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CRIMINAL LAW

THE COMPETENCE OF CRIMINAL DEFENDANTS WITH MENTAL RETARDATION TO PARTICIPATE IN THEIR OWN DEFENSE*

RICHARD J. BONNIE**

I. INTRODUCTION

On an initial view, the legal rules relating to the competence of defendants with mental retardation to assist in their own defense¹ seem both well-settled and well-suited to promote fairness in the criminal process. As the Supreme Court noted in 1975, "it has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial."² Whenever a defense attorney has a good faith doubt regarding the competence of his or her client, the attorney is obligated both to seek a clinical evaluation of the issue and to bring his or her doubts to judicial

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¹ Although criminal defendants constitutionally are entitled to waive their right to counsel and to represent themselves, *Faretta v. California*, 422 U.S. 806 (1975), this issue is not of practical significance in cases involving defendants with mental retardation.

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

attention.³ Further, whenever a *bona fide* doubt arises regarding the defendant's competence, the trial judge is obligated to hold a hearing, whether or not the defense has requested one.⁴ This obligation arises at all stages of the proceedings.

A defendant found to be incompetent to stand trial may not be convicted.⁵ However, the defendant may be committed for the purpose of assessing the probability that competence can be affected in the foreseeable future and for making efforts to do so.⁶ Although the long-term character of the disability precludes prosecution in many cases, some competence-enhancing interventions may be efficacious.⁷

Notwithstanding the clarity of these broad legal principles, two problems require attention. First, and most important, there is reason to doubt that, in practice, the interests of defendants with mental retardation are adequately protected. I shall refer to this as the problem of "under-identification." Second, latent ambiguity concerning the concept of incompetence, and the values it is designed to serve, has raised unresolved questions regarding the legal significance of mental retardation in some cases. The problem is most evident in the controversy regarding whether a defendant who is competent to be tried may be found incompetent to plead guilty. Each of these problems is addressed below.

II. THE PROBLEM OF UNDER-IDENTIFICATION

According to most commentators, legally significant impairments due to mental retardation are largely unrecognized by attorneys and courts.⁸ As Ellis and Luckasson have observed, "efforts

³ CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-4.2(c) and accompanying commentary (1986) [hereinafter ABA STANDARDS].

⁴ *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).

⁵ *Pate*, 383 U.S. at 378 (noting and apparently endorsing the government's stipulations "that the conviction of an accused person [who] is legally incompetent violates due process . . ."). Incompetence does not bar "innocent only" adjudications. Whether it bars factual determinations that establish the necessary predicate for restrictive civil commitment statutes is a controversial issue. See ABA STANDARDS, *supra* note 3, Standard 7-4.13 and accompanying commentary.

⁶ *Jackson v. Indiana*, 406 U.S. 715 (1972).

⁷ See generally I. Keilitz, Monahan, S.L. Keilitz & Dillon, Criminal Defendants with Trial Disabilities: The Theory and Practice of Competency Assistance (Grant No. G008535166) (Inst. on Mental Disability and the Law, Nat'l Center for State Courts, Apr. 30, 1987) (unpublished manuscript).

⁸ See, e.g., Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985) [hereinafter Ellis & Luckasson]; Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365 (1981) [hereinafter Mickenberg]; Person, *The Accused Retardate*, 4 COLUM. HUM. RTS. L. REV. 239 (1972).

that many mentally retarded people typically expend in trying to prevent any discovery of their handicap may render the existence or the magnitude of their disability invisible to criminal justice system personnel."⁹ Impairments become visible enough to trigger evaluation, it is thought, mainly when the defendant is also mentally ill or acts in a bizarre or disruptive fashion.¹⁰

Although the "under-identification" hypothesis is widely accepted, empirical data on the issue are sparse. The hypothesis rests on the following two suppositions: first, a substantial proportion of defendants with mental retardation are not referred for psychological assessment; and second, this low rate of referral is attributable to a general failure to recognize the "existence or magnitude" of the disability.¹¹ The main source of empirical support for the under-referral supposition is a 1966 case study of thirty-one prison inmates with mental retardation. The study found that pretrial psychological assessments had occurred in only three cases.¹² Indirect empirical support for the under-referral hypothesis can also be found in studies of defendants who *are* referred for pretrial forensic evaluation. These studies consistently show that diagnosed mental retardation ranges between two percent and seven percent of the pretrial referral population,¹³ as compared with about ten percent of the correctional population.¹⁴

In the absence of any contradictory data, it seems reasonable to assume that a substantial proportion (perhaps half) of defendants with mental retardation are not referred for pretrial competence evaluation. The key question is whether this pattern of under-refer-

⁹ Ellis & Luckasson, *supra* note 8, at 458.

¹⁰ *Id.*

¹¹ As noted *infra* note 13, forensic clinicians who are not trained to assess mental retardation probably fail to recognize the magnitude of the disability even in cases referred for evaluation.

¹² Brown & Courtless, *The Mentally Retarded in Penal and Correctional Institutions*, 124 AM. J. PSYCH. 1164 (1968); Allen, *The Retarded Offender: Unrecognized in Court and Untreated in Prison*, 32 FED. PROBATION 22 (1968).

¹³ In a database maintained by the University of Virginia Institute of Law, Psychiatry and Public Policy, which encompasses a substantial proportion of forensic evaluations conducted in Virginia from July, 1985 through June, 1989, the proportion of defendants diagnosed as retarded was 4.7%. R. Petrella, *Offenders with Mental Retardation in the Forensic Services System* (1990) (unpublished manuscript available from the author) [hereinafter R. Petrella]. See also Reich & Wells, *Psychiatric Diagnosis and Competency to Stand Trial*, 26 COMPREHENSIVE PSYCHIATRY 421 (1985) (5.9%); J. Petrila, Selle, Rouse, Evans & Moore, *The Pretrial Examination Process in Missouri: A Descriptive Study*, 9 BULL. OF THE AM. ACAD. OF PSYCHIATRY AND THE LAW 61 (1981) [hereinafter J. Petrila] (7.3%); Heller, Traylor, Ehrich & Lester, *Intelligence Psychosis and Competency to Stand Trial*, 9 BULL. OF THE AM. ACAD. OF PSYCHIATRY AND THE LAW 267 (1981) (2.5%).

¹⁴ Brown & Courtless, *supra* note 12.

ral is normatively problematic. Even though many defendants with mental retardation are not being brought to clinical (or judicial) attention, it is conceivable that defendants whose impairments are serious enough to amount to incompetence under the applicable legal tests *are* being referred. It is therefore possible that the constitutional injunction against convicting incompetent defendants is not being violated.

Whether legally significant disabilities are going unrecognized by attorneys and judges has not been investigated empirically,¹⁵ and no reliable inference, one way or the other, can be drawn from available data.¹⁶ In my opinion, however, the documented pattern of under-referral is normatively problematic, even if all "incompetent" defendants are being identified. This is because systematic under-identification of mental retardation tends to produce a pattern of inadequate legal representation for clients who are functionally impaired, even though they are not so impaired as to fall below the undemanding threshold of legal incompetence. The problem, in short, is that current practice provides no margin of safety.

In cases involving *mentally ill* defendants, it is likely that forensic and judicial practice errs in the direction of finding *incompetence* in marginal cases, at least in the early phases of the pretrial process. This is so for a variety of reasons, including the perceived need for therapeutic restraint and the provisional nature of the finding of "incompetence" in most cases. If a defendant with *mental retardation* is found incompetent to proceed, however, "restoration" of competency is unlikely in most cases, and the pretrial finding of incompetence is therefore likely to be a definitive bar to adjudication. In light of the dispositional consequences of a finding of incompetence, forensic and judicial practice probably tilt toward findings of *competence* in marginal cases.

Another way of stating this point is that the threshold of competence for defendants with mental retardation is set relatively low in

¹⁵ This question can be answered empirically only by studying a representative sample of defendants with mental retardation who have *not* been referred for evaluation, and comparing them, in terms of legally relevant incapacities, with defendants referred for evaluation who are, and are not, found to be incompetent. This, of course, has not been done.

¹⁶ It appears that about one-third of the defendants with mental retardation who are referred for evaluation are found to be incompetent. *See, e.g.,* J. Pettila, *supra* note 13; R. Petrella, *supra* note 13. If the referred defendants are those with the most severe impairments, then one might infer that few incompetent defendants are escaping detection. However, if the referred defendants are representative of the entire population of defendants with retardation, one could infer that a significant proportion of the unreferred defendants are significantly impaired.

practice, and a substantial number of these defendants are, at best, marginally competent. If this assertion is correct, the fairness of adjudication in most cases involving defendants with mental retardation depends largely on the ability and inclination of the *attorney* to recognize and to compensate for the client's limitations. In this sense, enhanced competence of attorneys is necessary to assure adequate representation of marginally competent clients with mental retardation.

The pressures to cut corners in criminal defense, especially for public defenders and court-appointed counsel working for set fees, are well-known. Unfortunately, the risks of inadequate representation are magnified when the client has mental retardation, not only because the client is in no position to monitor the attorney's performance even in a superficial way, but also because attorneys are likely to spend *less* time interviewing clients with mental retardation when *more* time is really needed.

If the attorney fails to employ discerning interviewing techniques to offset the well-documented tendency of persons with mental retardation to conceal their disability, important facts are likely to be masked or distorted. Clients with mental retardation tend to act as though they understand their attorneys when they do not, and to bias their responses in favor of what they believe their attorneys want them to say or in the direction of concrete, though inaccurate, responses.¹⁷ Only attorneys who have had specialized training or experience in representing clients with mental retardation are likely to be aware of these problems. For others, the risk of unwittingly inadequate representation is a serious one.

When viewed from this perspective, the failure of the legal system to develop mechanisms for assisting lawyers who are representing marginally competent defendants—a problem that is much more serious when the client has mental retardation than when the client is mentally ill—is more significant, in practical effect, than the under-identification of “legally incompetent” defendants.

Two corrective arrangements are available. The first arrangement is to assure that any defendant with recognizable deficiencies in intellectual capacity is evaluated by forensic clinicians who have specialized skills in dealing with persons with mental retardation. The threshold for referral should be relatively low. These clinical evaluations should be arranged, within the framework of the attorney-client relationship, for a dual purpose—to assess “legal incompetence” *and* to assure that the client is carefully and thoroughly

¹⁷ Ellis & Luckasson, *supra* note 8, at 428-29.

interviewed about the alleged offense by a properly trained person. Implementing this proposal would require major changes in current practice, not only because the evaluation-referral rate is currently so low, but also because most forensic clinicians lack specialized understanding of mental retardation as well.

A second corrective arrangement would be to draw on specialized services for persons with mental retardation. In some cases, interested family members or guardians now play an active role in facilitating communication between defendants with mental retardation and their attorneys and in helping to make whatever decisions the client is expected to make. However, most defendants with mental retardation lack interested family representatives. In theory, at least, it ought to be possible to provide adjunctive assistance in these cases through judicially designated "representatives" or "consultants," not only to identify dispositional alternatives, but also to facilitate informed representation by counsel.

In making these proposals, I have tried to direct attention to issues of fairness in criminal adjudications involving persons with mental retardation that are penumbral to the constitutional ban against trying incompetent defendants. However, I also believe that these observations cast some light on several controverted issues regarding the meaning and application of the constitutional norm. The remainder of this paper will address these issues.

III. THE MEANING OF INCOMPETENCE

In its most recent formulation of the test of "incompetence to stand trial," the Supreme Court stated that the due process clause bars trial of a person "whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense."¹⁸ It has often been observed that this "test" is open-textured and highly contextual in application. As noted in the commentary of the American Bar Association *Criminal Justice Mental Health Standards* ("ABA Standards"), "competence is functional in nature, context-dependent and pragmatic in orientation."¹⁹ Recognition of the functional dimension of the competence determination has led forensic clinicians to develop checklists and protocols for

¹⁸ *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Another, less comprehensive formulation appears in *Dusky v. United States*, 383 U.S. 375, 402 (1960):

[The] test must be whether [a 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.

¹⁹ ABA STANDARDS, *supra* note 3, Standard 7-4.1 commentary at 175.

assessing various functions that a "competent" defendant is expected to perform.²⁰ Because increasing proportions of forensic evaluations are being conducted by clinicians who have received specialized training, it seems likely that this functional approach is now more widely utilized in forensic practice than was the case ten years ago. The ABA Standards themselves have contributed to improvements in forensic practice. Clinicians are now more likely to recognize that the concept of incompetence is a legal concept, that a defendant who has mental retardation (or is psychotic) is not necessarily incompetent for legal purposes, and that the relevant functional capacities relate to various forms of participation in the criminal process, not to mental condition at the time of the offense (*i.e.*, to issues of "responsibility").²¹

The increasing sophistication of forensic practice has helped to expose a latent ambiguity in the construct of incompetence, one which has particular bearing on the assessment of defendants with mental retardation. In its most general formulation, the question is whether competence to participate in one's own defense is a single, open-textured construct, or a multiple construct. The most significant subsidiary question, which has befuddled courts and commentators, is whether competence to plead guilty is subsumed within a broader construct of trial competence, or whether a defendant who is competent to assist counsel (and proceed to trial) might not be competent to plead guilty.

According to one view, a defendant is not competent to plead guilty if he is not capable of understanding the alternatives and making a "reasoned choice" among them.²² Under this view, a defendant with limited intelligence and conceptual ability may not be competent to plead guilty even though he is competent to be tried. Although this view has been endorsed by most commentators²³ and

²⁰ See, *e.g.*, Lipsett, Lelos & McGarry, *Competency for Trial: A Screening Instrument*, 128 AM. J. PSYCH. 105 (1977); Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCH. 616 (1965). See generally T. GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1986). Luckasson and Everington have developed a specialized instrument for defendants with mental retardation, the "Competence Assessment for Standing Trial for Defendants with Mental Retardation" ("CAST-MR"). This instrument is available from the authors.

²¹ For earlier critical studies, see, *e.g.*, Poythress & Stack, *Competency to Stand Trial: A Historical Review and Some New Data*, 8 J. PSYCH. & L. 131 (1980); Vann & Morganroth, *Psychiatrists and Competence to Stand Trial*, 42 U. DET. L. REV. 75 (1964).

²² See, *e.g.*, *United States v. Masthers*, 539 F.2d 721 (D.C. Cir. 1976); *Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973).

²³ See, *e.g.*, Weiner, *Mental Disability and the Criminal Law*, in *THE MENTALLY DISABLED AND THE LAW* 693, 696-97 (S. Brakel, J. Parry & B.A. Weiner 3d ed. 1985); G. MELTON, J.

by the ABA Standards,²⁴ it has been rejected by most courts.²⁵ The prevailing judicial view appears to be that the "test" for competence to plead guilty is the "same" as the test for competence to stand trial.

I endorse the view that competence to participate in the criminal process is a multiple construct and that competence to plead guilty (or to make other decisions) is conceptually (and clinically) distinct from competence to assist counsel. In my opinion, however, the debate about whether the "test" for competence to plead guilty is "higher" than the test for competence to stand trial has largely obscured the underlying questions that are raised when defendants with limited intelligence plead guilty—questions concerning the nature and quality of the interaction between these defendants and their attorneys.

A. WHY INCOMPETENCE MATTERS

Although this is not the place for an elaborate analysis of the competence construct, brief treatment of the subject is necessary to establish a frame of reference and a conceptual vocabulary for the following discussion. It is important initially to ask why a defendant's incompetence matters at all. A review of cases and commentary yields three conceptually independent rationales which, for convenience of reference, might be labeled *dignity*, *reliability*, and *autonomy*.²⁶

First, a person who lacks a rudimentary understanding of the nature and purpose of the proceedings against him is not a "fit" subject for criminal prosecution and punishment. To proceed against such a person offends the moral *dignity* of the process because it treats the defendant not as an accountable person, but rather as an object of the state's effort to carry out its promises.²⁷

PETRILA, N. POYTHRESS & C. SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 97 (1987).

²⁴ See ABA STANDARDS, *supra* note 3, Standard 7-5.1 and accompanying commentary at 266 (Standard 7-5.1 "embodies the Association's judgment that a special norm ought to govern plea proceedings").

²⁵ See, e.g., *Curry v. Estelle*, 531 F.2d 766 (5th Cir. 1976); *Suggs v. LaVallee*, 570 F.2d 1092 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978).

²⁶ There is surprisingly little theoretical discussion of the concept of incompetence in the academic literature. Commentators tend either to rely on implicit rationales (as by exploring "reasoning ability" without explaining why this might matter) or to refer explicitly to a variety of overlapping rationales. The reasons for the incompetence doctrine are most explicitly discussed in Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967).

²⁷ See H. MORRIS, *ON GUILT AND INNOCENCE* 46-57 (1976). Whether or not one accepts the idea that wrongdoers have a right to be punished, or that punishment of

The dignitarian rationale is implicated only in cases involving defendants who lack a meaningful moral understanding of wrongdoing and punishment. The procedural bar against prosecution in such cases would seem to be uncontroversial.

Second, the main purpose of the incompetence construct is to bar definitive adjudication in those cases, and under those circumstances, where the defendant is incapable of providing whatever assistance is necessary to instill confidence in the *reliability* of the outcome. To proceed against a defendant who lacks the capacity to recall relevant information and to communicate this information to his or her attorney would be unfair to the defendant, and would undermine society's independent interest in the integrity of its criminal process. This is what the Supreme Court had in mind when it stated that the bar against trying the incompetent defendant is "fundamental to an adversary system of justice."²⁸ When viewed from the perspective of reliable adjudication, the concept of incompetence is instrumental in nature and is operationalized within the context of the attorney-client relationship—a defendant is competent if he or she is able to communicate with counsel and to provide whatever assistance counsel requires in order to explore and to present an adequate defense on the defendant's behalf.

A third dimension of the competence construct, which is conceptually independent of the two dimensions already discussed, is derived from legal rules which establish that certain decisions regarding the defense or disposition of the case must be made by (or are within the prerogative of) the defendant himself or herself. Some construct of "decisional competence" is an inherent, though derivative, feature of any legal structure that prescribes a norm of client *autonomy*. In theory at least, it is possible to imagine a system of criminal adjudication that leaves no room for client self-determination—one which bars self-representation, which does not permit guilty pleas, and in which all decisions regarding the conduct and defense of the case (including those that waive constitutional protections) are made by counsel, not by the defendant. Under these legal arrangements, a defendant's decisional competence would not be relevant. But this is not our system. In our system, some deci-

wrongdoing is a categorical imperative, it is common ground that personhood is a moral prerequisite to the imposition of punishment. As I have written elsewhere, no other rationale satisfactorily explains our continued adherence to the traditional ban against execution of presently incompetent prisoners. See Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUMAN BEHAV. 67, 86-88 (1990).

²⁸ *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

sions regarding the defense or disposition of the case are committed, by law, to the defendant and not to the attorney. According to all authorities, these include decisions regarding the plea, and if the case is to be tried, regarding whether it should be tried before a jury, whether the defendant will be present, and whether the defendant will testify.²⁹

B. DECISIONAL COMPETENCE AND AUTONOMY

Notwithstanding the fact that decisional competence rests on a different conceptual foundation than other competencies required of criminal defendants, it is often included as a component of a unitary formula for what is usually called "competence to stand trial."³⁰ Forensic "checklists" used for competence-to-stand-trial assessments typically include items relating to capacity to "make decisions after receiving advice,"³¹ "planning of legal strategy,"³² or "appreciating the consequences of various legal options."³³ The commentary to the ABA Standards refers to "a capacity . . . to advise and accept advice from counsel, to elect an appropriate plea and to approve the legal strategy of the trial."³⁴ According to one frequently cited commentary, the constitutional standard requires "the capacity to make decisions during the course of the proceedings in response to alternatives explained by the attorney."³⁵

Decisional competence is not properly understood as a component of a unitary competence standard. In the first place, recent case law in a number of discrete contexts is incompatible with this view. For example, courts have recognized that defendants who are "competent to stand trial" may not be competent to make specific

²⁹ See, e.g., *Brookhart v. Janis*, 384 U.S. 1 (1966) (whether to plead guilty); *Rock v. Arkansas*, 483 U.S. 44 (1987) (whether to testify); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (waiver of jury trial). See generally ABA STANDARDS, *supra* note 3, Standard 4-5.2(a); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

³⁰ Everyone agrees that "competency to stand trial" is a misnomer because 90% of criminal cases are not actually tried. Golding and Roesch have suggested use of the phrase "competency for adjudication." See Golding & Roesch, *Competency for Adjudication: An International Analysis*, in 4 LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 73-109 (D. Weisstub ed. 1988).

³¹ GROUP FOR ADVANCEMENT OF PSYCHIATRY, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 896-97 (Vol. VIII, Rep. No. 89, Feb. 1974).

³² McGarry, *Competency to Stand Trial and Mental Illness* (Proj. No. 7R01-MH-18112-01) (Harvard Medical School, Laboratory of Community Psychiatry 1974). A.L. McGarry was the principal investigator for the project.

³³ Golding, Roesch & Schreiber, *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUMAN BEHAV. 321 (1984).

³⁴ ABA STANDARDS, *supra* note 3, Standard 7-4.1 commentary at 174.

³⁵ Mickenberg, *supra* note 8, at 385.

decisions, such as whether to raise an insanity defense³⁶ or whether to decline to introduce mitigating evidence in capital cases.³⁷ As noted earlier, courts are divided on whether the same should be said of competence to plead guilty.

Second, it seems doubtful that trial courts would be inclined to preclude adjudication altogether in cases involving defendants who understand the charges and are able to assist counsel, but who are not competent to make an "informed decision" about issues requiring more sophisticated understanding or complex risk-benefit judgments, such as whether to plead guilty or whether to waive a jury trial. In practice, it seems likely that most courts avoid the consequences of a finding of "incompetence to stand trial" in such cases, either by closing their eyes to the defendants' decisional incompetence or by splitting off the decisional competence issue and dealing with it separately.

A 1984 Alaska case, *McCarlo v. State*,³⁸ is illustrative. McCarlo was charged with rape and attempted sexual assault. After being found incompetent to stand trial due to mental retardation, he was committed for six months during which the facility staff "worked with [him] to improve his understanding of the judicial system and the criminal proceedings he faced."³⁹ He was then found competent to stand trial. However, the trial court repeatedly refused to accept McCarlo's proffered guilty pleas on the ground that he "did not have sufficient understanding of the rights he would give up by pleading guilty."⁴⁰

At trial, McCarlo waived his right to a trial by jury. After a colloquy with him, the judge accepted the waiver, notwithstanding the fact that "the dialogue . . . indicated substantial confusion on McCarlo's part concerning the specific nature of the proceedings he was involved in, as well as considerable uncertainty about the precise role of a jury."⁴¹ Although the Alaska Court of Appeals affirmed the trial court's decision, it obviously was a bit puzzled about how to explain this result.

On the one hand, the court noted that McCarlo's "competence to waive jury trial is implicit in the trial court's determination of his

³⁶ See, e.g., *Treece v. State*, 313 Md. 665, 547 A.2d 1054 (1988); *Frendak v. United States*, 408 A.2d 364 (D.C. 1979).

³⁷ See, e.g., *Fisher v. State*, 739 P.2d 523, 525 (Okla. Crim. App. 1987); *Commonwealth v. Crawley*, 514 Pa. 539, 526 A.2d 334, 340 n.1 (Pa. 1987).

³⁸ 677 P.2d 1268 (Alaska Ct. App. 1984).

³⁹ *Id.* at 1270.

⁴⁰ *Id.*

⁴¹ *Id.* at 1273.

competence to stand trial,"⁴² an obviously fictional conclusion because McCarlo had been found competent to stand trial before this issue arose, and the trial judge had obviously thought it required separate attention. On the other hand, the appellate court also appeared to recognize that McCarlo's decisional competence required an independent determination, and the court proceeded to set a relatively low standard. McCarlo's waiver was said to be valid, in effect, simply because he had been able to express reasons for not wanting a jury—he trusted the trial judge and a jury would make him nervous.⁴³ Regardless of the court's technical legal explanation for affirming the trial court's "finding" of decisional competence, it is clear that the most salient factor in the court's decision was the attitude of McCarlo's attorney, who "acquiesced in the waiver of jury trial and affirmatively indicated his belief that it was appropriate to proceed with a non-jury trial."⁴⁴

As *McCarlo* demonstrates, questions about decisional competence, which implicate the principle of autonomy, must be exposed for independent scrutiny if they are to be sensibly resolved. The reasons (dignity and reliability) for barring adjudication when the defendant is unable either to understand the nature and purpose of the criminal process or to assist counsel do not apply when the defendant's deficits relate solely to the capacity to make sufficiently "autonomous" decisions regarding the defense or disposition of the case. Even though our system obligates attorneys to adhere to the wishes of competent clients on certain issues, it does not follow that adjudication should be barred if defendants are not competent to make those decisions; other legal responses, such as allocating decisional responsibility to the attorney or directing the attorney to follow a "default" rule, are possible in such cases.

Further, there is no reason, in principle, why the definition or "test" of decisional competence would necessarily be the same in connection with all decisions. For example, a demanding test of competence might be utilized if the defendant insists, over the attorney's advice, on pleading guilty to a capital offense, or refuses to authorize the attorney to introduce mitigating evidence,⁴⁵ while a less demanding standard might be appropriate if the defendant is acceding to his or her attorney's recommendation that a jury trial be

⁴² *Id.* at 1272 n.3.

⁴³ *Id.* at 1273-74.

⁴⁴ *Id.* at 1273 n.1.

⁴⁵ See generally Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1388-89 (1988). Cf. CAL. PENAL CODE § 1018 (West 1985) (precluding a defendant from pleading guilty to a capital offense without the consent of his or her lawyer).

waived, as in *McCarlo*. In short, the criteria for decisional competence are likely to be highly contextual, depending on the value placed on client autonomy and on the practical consequences of alternative approaches.

C. A CONCEPTUAL VOCABULARY

In the remainder of this paper, I will employ a conceptual vocabulary that disaggregates the functionally distinct features of the "open construct" typically called "competence to stand trial." I will distinguish between a baseline concept of "competence to assist counsel" (which reflects the dignity and reliability rationales of the incompetence construct) and a highly contextualized concept of "decisional competence" (which primarily reflects the autonomy rationale). By "competence to assist counsel," I mean to refer to the minimum conditions for participating in one's own defense.⁴⁶ Although there is some room for debate about what the law "is" in this context, courts and commentators generally refer to: (i) the capacity to understand the charges and the nature and purpose of the adversary process; and (ii) the capacity to communicate rationally with counsel about the facts of the case.⁴⁷

Because competence to assist counsel in the sense described above is a baseline concept, a defendant who is not competent to assist counsel will have no occasion to make decisions regarding defense or disposition of the case.⁴⁸ However, even a defendant who

⁴⁶ Because of its "baseline" feature, "competence to assist counsel" might also be characterized as "competence to proceed," a phrase that is occasionally used in lieu of "competence to stand trial." However, "competence to assist counsel" has the advantage of conveying the functional content of the concept, which "competence to proceed" does not.

The phrase "competence to assist counsel" is admittedly underinclusive, in theory, because it does not take explicit account of the possibility that a *pro se* defendant might not be competent to proceed. However, even if the phrase is imperfect in this marginal sense, it is still preferable to any of the apparent alternatives. Moreover, the capacities required of defendants who seek to represent themselves should be encompassed by an independent construct which includes not only the baseline capacities, but also the capacities required for self-representation and competent decision-making. Obviously a defendant with retardation will not meet the criteria for self-representation and will not, for this reason, be permitted to waive counsel.

⁴⁷ This is, of course, a restatement of the "test" articulated in *Dusky v. United States*, 362 U.S. 402 (1960). In addition, the concept probably encompasses a "motivational" component pertaining to capacity to cooperate with one's attorney, thereby enabling the attorney to perform his or her assigned role in the process. *Cf. State v. Johnson*, 133 Wis. 2d 212, 395 N.W.2d 176 (1986). The puzzle in these cases is differentiating between "can't" and "won't," a problem not apt to arise in cases involving defendants with mental retardation in the absence of a "dual diagnosis" of mental illness.

⁴⁸ This construct also has a chronological dimension which helps to explain how it ordinarily becomes operationalized: in many cases, questions about "competence to as-

is (provisionally) competent to assist counsel may not be competent to make specific decisions that are encountered as the process unfolds. As has been noted, the “relevant decisions” are those which are committed, by law, to the competent defendant and not to the lawyer—or, to state it the other way, those that counsel is not permitted to make on his or her own—whether they are made prior to trial, at trial, or in lieu of trial. “Decisional competence” cannot be addressed in the abstract or in the general sense described earlier; it must be addressed in the context of the specific decision that is encountered as the process unfolds. Decisional competence *requires* a contextualized inquiry.

Competence to assist counsel and decisional competence, as defined above, seem to embrace the full meaning of the competence construct, and I am presently inclined to regard “competence to stand trial” as a redundant concept.⁴⁹ Thus, in the context of trial proceedings,⁵⁰ the defendant must be competent to participate in his or her own defense to the extent necessary to assure a fair trial. This means the defendant must be “competent to assist counsel” in the baseline sense described above—that is, he or she must be capable of understanding the proceedings and of engaging in rational communication with counsel, as needed, during the proceedings.⁵¹ A few discrete issues regarding “decisional competence” may arise at the trial itself if they have not been anticipated, and resolved, during the course of pre-trial interactions with the attorney,⁵² or, if the defendant’s decision must be verified on the record, as with a waiver

sist counsel” arise at the outset of the process—before significant interactions with counsel have occurred and before strategic decisions regarding defense of the case have been encountered or considered.

⁴⁹ I have not yet come to rest on this question. It is possible that other mental capacities, not embraced by the constructs of competence to assist counsel and decisional competence, are required for trial participation. However, my present view is that the capacities required for trial participation are simply contextual applications of these two concepts.

⁵⁰ “Trial proceedings” are meant to include the sentencing phase of the trial in capital cases, and any other proceedings involving an evidentiary hearing.

⁵¹ A focus on the trial emphasizes the dynamic and sequential dimensions of competence assessment. A defendant who was regarded as sufficiently competent during earlier stages of the process (or whose competence was restored) may deteriorate under the stresses of a trial.

⁵² Cases have arisen, for example, in which a defendant convicted of a capital crime seeks to preclude his attorney from introducing mitigating evidence or arguing for leniency at the sentencing phase of the trial; in states where appellate courts have held that the attorney is obligated to adhere to the defendant’s wishes, they have also directed trial judges to make contemporaneous assessments of the defendants’ competency. I have discussed this problem in Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988).

of jury trial.⁵³ One particularly intriguing issue concerns the competence of a defendant to waive his right to be present at trial, a problem that usually arises in connection with disruptive conduct in the courtroom.⁵⁴

The remainder of the paper applies these concepts to cases involving defendants with mental retardation. The next section briefly illustrates the essential meaning of "competence to assist counsel" in this context, and the final section addresses the problem of decisional competence in relation to guilty pleas.

IV. COMPETENCE TO ASSIST COUNSEL

As I noted earlier, judicial practice probably tilts against determinations of incompetence in cases involving defendants with mental retardation in order to avoid the dispositional dilemmas presented in such cases. It would be a mistake to assume, however, that the construct of incompetence has no normative content. Empirical studies of forensic facilities consistently show that about ten percent of the defendants found incompetent are mentally retarded,⁵⁵ and appellate courts reverse trial court findings of competence with sufficient frequency to demonstrate that the traditional ban against adjudication has continuing normative force.

A review of appellate opinions on the subject⁵⁶ yields a relatively clear picture of the requirements for baseline competence to assist counsel. Two recent cases are illustrative. In *State v. Benton*,⁵⁷ the Tennessee Court of Criminal Appeals reversed the aggravated rape and aggravated sexual battery convictions of a forty-three year-old man whose full-scale IQ (on the Wechsler Adult Intelligence Scale—Revised) was forty-seven, and whose performance on the various domains of the Vineland Adaptive Behavior Scale was roughly equivalent to that of an average five- or six-year-old child.⁵⁸

⁵³ See, e.g., *McCarlo v. State*, 677 P.2d 1268 (Alaska Ct. App. 1984).

⁵⁴ See, e.g., *Sweezy v. Garrison*, 554 F. Supp. 481 (W.D.N.C. 1982). Some decisions may also be required as part of the sentencing process itself such as the exercise (or waiver) of the right of allocution. See, e.g., *Wotjowicz v. United States*, 550 F.2d 786 (2d Cir. 1977).

⁵⁵ Data compiled by the University of Virginia Institute of Law, Psychiatry and Public Policy (July, 1985 - June, 1989) show that 8.2% (38 out of 312) of defendants found incompetent had diagnoses of mental retardation. See also, R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL 149 (1980) (18%); J. Petrila, *supra* note 13 (10%).

⁵⁶ See generally Dove, *Competency to Stand Trial of Criminal Defendant Diagnosed as 'Mentally Retarded'* - *Modern Cases*, 23 A.L.R. 4TH 493 (1983).

⁵⁷ 759 S.W.2d 427 (Tenn. Crim. App. 1988).

⁵⁸ According to the appellate court,

the record reveals that the defendant intellectualizes as a child five to seven years old does. Efforts to educate him were abandoned after he attended his first (and

Benton's incapacities clearly implicated the dignity rationale of the incompetence doctrine—he was apparently unable to understand the nature and purpose of the criminal proceedings or the nature of the charges against him. Accordingly to a widely shared judicial intuition, prosecution, conviction, and punishment in cases of this nature would demean the moral integrity of the criminal process.

In *State v. Rogers*,⁵⁹ a divided Louisiana Supreme Court reversed a trial court finding of competence in a case which illustrates the reliability rationale for the bar against adjudication. Rogers had been charged with aggravated rape and had been evaluated by three psychiatrists, who agreed that he was mentally retarded but disagreed about the severity of his disability. In finding Rogers to be competent, the trial court relied primarily on the testimony of one psychiatrist whose opinion, though equivocal, tilted in the direction of competence. The court rejected the testimony of the other two psychiatrists, who estimated Rogers' IQ to be about fifty and who raised substantial doubts about his ability to assist his attorney.⁶⁰

The case came to the Louisiana Supreme Court on an interlocutory appeal. Although nothing is said in the court's opinion about the evidence introduced against Rogers at the preliminary hearing, the impression clearly emerges that the court was worried about the reliability of any conviction that might ensue. According to the preponderance of psychiatric opinion, Rogers had "extreme difficulty in recalling events and circumstances" and "has periods of time up to an hour and a half when he does not know what happened."⁶¹ As a result, he "would not be able to assist in his defense by recalling his whereabouts, locating witnesses or testifying without confusion or contradiction."⁶² Under these circumstances, the majority of the court apparently concluded that the risk of an erroneous conviction was unacceptably high.

Taken together, *Benton* and *Rogers* reveal the normative structure of the baseline concept of competence to assist counsel. The ability to understand the nature and purpose of the criminal pro-

only) day of school. Consequently, he is unable to read or write and reached age nine or ten before beginning to talk. . . . The defendant . . . has always lived at home with his parents who treat him as a child. Almost everything he does requires adult supervision. . . . He is never allowed to go anywhere alone because he passes out almost every time he is in a crowd of people. He is unable to run a simple 'go get' type of errand; that is, he 'doesn't understand what you tell him and forgets before he gets to where he's going.'

759 S.W.2d at 430-31.

⁵⁹ 419 So.2d 840 (La. 1982).

⁶⁰ *Id.* at 842-43.

⁶¹ *Id.* at 843.

⁶² *Id.* at 842.

ceedings, and the essence of the charge of wrongdoing, is a relatively determinate precondition for competence to proceed. It does not depend on the evidence against the defendant, but instead reflects a widely accepted moral intuition regarding the integrity of the criminal process. The ability to recall and describe pertinent events is a less determinate requirement and is, in practice, highly contextual. What is required is a qualitative judgment in each case regarding whether the defendant has *sufficient* ability to recall and describe events (including mental "events") to enable the attorney to explore and present an adequate defense.⁶³ What is sufficient, in a given case, will depend on the evidence against the defendant and on the plausible lines of defense.

V. DECISIONAL COMPETENCE AND THE GUILTY PLEA PROBLEM

As noted above, decisional competence is conceptually and clinically distinct from competence to understand the criminal process and communicate with counsel. Although the relevant psychological capacities may overlap, decision-making about defense strategy obviously encompasses conceptual abilities, cognitive skills, and capacities for rational manipulation of information that are not required for assisting counsel. The key question is how demanding the test for decisional competence should be.

Although forensic experts have not yet conceptualized the clinical content of alternative tests of decisional competence in the context of criminal defense, the formulations developed by Appelbaum and Grisso in their continuing research on decisional competence for medical treatment can be used as a starting point.⁶⁴ The *ability to understand relevant information* about a particular decision is the criterion most often utilized in many decisional contexts. This "test" involves the basic idea that clients who cannot understand the relevant considerations after they have been conveyed, or who cannot understand their own prerogatives as a "decision-maker," are not competent to decide whether to accept or reject the attorney's advice. This test, which is purely cognitive, can be varied in its stringency according to which considerations are regarded as relevant, and therefore must be understood by the defendant. This point is

⁶³ Cf. *Schade v. State*, 512 P.2d 907, 914 (Alaska 1973) ("The defendant must have some minimum ability to provide his counsel with information necessary or relevant to his defense. . . . But this does not mean that a defendant must possess any high degree of legal sophistication or intellectual prowess. In determining competency, the standard of judgment must be a relative one. . . .").

⁶⁴ See generally Appelbaum & Grisso, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENGLAND J. MED. 1635 (1988).

especially pertinent in cases involving defendants with mental retardation, who may have the capacity to understand some considerations (*e.g.*, the nature of the alternative courses of action—plea or trial, jury trial or bench trial), but may not be able to understand others (*e.g.*, the risks or consequences of choosing one course or the other).

A defendant who is able to comprehend relevant information may be *unable to appreciate the significance of that information* in his or her own case. Problems in appreciating the situation and its consequences may arise due to limitations in cognitive capacity, to disturbances of thought, or to affective disorders. In the context of defendants with mental retardation, a deficit of appreciation may arise from an inability to translate the information (about the consequences of a particular course of action) to his or her own situation.

Finally, a defendant who is able to understand information relevant to a decision and is able to appreciate the “meaning” of the decision in his or her situation, may nonetheless lack the capacity to use logical processes to compare the benefits and risks of the decisional options. Again, assuming the person is able to understand relevant information, the *inability to engage in rational manipulation of information* (or to engage in a rational decisional process) may be relevant in cases involving defendants with all forms of mental disability.

As this summary of alternative clinical formulations demonstrates, the legal “test” for decisional competence can be made more or less demanding. Moreover, it is clear that the choice of a “test” must turn on a theory of autonomy in the context of the attorney-client relationship, and on the consequences of a determination of incompetence. Although comprehensive discussion of these issues would far exceed the ambition of this paper, I will offer an exploratory analysis of the problem in the context of the controversy about the “test” for competence to plead guilty.

When analyzed within this conceptual framework, guilty pleas by defendants with mental retardation implicate two different concerns that must be isolated for separate consideration. First, the admissions embedded in a guilty plea may not be reliable. To the extent that reliability is the underlying concern, a finding that the defendant is competent to make the necessary admissions is a necessary condition for a fair adjudication *if* the adjudication is to be accomplished by a guilty plea. Second, even if the reliability of the defendant’s admissions are not in doubt, the defendant may be regarded as “incompetent” to plead guilty (and waive his or her constitutional rights) because he or she lacks the capacity to render a

sufficiently "autonomous" decision. Because decisional competence in this sense is not a necessary condition for a fair adjudication, the "test" for competence to plead guilty, when viewed from this perspective, depends entirely on the theory of autonomy that is, or should be, reflected in the law.

A. RELIABILITY

Substantial reliability concerns are raised whenever a defendant with mental retardation pleads guilty. All of the concerns about reliability of confessions described by Ellis⁶⁵ are even more pronounced when inculpatory admissions are embedded in a plea of guilty. Limited conceptual skills, biased responding, and submissiveness to authority may mask significant doubts about criminal liability, especially in relation to culpability elements. The risk of unreliable pleas is further magnified by structural arrangements in criminal justice administration that encourage negotiated pleas. Public defenders or appointed lawyers often spend little time probing the more subtle aspects of criminal liability that may be most pertinent in the defense of persons with mental retardation.

This problem is nicely illustrated by *Gaddy v. Linahan*.⁶⁶ Gaddy and his uncle were charged with murder and burglary in a case involving the stabbing of the victim in his home. They were apprehended two days after the offense following a high-speed automobile chase. Shortly after the indictment, Gaddy's uncle pled guilty to both charges. About a month later, Gaddy, a thirty-year-old man who could not read or write, pled guilty to "malice murder" pursuant to a plea agreement under which the prosecution agreed not to seek the death penalty and to dismiss the burglary indictment.⁶⁷

After noting, for the record, Gaddy's "limited education and his inability to read," the trial court asked the prosecutor to read the indictment, and then asked Gaddy whether he had talked to his attorney about the charge, whether he understood it, whether he understood that he was waiving various rights by pleading guilty, whether he had made up his own mind to do so, and other aspects of the standard plea colloquy. Gaddy simply answered "yes, sir" to virtually all of these questions.⁶⁸ The trial court then accepted the plea and sentenced Gaddy to a life term. Proceedings were subse-

⁶⁵ Ellis, *Confessions By Defendants With Mental Retardation* (1990) (unpublished manuscript available from the author).

⁶⁶ 780 F.2d 935 (11th Cir. 1986).

⁶⁷ *Id.* at 938.

⁶⁸ *Id.* at 938-40.

quently initiated in state court to set aside the plea on a variety of grounds, including the allegation that Gaddy did not understand the elements of the offense of "malice murder." After these efforts were unavailing, habeas proceedings were filed in federal court.⁶⁹

Based on the description of the evidence in the Eleventh Circuit's opinion, it seems likely that this is what happened: Gaddy's attorney met with him briefly a couple of times. Although Gaddy said that he was "innocent" because his uncle had stabbed the victim, the attorney quickly reached the conclusion that Gaddy was criminally liable as an accomplice to felony murder because he had been present during the alleged burglary and killing. There is no indication, however, that the attorney interviewed Gaddy carefully about Gaddy's awareness of, or degree of participation in, his uncle's conduct, *or* that the attorney ever tried to explain to him the "elements" of complicity or felony-murder on which the plea of guilt was predicated. The record reveals that none of this occurred during the plea colloquy either.

In the absence of a more complete understanding of the charge, Gaddy's plea was hardly "an intelligent admission of guilt," and might well have been an unreliable one. (Gaddy probably understood that he was pleading guilty to the offense of "murder," which he understood in a lay sense, but he did so because his lawyer led him to believe that he could be sentenced to death if he didn't plead guilty.) As the Eleventh Circuit said:

The transcripts of the plea hearing and the state habeas hearing fail to indicate whether the petitioner had any understanding of the elements of malice murder, whether the facts of his case fit those elements, or whether the state had proof sufficient to obtain a conviction at trial. Neither petitioner nor his attorney represented at either hearing that they had discussed details of the crime. The record does reveal that defense counsel believed that petitioner's conduct fulfilled the elements of the crime of malice murder. But counsel never said that he had explained his conclusion to petitioner. All we learn from counsel's testimony is that he and the petitioner talked with each other about the constitutional rights petitioner would be waiving by pleading guilty and that petitioner would not have the benefit of the prosecutor's recommendation of a sentence of life imprisonment if petitioner opted for a trial.

The only evidence the State can rely on to establish the fact that petitioner knew and understood the elements of malice murder is the one-sentence indictment that prosecutor read to petitioner during the plea hearing. The terms "murder" and "malice aforethought," as they appear in the indictment, are not readily understandable by a layman, particularly one of minimal intelligence. They are complex legal

⁶⁹ *Id.* at 940-41.

terms, the discussion of which consumes pages of Georgia case law. Considering the petitioner's lack of intelligence, his expressed confusion, the complexity of the case, and the extraordinary consequences of pleading guilty to malice murder, a more thorough explanation of the nature of the crime and its elements was required to satisfy the tenets of due process.⁷⁰

In cases involving defendants with normal intelligence, attorneys are likely to elicit relevant information regarding the offense, and are likely to explain the elements of legal guilt to the defendant. As a result, guilty pleas are more likely to represent reliable admissions of guilt. However, in cases involving defendants with subnormal intelligence, special precautions are required to offset the many factors which propel the system toward efficient outcomes rather than reliable ones.⁷¹ Gaddy may have had the capacity to understand the offense and to make an intelligent admission of guilt, but his interactions with his attorney and the court were insufficient to assure that he in fact did.

Insofar as reliability is the underlying concern, the capacities required for competent guilty pleas are substantially congruent with those required for competence to assist counsel. The defendant must have a sufficient understanding of the charges, in lay terms, and a sufficient understanding of what happened at the time of the offense, to "understand and agree that he performed some acts and that those acts are unlawful."⁷² Whether the acts admitted by the defendant provide a sufficient foundation for the plea is a legal judgment which must be made initially by the attorney and then by the court. In *this* respect, the "test" for competence to plead guilty is not "higher" than the test for competence to assist counsel; however, this formulation of the issue misses the key point—the fact that the defendant has been "found" to be competent to assist counsel (or to "stand trial," in the usual phrase) does not establish the reliability of the admissions that may subsequently be embedded in a guilty plea. This matter requires careful attention by counsel and independent scrutiny by the court at the time of the plea. The "competence" of the defendant with mental retardation to plead

⁷⁰ *Id.* at 945-46.

⁷¹ I am putting to one side the concern with undermining the finality of adjudications based on guilty pleas that has led the Supreme Court to state that it "may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983) (quoting *Henderson v. Morgan*, 426 U.S. 637, 647 (1983)). For present purposes, the important point is that attorneys often fail to provide sufficient explanations in cases involving defendants with limited intelligence, as the Supreme Court itself noted in *Henderson*, 426 U.S. at 647.

⁷² *Allard v. Helgemoe*, 572 F.2d 1, 6 (1st Cir. 1978).

guilty must be given heightened consideration, not because the "test" is higher but because careful scrutiny is necessary to assure that the defendant's admissions, when taken together with other evidence, provide a reliable foundation for the plea.

B. AUTONOMY

The complexion of the "competence-to-plead-guilty" issue changes considerably when it is viewed in terms of autonomy. Consider the facts of *Allard v. Helgemoe*.⁷³ Allard was charged with burglary. He apparently admitted that he had broken into the building where the crime occurred and had taken property there.⁷⁴ He apparently understood that these acts were wrong. It appears, however, that, according to his imperfect recollection of the relevant facts, he may not have had a conscious purpose to steal when he entered the building, and may have "succumbed to the temptation" to steal after he was already there. This fact is legally significant because he would not be guilty of the offense of burglary if he lacked the "intent to steal" at the time he broke into the building.

Allard's attorney had done what Gaddy's attorney failed to do. He had carefully interviewed his client and reached a judgment that Allard was guilty of breaking and entering and theft, but that his liability for the more serious burglary offense was at least open to doubt. Notwithstanding this doubt, he concluded that Allard would probably be convicted of burglary if he went to trial and recommended a guilty plea in anticipation of a more lenient sentence.⁷⁵

Allard's attorney tried to explain all this to him. However, due to his limited intelligence, Allard apparently was unable to understand the relevant legal distinction.⁷⁶ The judge's colloquy at the time the plea was made and accepted did not expose the problem. In a subsequent challenge to the validity of the guilty plea, Allard's new attorneys argued that he had not been competent to decide to plead guilty because he lacked the capacity to make a "reasoned choice" among the alternative courses of action. The central con-

⁷³ *Id.* at 1.

⁷⁴ *Id.*

⁷⁵ *Id.* at 2.

⁷⁶ The district court's finding on this issue was as follows:

The petitioner may have understood the intent requirement of burglary at some time for a brief period, but he did not carry that understanding with him to his plea hearing, nor was he ever able to thoroughly comprehend the importance of the element of the crime. . . . It is unlikely that he will ever be able to comprehend the element of intent required, and the other elements of burglary as they distinguish it from the crime of breaking and entering, and retain that comprehension for any length of time.

Id. at 2 n.1.

tion was that "an understanding of the elements of the offense with which one is charged is essential in practical terms to make any kind of informed evaluation of the probability of success at trial."⁷⁷

Resolution of the issue posed in Allard's case requires a theory of autonomy. Allard knew and understood that the decision to plead guilty or go to trial was his to make, that he could get a more severe sentence if he went to trial, and that his attorney had recommended a guilty plea. Allard, however, was not able to make his "own" evaluation of the alternatives. At best, he was able to decide to follow his attorney's advice. Is this enough? If not, it would seem likely that many defendants with mental retardation are not competent to plead guilty.⁷⁸

An analogous problem arises in treatment decision-making. In this context, legal rules requiring informed consent have been designed to create conditions conducive to autonomous patient decision-making, even though most patients choose to defer in practice to their physicians' recommendations. If a patient is not able to understand a salient aspect of the disease or the possible effect of a proposed treatment, it might be said that the patient is not "competent" to give informed consent. Although physicians often rely on incompetent "assents" under these circumstances, avenues of surrogate decision-making typically are available.

How should the problem of "incompetent assents" be handled in the context of attorney-client decision-making in criminal defense? There are three possibilities. One is to adopt legal rules that reflect a "softer" or "weaker" theory of autonomy than that which was implicit in the argument advanced by Allard's habeas attorneys. It can be explicitly recognized, for example, that a "reasoned choice" by the client is an idealized norm, not a legal predicate for a valid decision (here, a valid guilty plea). Although the *lawyer* is expected to make a "reasoned choice" among alternatives, based on his or her specialized knowledge, and the client is *entitled* to exercise an independent prerogative, client deference to the attorney's judgment is the expected norm. Under this view, the law would require only that the client know and understand that the decision is his or hers to make, and that the lawyer make an effort to inform the client

⁷⁷ *Id.* at 5.

⁷⁸ For an example of a case in which the defendant was found competent to stand trial (for rape) but not competent to plead guilty because "he did not have a sufficient understanding of the rights he would give up by entering a guilty plea," see *McCarlo v. State*, 677 P.2d 1268, 1270 (Alaska Ct. App. 1984). *McCarlo* demonstrates that the gap between competence to assist counsel and decisional competence (to plead guilty) can arise even in jurisdictions that have rejected the *Sieling* "reasoned choice" formula. *Id.* at 1272 n.2.

of the relevant considerations. However, since a reasoned choice among alternatives is *not* the legally prescribed norm for client decision-making, an inability to do so does not constitute decisional incompetence. This was the position taken by the First Circuit in *Allard*:

We must accept the obvious fact that different defendants will have different abilities (as will their counsel) in making all legal decisions, including the decision whether or not to plead guilty as opposed to going to trial. Most will have no choice but to rely heavily on the advice of their counsel in evaluating all the factors affecting their chances of success at trial.⁷⁹

A second possibility is to adopt a more demanding theory of autonomy, one which envisions a more active client role in decision-making. Under this view, which has been endorsed by many commentators and a minority of courts, a guilty plea is not valid if the defendant lacks the capacity to make a "reasoned choice." As I have suggested, this position implicitly rests on a set of expectations regarding client autonomy in the attorney-client relationship that is somewhat heroic when compared with actual practice. In addition, however, this approach, under which "incompetent assents" to negotiated guilty pleas would be invalid, is subject to a significant practical objection because it bars only one of the decisional options. The other option, going to trial, remains legally available—assuming, of course, that the defendant is able to understand the proceedings and assist counsel in that context. As a result, those defendants who are competent to be tried, but who are (unrestorably) incompetent to plead guilty, are denied the possible advantages of plea bargaining.⁸⁰

The analogy to medical treatment suggests a third possible solution to the problem—namely, reliance on surrogate decision-making. The idea of using a surrogate decision-maker for "decisionally incompetent" criminal defendants may appear far-fetched at first glance. Indeed, in *Commonwealth v. Delverde*,⁸¹ the Supreme Judicial Court of Massachusetts emphatically rejected the defense attorney's effort to utilize a surrogate decision-maker to enter a guilty plea on behalf of a defendant with mental retardation. It is important to recognize, however, that Delverde was also incompetent to stand trial, and that *any* conviction in the case, by plea or otherwise, would

⁷⁹ *Allard*, 572 F.2d at 6.

⁸⁰ Although it has been suggested that defendants found incompetent to plead should be able to "enforce" any plea agreement previously arranged, or should be entitled to whatever sentencing leniency would otherwise have been accorded, see Ellis & Luckasson, *supra* note 8, at 464-65, these solutions are not feasible.

⁸¹ 398 Mass. 288, 496 N.E.2d 1357 (1985).

have violated the constitutional prohibition against convicting defendants who lack "baseline" competence to assist in their own defense.⁸² In contrast, when the standard for decisional competence is *elevated* in a specific context, and a defendant *is* sufficiently competent to be tried, some form of surrogate decision-making might be a plausible response to a difficult problem. In other words, if neither the dignity nor the reliability of the criminal process is implicated, and the only basis for decisional incompetence is an inability to make sufficiently "autonomous" decisions, surrogate decision-making would not contradict the principles of fairness embodied in the due process clause. Nor is surrogate decision-making altogether unprecedented in the criminal process. An increasing number of courts have held that a mentally ill defendant who is "competent to stand trial" may not be competent to decide whether or not to invoke the insanity defense.⁸³ These cases can sensibly be understood as permitting the attorney (or the judge) to serve as surrogate decision-maker.⁸⁴

Reliance on surrogate decision-making to "solve" problems of decisional incompetence might be regarded as problematic when the defendant is refusing to do what the attorney believes to be in his or her best interests. When the "surrogate" overrides the defendant's objections in such a case—which is equivalent to the imposition of medical treatment over a patient's incompetent refusal—the subject's known preferences are ignored on the basis of the controversial assertion that they are not entitled to respect. However, in cases involving incompetent "assents," surrogate decision-making provides a costless solution to the problem of decisional incompetence. Surrogate decision-making provides a device for vindicating the best interests of the subject when he or she may not be able to do so, and it also provides a mechanism for monitoring the judgment of attorneys, a task that "normal," self-interested clients are expected to perform for themselves.

As these observations imply, the real issue in cases involving

⁸² The opinion does not elaborate on Delverde's capacities, so it is not possible to ascertain the respects in which he was incompetent.

⁸³ See, e.g., *Treece v. State*, 313 Md. 665, 547 A.2d 1054 (1988); *Frendak v. United States*, 408 A.2d 364 (D.C. 1979).

⁸⁴ A "pure" version of surrogate decision-making would involve appointment of a "guardian" to make the decision on the defendant's behalf. This solution is preferable to allowing the judge or the defendant's attorney to make the decision. A law-trained guardian would be preferable to the judge because the surrogate should stand in the defendant's shoes (whether the perspective is substituted judgment or "best interests"), something the judge is in no position to do. A law-trained guardian would also be preferable to the defense attorney because he or she could "check" the attorney's reasoning in a way that a "competent" defendant might be expected to do.

marginal decisional competence is not autonomy but quality assurance. In cases involving defendants with mental retardation who are otherwise competent to assist counsel, some form of contemporaneous monitoring would be desirable to assure that the attorneys' judgments are in their clients' best interests. At the present time, neither the court nor any formal surrogate decision-maker is serving this function. As was suggested earlier, however, designated "representatives" (such as family members or advocacy services) might usefully be utilized in this context. They could serve in a formal surrogate role if the "test" for decisional competence is a demanding one, such as "capacity for reasoned choice," or in an adjunctive role if the "test" for competence is less demanding.

C. SUMMARY

Capacity for "reasoned choice" is too demanding a test for decisional competence. It reflects a conception of autonomy that is at odds with a realistic understanding of the attorney-client relationship in criminal defense. A less demanding test of "understanding," similar to the one formulated in *Allard*, is sufficient. However, this is not to say that the test for competence to plead guilty is the "same" as the test for competence to assist counsel (or to stand trial) or that a finding of competence to assist obviates the need for assessing competence to plead guilty, as many courts seem to have assumed.

The competence of a defendant with mental retardation to plead guilty requires careful assessment in order to assure both that the admissions embedded in the plea are reliable *and* that the defendant understands the nature and consequences of the plea. Routine attorney-client interactions and routine plea colloquies will not do the job.

At a minimum, when a plea is proffered by a defendant with mental retardation, the judge must assure that an adequate clinical evaluation has been conducted, and must affirmatively seek to satisfy himself or herself concerning the factual basis for the plea and the defendant's understanding of its consequences. In addition, adjunctive involvement by family members or advocacy services can ameliorate the difficulties in communication between attorney and client, and if plea decisions are to be made, they can provide an independent assessment of the attorney's recommendation.⁸⁵ If the

⁸⁵ This same analysis is applicable to all other contexts in which decisions regarding the defense of the case are allocated, by law, to the defendant rather than the attorney. As a practical matter, most decisions (other than those regarding the plea) concern issues that arise at trial, such as whether to be tried by a jury and whether or not to testify.

standard for decisional competence to plead guilty is not set too high, these persons would not be needed to serve as formal surrogate decision-makers. However, by serving these facilitative and monitoring functions, this adjunctive participation would provide the margin of safety that is currently lacking in cases involving mentally disabled defendants.

VI. CONCLUSIONS

This paper has focused on one central theme—the critical normative issue raised by current practice in cases involving defendants with mental retardation is whether these defendants are receiving adequate legal representation. As a practical matter, the procedures for assessing and judging the competence of defendants with mental retardation must be designed and administered to enhance the competence of *counsel*.

The low rate of referral for pretrial forensic evaluation raises the possibility that some defendants with mental retardation who “should” be found incompetent are now being convicted. The more significant problem, however, is that lawyers are probably providing inadequate representation to the much larger number of marginally competent defendants whose disabilities can be counteracted by skillful interviewing and counseling. This problem can be ameliorated by providing thorough forensic assessment and consultative assistance, by appropriately trained clinicians, in any case involving a defendant with significantly subaverage intellectual abilities, and by drawing on the services of trained representatives for the persons with mental retardation.

When viewed from this perspective, the controversy regarding the correct “test” for competence to plead guilty comes into clearer focus. To the extent that guilty pleas by defendants with mental retardation raise concerns about the reliability of the admissions embedded in the pleas, these concerns can be ameliorated by assuring that counsel is able to make an informed judgment about the reliability of the defendant’s acknowledgments of guilt and by assuring that courts carefully scrutinize the factual foundation for these pleas. Judicial sparring over the correct “test” for competence to plead guilty tends to obscure the real problem.

Guilty pleas by defendants with mental retardation (or other decisions regarding the defense or disposition of the case) are also problematic due to doubts about the defendants’ capacity for “autonomous” decision-making. Put simply, the issue is how the law should deal with decision-making by marginally competent defend-

ants who assent to the advice of their attorneys even though they are not able to understand all of the relevant considerations. Resolution of this issue depends on what steps are thought to be necessary to assure that decisions being made are in the defendants' best interests. A "default" rule against guilty pleas (or against waiver of other constitutional rights) would often *not* be in these defendants' best interests; this is why a demanding standard of decisional competence is undesirable, at least in the absence of a procedure for surrogate decision-making. However, uncritical acceptance of simple "assent" in these circumstances is also undesirable in light of the significant danger of ill-considered legal advice. Some form of adjunctive participation by designated representatives for defendants with mental retardation, together with careful judicial monitoring of these decisions, would provide necessary incentives for improved legal representation.