demonstrate lack of competence. All defendants are presumed competent, and have the burden of proving lack of competence. Some facts, however, such as a suicide attempt, indicate "a rather substantial degree of mental instability contemporaneous with the trial." Moreover, because *Drope's* suicide attempt left him absent from the trial, "the trial judge and defense counsel were no longer able to observe him in the context of the trial and gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.,,28. The bona fide reason to question competence, plus the inability to ensure it, can render a defendant not competent to stand trial.

2. Other Jurisdictions

The rule in Britain is very similar. There "the court is entitled to postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence, if, having regard to the nature of the supposed disability, it is of opinion that is expedient to do so and is in the interest

²⁷ *Id* at p.180.

²⁸ *Id* at p. 181.

of the accused. However, the question of fitness to be tried must generally be determined as soon as it arises.,,29 As in the United States, upon the issue of competence to stand trial being raised, the court must address it.

Canadian law also addresses this problem, "if there is ground for doubting his sanity at the time of his trial, that doubt should be resolved one way or the other, by inquiry just as thorough as a defence of insanity would be given.,,30 After the issue is raised, "an adequate inquiry to determine whether the accused is fit to be tried should be made and until it is made there can be no proper determination of his guilt.,,31 In Canada, as in the United States, no person "can legally and properly be tried for a criminal offence while he is insane.,,32 Trial proceedings will stop until it can be determined that the accused is competent to stand trial.

B. The Competency Hearing

1. The United States

Given that a defendant whose competence comes into question, is guaranteed by the Fifth Amendment right to Due Process a hearing to determine competency, the next question is what evidence will be presented to determine competence to stand trial. Most jurisdictions require an examination prior to the hearing by a qualified mental health professional. In the federal system, for

²⁹ Trial of indictments Para 963.

³⁰ Rex v. Gibbons [1946] Criminal Reporter. 522, 549.

³¹ Id at p. 549.

³² Id at p. 548

example, a psychiatric examination "shall be conducted by a licensed or certified psychiatrist or clinical psychologist."³³ During the examination period, the defendant may be committed to a suitable mental health facility so that appropriate tests may be conducted to properly assess competence. The commitment for these purposes may not exceed 30 days, unless the director of the mental health facility applies for an extension, which will not be more than 15 days. In order to extend this period, the director must show good cause as to why the additional time period is needed for diagnostic purposes.³⁴

At the hearing, the psychiatrist or psychologist will present testimony and reports regarding the defendant's current mental state and competency.³⁵ In Britain, two "registered medical practitioners, at least one of whom is duly approved,"³⁶ must present written or oral testimony as to the defendant's mental competence. In the United States, the expert is not permitted to introduce evidence about the defendant's state of mind at the time the crime was committed.³⁷ Testimony regarding the sanity of the defendant at the time of the commission of the crime can be presented at trial by either side only if an insanity defense is raised.

³³ 18 U.S.C.A. §4247 (b)-Prisons and prisoners section for Mental Defectives

³⁴ Id at §4247 (b)

³⁵ 21 Am. Jur. 2d. *Criminal Law* § 117 (1981).

³⁶ Criminal Procedure (Insanity) Act, 1964 c 84 §6

³⁷ § 117 (1981).

Testimony and documentation provided by the examining psychiatrist will be delivered to the judge, defense and the prosecution. Information provided will include the following:

- 1) the person's history and present symptoms³⁸; 2) a description of the psychiatric, **psychological** and medical tests that were employed and their results³⁹; 3) the examiner's **findings**⁴⁰; and 4) the examiner's opinion as to the diagnosis, prognosis⁴¹ and whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.⁴²

The determination as to the competency of the defendant is "a question left to the sound discretion of the trial court."⁴³ Defendants are generally presumed to be competent. The information given by the psychiatrist regarding the defendant's competency is not dispositive of the issue of competence. Psychiatric reports may indicate, for example that the defendant is competent to stand trial, yet, the trial judge may decide that, based on personal observation of the defendant or his past behavior, the defendant is not competent to stand trial. The issue of competence, like the issue of insanity, is not a medical or scientific question; it is ultimately a legal matter. If the defendant is found to be competent, the trial will proceed. However, it is important to note that the finding of competence to stand trial does not bar or prohibit a defense based on

³⁸ Id at §4247 (c) (1).

³⁹ Id at §4247 (c) (2).

⁴⁰ Id at §4247 (c) (3).

⁴¹ Id at §4247 (c) (4).

⁴² Id at §4247 (c) (4)(A).

⁴³ Medina v. Cal., 112 S.Ct. 2572

insanity, or any other mental impairment, from being raised by the defendant later during trial.

2. Other Jurisdictions

British law diverges from American law on this point. In Britain, the question of the defendant's competence to stand trial will be determined by a jury. However, a special jury will be formed to hear the evidence presented regarding the defendant's competence. This will not be the same jury that hears the evidence presented regarding other issues of the case.⁴⁴ As in Britain, Canadian law also turns over the decision as to whether the accused is competent to stand trial to a jury. The jury's decision will be the final one "unless this Court is satisfied the jury erred in its finding that [the defendant] was fit."⁴⁵

C. Burdens and Presumptions in the Process of a Competency Hearing

Generally, a defendant, until proven otherwise, is presumed to be competent. The burden of establishing lack of competence may be placed on the **defendant**.⁴⁶ Additionally, "the state may presume that the defendant is competent to stand trial and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence."⁴⁷

⁴⁴ Criminal Procedure (Insanity) Act, 1964 c. 84 §5 (a) and § 5 (b).

⁴⁵ Regina v. Hubach [1965] 48 C.R. 252, 254 citing Regina v. Wolfson [1965] 46 C.R. 8.

⁴⁶ *Patterson v. New York*, 432 U.S. 197 (1977).

⁴⁷ *Cooper v. Okla.*, 517 U.S. 348, 116 S. Ct. 1373(1996).

In the United States the determination of competency is not an issue which will be determined by the jury.⁴⁸ In fact, in most situations the jury will usually never know that the issue arose. If the defendant is found competent, the jury will be recalled to resume the trial. The ruling of the trial judge regarding competence will be upheld, unless there is a showing of a clear abuse of judicial discretion.

IV. DISPOSITION OF DEFENDANTS FOUND NOT COMPETENT TO STAND TRIAL

A. The United States

Once a hearing is conducted and the defendant is found, by a preponderance of the evidence, to be not competent to stand trial, that defendant will be placed in to "a suitable hospital or other facility designated by the court."⁴⁹ There are for two reasons for this commitment: first, to determine whether the defendant will ever be able to become competent to stand trial; and second, to provide the defendant with the appropriate psychological treatment necessary to achieve competence to stand trial. When, if ever, the defendant is found competent to proceed, the criminal trial may continue. Pursuant to statute, once a defendant in federal court is determined not competent to stand trial, he

⁴⁸ 18 U.S.C. §4241 (d).

⁴⁹ 21 Am. Jur. 2D *Criminal Law* § 119 (1981).

is placed into the custody of the Attorney General who will place the defendant for treatment in a suitable hospital or treatment facility.⁵⁰

There are constitutional time constraints as to how long the defendant can be held in a treatment facility without further proceedings becoming necessary. Statutory provisions limit the diagnostic period for determining whether the individual will ever be competent to stand trial to "a reasonable period of time, not to exceed four months...⁵¹ The director of the facility where the defendant receives the therapy and rehabilitation must periodically report to the clerk of the appropriate court on the defendant's ability to improve his competence to stand trial through treatment. After the determination is made that the defendant will eventually become competent, the court may then hold him in this facility "for an additional reasonable period of time until⁵² his mental condition is so improved that trial may proceed if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed...⁵³

Once it has been determined that the defendant is competent, as defined under the *Dusky* test, the director of the mental health facility will contact the clerk's office of the court which ordered the defendant's commitment. At this time, the court will hold a second competency hearing with the defendant, defense counsel and prosecution present. If the defendant is found to be

⁵⁰ 18 V.S.C. § 4241 (d) for determination and disposition

⁵¹ 18 V.S.C. § 4241 (dXI).

⁵² Id at (d)(2).

⁵³ Id at (d)(2)(A).

competent (by a preponderance of the evidence) he will then be discharged from the hospital and a date for trial will be set.⁵⁴ If he is found not be competent for trial at that time, he will be returned to the psychiatric hospital to receive the additional treatment necessary to become competent to stand trial.

Situations do arise, however, in which the defendant will never be able to reach competence. Civil commitment proceedings should then take place to have the defendant committed to a mental health facility or the defendant should be released from custody.

Due process guarantees regular review of a defendant's progress or lack thereof to competence. In *Jackson v. Indiana*, the U.S. Supreme Court held that effective indefinite commitment, without a showing of risk to self or others, violated due process. Theon Jackson was charged with the robberies of two women for minuscule amounts of money. Mr. Jackson was a deaf-mute with the "mental level of a pre-school child"sS and was unable due to mental deficiency to learn to read or write or even clearly communicate with a sign language interpreter. The physician who examined the defendant determined that even if he could hear or speak, Mr. Jackson did not have "sufficient intelligence,,⁵⁶ to ever achieve the mental competence required to stand trial. Indiana did not have any specific statutory provisions that dealt with situations where the defendant would be found to be permanently incompetent to stand trial, so the

⁵⁴ 18 U.S.C. § 4241 (e).

⁵⁵ *Jackson v. Indiana*, 406 U.S. 715,92 S.Ct. 1845,1847 (1972).

⁵⁶ *Id* at p. 1848.

trial court ordered that the defendant be committed to the Indiana Department of Mental Health until such time that he could be found competent to stand trial.

"Commitment under these circumstances amounted to a 'life sentence' without his ever having been convicted of a crime,⁵⁷ and the U.S. Supreme Court held that this violated Mr. Jackson's right to due process and equal protection under the United States Constitution.

In order to protect these rights, the Supreme Court determined that Mr. Jackson should have a general civil commitment hearing, with the same criteria and standards used as would be in a case of civil commitment for any individual who was found to be mentally ill, dangerous to himself or others, and unable to care for himself. The statutory provision defined someone who was mentally ill and who would be eligible for civil commitment as "one who is afflicted with a psychiatric disorder which substantially impairs his mental health; and because of such psychiatric disorder. requires care, treatment, training or detention in the interest of the welfare of such person or others of the community in which such a person resides.,⁵⁸ Additionally, the release standards for someone who is civilly committed are less stringent than those imposed on a criminal defendant who must prove competency to stand trial in order to be discharged from the mental health facility prior to his case going to trial. Release from civil commitment was based upon a showing that the individual was now able to care for himself and not be a burden on the community where he would reside.

⁵⁷ Id at p. 1849.

⁵⁸ Id at p. 1850.

In this case, the Supreme Court held that the case of one charged with a criminal offense and found to be permanently incompetent to stand trial was entitled to the same standard of review as that of someone civilly rather than criminally committed. Any other result would have rendered his commitment an indefinite and almost certainly permanent one.

Since Indiana did not have sufficient mental health facilities available to treat Mr. Jackson's psychological condition, the Supreme Court held that he would never be competent enough to stand trial, thus the criminal charges should be dismissed. It also found that if Indiana was not able to commit Mr. Jackson under the provisions for civil commitment, or if the state was unable to provide better care facilities for Mr. Jackson than his current living arrangements, he should be discharged from the Department of Mental Health and returned to his home.

B. Other Jurisdictions

British treatment of individuals found not competent to stand trial is similar to that of the United States. In Britain, if an individual is found to be incompetent, the trial will not proceed and he may be ordered to be admitted to "such hospital as may be specified by the Secretary of State.,⁵⁹ However, if the defendant is found "fit to be tried, the accused is still entitled to enter a plea of not guilty.,⁶⁰

⁵⁹ Trial of Indictments Para. 963.

⁶⁰ Id at Para. 963.

V. PERMANENT COMMITMENT AFTER A DEFENDANT HAS BEEN CONVICTED AND SERVED THEIR SENTENCE

The question of permanent commitment may also arise after an individual has been convicted and has served the full sentence for his crime. This situation will arise upon the finding that an individual, due to his mental illness, will be a threat to the community where he resides. The issue that is likely to arise is whether the due process requirement for involuntary civil commitment which specifies that the individual must be mentally ill, can be sufficiently satisfied by a finding of a "mental abnormality." In this matter, the Supreme Court referred to a previous ruling which stated that "this court has consistently upheld involuntary commitment statutes that detain people who are unable to control their behavior and thereby pose a danger to the public health and safety, provided the confinement takes place pursuant to proper procedures and evidentiary standards."⁶¹ When an individual's liberty, or any other fundamental interest, is subject to such regulation, the Supreme Court has developed a two-tiered test to determine the constitutionality of such regulation. The state must show that there is a "compelling state interest" in regulating the activity⁶² and that the means being employed are necessary to achieve the end objective.⁶³ Protecting the health and safety of the public from an individual who is unable to control dangerous behavior can be classified as a compelling state interest and

⁶¹ Id at p. 2074-2075 citing to *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780,1785-1786.

⁶² *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969)

⁶³ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)

In this case, the Supreme Court held that the case of one charged with a criminal offense and found to be permanently incompetent to stand trial was entitled to the same standard of review as that of someone civilly rather than criminally committed. Any other result would have rendered his commitment an indefinite and almost certainly permanent one.

Since Indiana did not have sufficient mental health facilities available to treat Mr. Jackson's psychological condition, the Supreme Court held that he would never be competent enough to stand trial, thus the criminal charges should be dismissed. It also found that if Indiana was not able to commit Mr. Jackson under the provisions for civil commitment, or if the state was unable to provide better care facilities for Mr. Jackson than his current living arrangements, he should be discharged from the Department of Mental Health and returned to his home.

B. Other Jurisdictions

British treatment of individuals found not competent to stand trial is similar to that of the United States. In Britain, if an individual is found to be incompetent, the trial will not proceed and he may be ordered to be admitted to "such hospital as may be specified by the Secretary of State."⁵⁹ However, if the defendant is found "fit to be tried, the accused is still entitled to enter a plea of not guilty.,⁶⁰

⁵⁹ Trial of Indictments Para. 963.

⁶⁰ Id at Para. 963.

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⁶¹ Id at p. 2074-2075 citing to *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780,1785-1786.

⁶² *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969)

⁶³ *Griswold v. Connecticut*, 381 U.S. 479,485 (1965)

confinement of such individuals in a system which will also provide mental health treatment can be seen as a legitimate means to the end.

This specific issue arose in the *Hendricks* case,⁶⁴ whereby the defendant was up for release from prison to a halfway house after serving time for "taking 'indecent liberties' with two 13-year-old boys."⁵⁵ Before his release, the State filed a petition with the court requesting that Hendricks be civilly confined on the basis that he was a "sexually violent offender."⁶⁶ Mr. Hendricks has also been diagnosed as a pedophile and testified that when he was under stress, he thought about having sex with children.

It was held that there was no violation of Hendrick's due process rights because he was granted a competence hearing where he was classified as being mentally ill and that he would pose a danger to the public's safety (particularly that of the children). The subsequent commitment was substantiated for three reasons:

- 1) the psychiatric profession classifies pedophilia as a serious mental disorder; 2) the abnormality suffered includes Hendricks' inability to control his actions, which the court specified as a "serious and and highly unusual ability;" and 3) the disease suffered presents a serious danger to the children in the community.⁵⁷

⁶⁴ *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997)

⁶⁵ *Id.* at p. 2078.

⁶⁶ Hendricks had a history of sexual molestation and abuse and was convicted on four other occasions for illegal sexual activity with a minor. At the civil commitment hearing, his two step-children testified that they had been "forced into engaging in sexual activity with him over a period of four years"

⁶⁷ *Id.* at pgs. 2088-2089.