



Recognizing and Handling Problems of Incompetent Deaf Defendants Charged with Serious Offenses

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The determination of competence to stand trial is a procedural fairness matter that affects a far greater number of defendants than any other forensic mental health matter. Fitness for trial requirements are intended to prevent those considered too mentally retarded or psychotic from standing trial. A significant percent of prelingually deaf defendants suffer from a different etiological form of incompetence (Table 1).

Prelingual deafness refers to deafness that occurs before 3 years of age. Individuals with this condition cannot use hearing to learn language. As a result, most of them grow up having severely constricted vocabularies and understanding of English grammar. Thus, their incompetence consists of markedly impaired linguistic capacity and/or functioning resulting in a lack of basic knowledge of legal terminology, social ethics, and conventional mores. It is the defendant's social/cognitive/linguistic mental state, not the defendant's deafness per se, that creates legal dispositional problems when these deaf individuals are charged with felonies. Although not mentally retarded, these defendants are similar to incompetent persons who are mentally retarded with respect to the fact that they are unlikely to ever be restored to competence. However, in many cases they are capable of standing trial if certain adjustments to the legal process are undertaken to mitigate against the linguistic/cognitive deficits caused by their prelingual deafness.

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TABLE 1
Primitive Personality: Surdophrenia

Diagnostic criteria for primitive personality (At least three of the following criteria must be present)

A. A meager or total absence of knowledge of sign language, English, or a foreign language.

B. Corollary to the above, those with Primitive Personality are functionally illiterate, i.e., they read at grade level 2.9 or below as measured by a standardized educational achievement test, preferably the appropriate battery of the Stanford Achievement Test.

C. A history of little or no formal education.

D. A pervasive cognitive deprivation involving little or no knowledge of such basics as what the U. S. Constitution is, Social Security, how to make change, pay taxes, follow recipes, plan a budget, how to function on a job, etc.

E. A performance IQ score of 70 or above.

Background Information

The initial U.S. Supreme Court decision, *Dusky v. U.S.*¹ which defined the legal standard for competence to stand trial, was intended to protect those who were mentally ill or mentally retarded from being convicted because of a flawed criminal process. In *Dusky*, the defendant's previous conviction was overturned in order that Dusky receive a pretrial competency assessment. In the process, he was treated with Thorazine for his schizophrenia and eventually returned to stand trial as competent.

An elaborate set of procedural safeguards defined by court precedents govern the process of pretrial competence, referral, and restoration to competence.² More than a decade following the *Dusky* opinion, the U.S. Supreme

¹The standard for competence to stand trial was defined by the U.S. Supreme Court in 1960 as "whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and he has a rational as well as a factual understanding of the proceedings against him." *Dusky v. U.S.* U.S. 403 (1960). Dusky had been prescribed Thorazine prior to trial. He remained at Springfield Hospital, a federal forensic hospital, for 4 months undergoing pretrial competence assessment. Initially, the trial court concluded that he was competent to stand trial because he was "oriented to time and place." He was found guilty of kidnaping and attempted rape and sentenced to 45 years in prison. On appeal, the Supreme Court rejected the lower court's definition of competence to stand trial and remanded the case, offering its own definition. Dusky was eventually found competent to stand trial and was found guilty, though the second time he was sentenced to 20 years with possibility of parole in 5 years.

²The competence decision is determined by the trial court judge, who in his or her discretion can hold a pretrial court hearing on the matter. The standard that the court employs is the "beyond a reasonable doubt" criterion. The court judge, prosecutor, or defense attorney can raise the issue of a defendant's fitness for trial. However, there needs to be a bona fide doubt, such as prior history of mental hospitalization, prior traumatization, or prior diagnosis of a mental disorder; see *Drope v. Missouri*, 420 U.S. 162 (1975). A competence hearing is not prosecutorial; it is protective of the trial process. A defendant must comply with the competency assessment. A defendant's attorney's obligation to investigate "implausible" and possibly delusional alibi can wait for the results of a fitness assessment. Finally, in some cases psychotropic medication can restore and maintain a defendant's competence, i.e., being on medication is not a bar to competence to stand trial.

Court in *Jackson v. Indiana*³ recognized the dispositional challenges of restoring a deaf defendant precluded from trial owing to severe linguistic deficits and resulting mental confusion. In that opinion, the Supreme Court reviewed the competence of Theon Jackson. The *Jackson* opinion required that a court referral for restoration of an incompetent defendant must be made to the “least restrictive treatment alternatives available” and that the duration of commitment must bear some reasonable relation to the condition for which the individual was committed. The Supreme Court indicated that an indefinite commitment as incompetent would be inappropriate considering the nature of the criminal charges filed against the defendant.⁴

Thus, the Court acknowledged in *Jackson* the problems inherent in the disposition of defendants incompetent owing to irreversible deficits in linguistic and mental functioning. In the period following the *Jackson* opinion, there has been little progress in treatment interventions to restore the competency of prelingually deaf defendants.⁵ Forensic hospital treatment providers are generally displeased with court decisions that lead to the indefinite commitment, (i.e., “warehousing” treatment) for sociolinguistically incompetent prelingually deaf defendants. Prosecutors, sensitive to community concerns about releasing violent and dangerous persons, are sometimes content to have such defendants confined indefinitely to state hospitals. Thus, they often fail to object to such decisions on the part of judges. It is primarily for this reason that the Supreme Court decision in *Jackson* has not been adequately implemented.

The Role of the Americans with Disabilities Act (ADA)

In accord with the judiciary’s interpretations of the Americans with Disabilities Act (ADA), defendants are “impaired” in their linguistic skills under the act if they do not speak or adequately understand English (or a comparable lan-

³*Jackson v. Indiana*, 406 U.S. 715 (1972). In its opinion, the Supreme Court ruled that “Indiana cannot constitutionally commit the Petitioner for an indefinite period simply on account of his incompetency.” The Court was unanimous in its belief that he was committed inappropriately without expectation of release. The Court held that the nature and duration of the commitment bear some reasonable relation to the purpose for which the individual is committed.” The mere finding of criminal charges is not enough. The implications of this opinion were twofold: (1) a referral to a state hospital facility for those adjudicated not competent for trial may be set aside if an outpatient community placement for treatment can restore a defendant’s competence without risk to the community at large; and (2) persons suffering irreversible incompetence for trial may not be permanently committed as incompetent. Alternatives such as civil commitment and/or dropping charges must be considered.

⁴In that case, the Court was faced with Mr. Theon Jackson, a 27-year-old deaf man whose only means of communication was very limited sign language. Mr. Jackson was accused of two separate counts of robbery. He was found not competent to stand trial on the basis of his essentially nonexistent communication skills resulting from his lack of hearing and his cognitive deficiency. Mr. Jackson was committed to the Department of Mental Health for treatment to restore him to competence. Mr. Jackson was recognized by mental health professionals to be unlikely that he would develop communications skills sufficient to be found competent to stand trial. In essence, according to the law of the day, Mr. Jackson faced a life sentence in a state mental hospital without being found guilty of stealing \$9. The U.S. Supreme Court agreed with the uneasy mental health practitioners who indicated that Mr. Jackson should not be indefinitely committed to a mental hospital. The Court held that unless it could be shown that the probability existed that he could regain his competence for trial with treatment, Mr. Jackson should be released from confinement in a mental hospital.

⁵M. Vernon *et al.*, *The Miranda Warnings and the Deaf Suspect*, 14 *Behav. Sci. & L.* 121–35 (1996).

guage) because of deafness.⁶ The ADA requires that “reasonable accommodation” be provided these defendants. Because of the ADA, such accommodation is not an option of the court but the law of the land. However, it is important to note that most prelingually deaf defendants do not require radical alteration of the criminal trial process to be accommodated, although some clearly do.

The Deaf Community

The deaf community comprises a minority culture with its own language, American Sign Language (ASL), and its own unique traditions. A heterogeneous mixture of persons make up this community, such as proficient lip readers, advocates of a separate deaf culture, and deaf persons who function within the majority culture of hearing persons. There also exist deaf persons who because of their prelingual profound hearing loss, resultant stimulus deprivation, and impoverished educational attainment are unable adequately to understand English and/or to substitute ASL or finger spelling in order to achieve sufficient comprehension to be competent to stand trial. A small but significant percentage of the deaf population is permanently incompetent to stand trial. These individuals have been described in the literature as having Primitive Personality Disorder or Surdophrenia (Table 1).

Primitive Personality (Surdophrenia)

Because of their linguistic disability, Primitive Personality Disordered persons, a subpopulation of deaf people, are severely cognitively deprived, psychologically naive, and immature (see Table 1). They are often impulsive and given to explosive outbursts. They are persons having poor language, an inadequate general fund of knowledge, constricted educational achievements, poor or nonexistent work history, disturbed family relationships, etc. They suffer from a poverty of content, social alienation, and often are unable to complete a course of action. They are likely to have infantile defense mechanisms such as projection of blame onto others, and they frequently experience substance abuse and legal troubles. Such individuals represent between 5% and 15% of the prelingually deaf population.⁷

A provocative theory concerning the etiology of Primitive Personality Disorder has been offered by psychiatrist, Barbara Haskins, who has indicated that the disorder may be the result of a dysfunctional “avoidant” or disconnected dyad created in the infant/parent relationship.⁸ She noted that it may be that children who develop Primitive Personality Disorder have a deficit in their ability to code autobiographical memory. Specifically, there is a failure in the child’s ability to co-construct, with the parents’ help, a memory of narrative describing what happens in their life. Without this essential narrative

⁶S. Dubow & S. Geer, *Legal Rights: The Guide for Deaf and Hard of Hearing People* 15–45 (1992).

⁷M. Vernon & J. F. Andrews, *The Psychology of Deafness: Understanding Deaf and Hard of Hearing People* 138–39 (1990).

⁸B. Haskins & L. J. Raifman, *Primitive Personality Disorder*. Paper presented at the Breakout IV Conference, Chicago, IL (May 2, 1996).

memory they have difficulty developing a sense of self identity. As a consequence, these persons have very poor expressive language capacity and fail to recognize linguistic and social rules and responsibilities.

Primitive Personality Disordered defendants also pose a difficult long-term treatment habilitation task. Whereas therapy for most mental patients is primarily a matter of returning the patient to previous levels of functioning, with the defendant suffering from Primitive Personality is a matter of raising the individual well beyond any stage of development previously achieved. This is often an overwhelming psychological, educational, and vocational task involving the total socialization process.⁹ In many cases, it is not feasible even with many years of intensive instruction.

The most tragic Primitive Personality cases are those who live dependently with their parents until the parents die in old age or become too feeble to maintain the home. Suddenly these previously overprotected, defenseless deaf adults, often in their thirties, forties, or fifties, face two severe traumas. One is the loss of the only people in the world with whom they have had any sort of deep human relationship. At the same time, they must face trying to cope with a job and independent living, two experiences for which they are not even minimally prepared. The result is often a psychotic break. Even without a psychosis, such persons are frequently placed in mental hospitals, partly because there is no alternative facility for them. In other instances, they are confined in the correctional system because of their impulsive behavior, substance abuse, naivete, or exploitation by others.

The diagnostic category of Primitive Personality includes, but is not limited to, feral deaf people. These are deaf individuals who never attended school or had any significant education and have not been exposed to sign language or English. Such persons grow up to have no functional language, i.e., they are essentially nonverbal other than for simple mime and pointing. However, to be subsumed under the diagnosis of Primitive Personality, they must not be mentally retarded as measured by a performance IQ test. A small minority of these deaf persons may also be aphasic or "autistic-like."¹⁰

Primitive Personality Disordered deaf defendants are incompetent to stand trial specifically because they lack adequate linguistic development or the general knowledge to communicate with their attorneys, to understand court proceedings, and/or to comprehend the charges against them.¹¹ Despite this in-

⁹See *supra* note 7, at 138–39.

¹⁰*Id.*

¹¹Research in the United States, England, and Scandinavia has identified a type of deaf patient who has extreme educational deprivation, very little understanding of language or sign language, inadequate socialization, and a generally psychologically barren life. The result is gross cognitive immaturity and severe cognitive deprivation. See T. Basilier, *Surdophrenia: The Psychic Consequences of Congenital or Early Acquired Deafness. Some Theoretical and Clinical Considerations*. 40 *Acta Psychiatrica Scandinavica Supplementum* 362–74 (1974); Roy R. Grinker, Sr., *Psychiatric Diagnosis, Therapy, and Research on the Psychotic Deaf: Final Report*, Grant no. RD 2407 S, Social and Rehabilitation Service, Department of Health, Education, and Welfare (1969). The report is available from Dr. Grinker, Michael Reese Hospital, E. S. Levine & E. E. Wagner, *Personality Patterns of Deaf Persons: An Interpretation Based upon Research with the Hand Test, 4 Perceptual & Motor Skills Monograph Suppl.* 39 (1974); J. D. Rainer et al. eds., *Family and Mental Health Problems in a Deaf Population* (1963); and M. Vernon & J. F. Andrews, *supra* note 7, at 137–38.

competence, such individuals are often tried and sentenced to prison.¹² At other times, plea bargains are made without the deaf defendant's understanding and/or knowing approval, even though such defendants ostensibly agree to the proceedings by signing the necessary documents. This segment of the deaf population will usually sign any paper a person in authority asks them to sign, even though they have no concept of its contents.¹³

At present, our criminal justice system is not designed to deal effectively with Primitive Personality Disordered persons. Compounding their communication difficulties are (1) the abstract legal concepts that need to be communicated but which are not part of the vocabulary of ASL, and (2) the different syntaxes of English and American Sign Language. Terms such as "plea bargain," "right to an attorney," "jury," "admissibility of evidence," "attorney/client privilege," etc., have to be re-conceptualized, role-played, mimed, and approximated in the sign language because no actual signs exist in ASL for these and many other words and concepts. Hence, significant content is lost or misrepresented in the interpreting process.

Because the legal system is unable to accommodate those with Primitive Personality Disorder, in some cases such individuals have, in effect, a license to act as they choose without the consequences of standing trial and being punished. At other times, as indicated earlier, they are plea-bargained without their understanding, found guilty despite their incompetence, or committed indefinitely to a state hospital despite being neither psychotic nor mentally retarded based on current DSM-IV criteria. In addition, they represent a legal liability to their caretakers or supervisors who have a responsibility to protect them from self-harm and can be held liable for the damage these clients cause to others.

Primitive Personality Disorder: A Case Presentation

The following case exemplifies the forensic issues posed by deaf defendants with Primitive Personality Disorder. Donald Lang is congenitally deaf due to prenatal rubella.¹⁴ Growing up on the streets of Chicago, Donald never attended school nor did he have any exposure to sign language. Thus, as an adult he had no means of linguistic communication, i.e., he knew no English, no sign language, could not talk, and was unable to read or write. Donald was an adult without a verbal symbol system—without language. Obviously his is a rare human condition.

As a teenager, Donald started hanging around the loading docks in a wholesale produce market where the teamsters would pay him to load and unload their trucks. Being extremely "macho," Donald enjoyed this physical work, the male comradeship, and the money. All went well for several years. Then

¹²Rainer et al. *id.* Rainer et al. labeled these persons Primitive Personalities. A Norwegian psychiatrist, T. Basilier, independently described the same condition, calling it Surdophrenia. *See*, Basilier, *supra* note 11.

¹³*See supra* note 5, at 000.

¹⁴*People v. Lang*, 26 Ill. App. 3rd 648 (1975) 325 N.E. 2d 305 (1975); *People v. Lang*, 62 Ill App. 3rd 688 (1978) 378 N.E. 2d 1106 (1978).

three life-shaping events occurred: First, Donald's mother died when he was 19, leaving no one who loved or supervised him. At about the same time, the men on the docks introduced Donald to alcohol and to sex with prostitutes. He began drinking heavily and frequenting a rundown bar known primarily as a place where prostitutes and their "Johns" met for sexual liaisons.

In 1966, Donald was charged with killing a prostitute.¹⁵ A psychologist diagnosed him as incompetent to stand trial owing to mental retardation. The court sent Donald to a hospital for the mentally retarded. After working with him for 4 years, the hospital staff realized he was not mentally retarded. However, the staff were unable to teach him either English or sign language, at least one of which he needed to know in order to be declared legally competent to stand trial. By then the key witnesses in the case had died or disappeared. Donald's incompetence and the death of these witnesses led to the charges being dropped. In 1970, Donald was released.¹⁶

Donald returned to Chicago and resumed his work at the produce market. Soon he began seeking sexual partners at the same bar where he had previously picked up prostitutes. The hotel next door served as the setting for sexual liaisons that began in the bar. One night in 1971, Donald took a prostitute to the hotel and checked into a room with her. An hour later he left, returning the room key to the desk clerk. Others who used the room that evening noticed nothing irregular. However, a day or so later, a couple noticed a foul odor. Upon opening the closet they discovered the dead body of the prostitute Donald had taken to the room. The woman had been stabbed and choked.

The case was highly publicized because this was the second time Donald, referred to in the newspapers as a "deaf mute," had been charged with killing a prostitute. Donald's attorney, citing the Illinois Supreme Court decision in the first case, advised his client to stand trial. Donald was convicted and sentenced to 14 to 25 years in prison. Four years later the conviction was overturned on the ground that it was "constitutionally impermissible, absent trial procedures, to effectively compensate Donald for his disabilities." In 1981, Donald was again declared mentally unfit to stand trial for the 1971 murder. The issue then became whether or not Donald had a mental disorder that caused him to be a danger to himself or others. If not, he would have to be released. The court, in this case, decided Primitive Personality Disorder was a mental illness. Consequently, Donald was involuntarily committed to a mental hospital to be taught sign language and made competent.

Donald Lang's hospitalization as mentally ill was extraordinary because neither the DSM-IV nor its predecessors recognizes Primitive Personality as a mental disorder, nor does it list any similar condition. In fact, only the few psychiatrists and psychologists who are specially trained and experienced in deafness are aware of the condition of Primitive Personality Disorder.

A few years after his commitment, it became apparent that Donald would never learn sign language sufficiently to be competent for trial. Despite that, he has now been held either in jails or in hospitals for 25 years as a result of his commitment stemming from the second alleged crime in addition to the 5

¹⁵See *supra* note 6, at 123-24.

¹⁶E. Tidyman, *Dummy* 135 (1974).

years he was hospitalized as an incompetent defendant for his first offense. At age 53, Donald has spent well over half his life confined without a valid trial to prove his guilt or innocence. Because he is a Primitive Personality Disordered deaf defendant whose problem is confounded by an aphasic-type learning disability, Donald is permanently incompetent. He cannot and never will be able adequately to understand the charges against him, nor will he ever be able to participate in his own defense.

Methodology

The importance of correctly determining competence in the prelingually deaf defendant, especially those with Primitive Personality Disorder, is illustrated in 26 homicide cases involving deaf defendants. These cases were part of the senior author's forensic practice during the years 1960 to 1996. The evaluations were made at the request of criminal defense lawyers, states' attorneys, or, in a few cases, psychiatric facilities. The cases were from various jurisdictions including Maryland, California, Illinois, Florida, Maine, Minnesota, Virginia, Oregon, Arizona, Ohio, and North Carolina. As part of the evaluations, demographic, psychiatric, and legal histories were also identified.

These cases do not represent a random sample in the statistical sense. However, we feel that the group is reasonably typical of deaf defendants charged with murder.

Results

In 12 of these 26 cases, the deaf defendants clearly had the sociolinguistic type of incompetence resulting in the diagnosis of Primitive Personality Disorder (Table 2). Seven defendants were borderline, i.e., a case could be made for incompetence on the aforementioned grounds, but the diagnosis was not clear-cut. Of the remaining defendants, one was moderately mentally retarded, three were psychotic, and one had brain damage. Only two were definitely competent to stand trial.

Obviously, if linguistic competence to stand trial should have been a major issue in 24 out of the 26 cases (92%) of this group of deaf defendants, competence is deserving of close attention by forensic experts, judges, and lawyers who may be involved in such cases. This is especially critical because the kind of incompetence many deaf defendants have involves a disorder unfamiliar to most persons involved in the justice system.

We examined in detail the disposition of the cases of the 12 defendants who were clearly incompetent owing to the severe sociolinguistic deficits of Primitive Personality Disorder (Table 2). In two of the cases (3 and 12) the murderers had confessed; in two others (4 and 10) their cases involved overwhelming evidence of guilt. In these four cases the charges were dropped and the individuals released. Although incompetent, because they were not psychotic or mentally retarded, there were no grounds on which to hospitalize them and they could not be tried. In seven of the cases (1, 2, 5, 6, 7, 9, and 10), the defendants were either found guilty or plea-bargained despite the fact that they were clearly incompetent owing to sociolinguistic deficits and/or Primitive

Personality Disorder. One (case 8) was treated as a juvenile, found guilty, but placed in a hospital. These 12 cases demonstrate that when the incompetence was recognized by the court, the guilty party was generally released, plea-bargained, or found guilty. None of these dispositions represent justice for socio-linguistically incompetent deaf defendants.

Legal Implications of the Primitive Personality Diagnosis

We propose that DSM-IV's eventual successor acknowledge Primitive Personality as a mental disorder. Such a finding should facilitate an appropriate

TABLE 2
Demographic Data of the 12 Homicide Cases

Case	Reading level as measured by Stanford Achievement Test	Level of sign language skill	Performance IQ	Competence opinion	Disposition of charges
1 ^a	Illiterate, answered randomly on most of reading test	None	90–100 range	Incompetent	Charges dropped
2	Grade level 2.5	Poor	79	Incompetent	Plea bargain
3	Grade level 2.8	Poor	99	Incompetent	Charges dropped
4	Grade level 2.2	Poor	93	Competent, then incompetent	Charges dropped
5	Grade level 2.4	Poor	104	Incompetent	Life in prison
6	Grade level 1.2	Poor	72	Competent	Guilty
7	Grade level 2.1	Fluent	104	Competent	Guilty
8	Grade level 2.5	Below average	70	Incompetent	Incompetent due to mental illness
9	Grade level 1.1	None	100	Incompetent	Plea bargain
10	Grade level 1.9	Poor	80	Incompetent	Charges dropped
11	Grade level 1.9	Below average	78	Incompetent	Case in progress
12	Grade level 2.8	Fair	115	Incompetent	Charges dropped

^aThe defendant in Case 1 was initially found incompetent and the charges dropped after he had been imprisoned several years. Upon release, he was charged with a second murder. In this case, the court recognized Primitive Personality Disorder as a mental illness, which caused the individual to be a danger to others, and he was hospitalized.

adjudication of incompetence to stand trial by the courts, given the multidimensional nature of certain deaf defendant's impairments. It would help solve the initial injustice, that of misdiagnosis and mislabeling of deaf Primitive Personality defendants as competent to stand trial. Acceptance of the diagnosis by DSM-IV's successor and by the mental health community would also increase access for these persons to mental health services such as individual therapy, case-management services, group homes, supervised housing behavioral interventions, and other alternative placements and/or treatments.

Primitive Personality Disorder Inappropriate as a Basis for Civil Commitment

The use of civil commitment to deprive prelingually deaf incompetent defendants of their liberty is inconsistent with the fundamental intent of civil commitment. This flawed solution frequently occurs because the community does not have the ability to evaluate the prelingually deaf defendant's communication skills relative to competency to stand trial but, at the same time, does not want to release a defendant who may be a danger to others. In such cases, mental hospitals act as warehouses, protecting the community, while offering the false impression that the defendant is in treatment. Perhaps a better placement would be maintenance services for irreversibly deaf Primitive Personalities in existing facilities that currently provide group living homes for Primitive Personalities and other dependent deaf people not charged with criminal offenses. Such facilities are analogous to half-way houses for groups such as ex-mental patients, addicted persons in recovery, those under house arrest, etc. In some cases the tendency to dispose of deaf defendants in state hospitals is a compromise between the need to safeguard the community from the criminal deaf defendant and the need to provide adequate placement for those defined as Primitive Personalities.

As noted earlier, the U.S. Supreme Court initially confronted the challenge of Primitive Personality in 1972 in *Jackson v. Indiana*.¹⁷ Justice Blackman wrote that an incompetent defendant cannot be held for more than a reasonable amount of time to find out if he is going to be restored to competence. Continued commitment must be justified by progress toward the goal of regaining the defendant's competence for trial. Further, the Court indicated as follows:

Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's in-

¹⁷See, *Jackson v. Indiana*, 406 U.S. 715 (1972), at 740–41. The American Bar Association Criminal Justice Mental Health Standards review noted that the judicial response to permitting legal proceedings for a defendant considered to be incompetent to stand trial varied. The Model Penal Code noted, "The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to the trial and without the personal participation of the defendant." Section 406 (1962). In some jurisdictions the finding of incompetence suspends all proceedings both against and by the defendant.

competency. . . . Some states have statutory provisions permitting pretrial motions to be made or even allowing the incompetent defendant a trial at which to establish his innocence, without permitting a conviction. We do not read this Court's previous decision to preclude the states from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel.¹⁸

*A Solution to the Three-Horned Dilemma:
Establishing a Flexible Court Procedure*

As just noted, both courts and commentators have stated the desirability of permitting some proceedings to go forward despite the defendant's incompetence. In fact, some states have statutory provisions permitting pretrial motions to be made or even allowing the incompetent defendant a trial at which to establish his innocence, without permitting a conviction.

We do not interpret the Court's decision in the *Jackson* case to preclude all states from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel.¹⁹ As described in its review, the American Bar Association Criminal Justice Mental Health Standards recognized as a "three-horned dilemma" the problems associated with criminal pretrial commitment, incarceration, or involuntary civil commitment of persons we have depicted as suffering from Primitive Personality Disorder:

. . . if it (the state) tries and punishes the defendant despite his lack of competency to stand trial, he had been denied due process; if it commits him until he is competent to stand trial, which, if he is permanently incompetent, he will never be, he has in effect been punished without trial; and if it finds him incompetent to stand trial yet is not allowed to commit him, he may, as a practical matter, have been given carte blanche to commit other crimes.²⁰

Previous disposition alternatives for the deaf defendant suffering with Primitive Personality Disorder have failed to provide appropriately for the defendant or the community, and have undermined the integrity of the criminal justice system's process. We believe the solution to this situation is found by adapting the criminal trial adjudication process to the psycho-sociolinguistic and linguistic capacities of the defendant while at the same achieving the due process requirements of the Constitution. An initial step has been taken in those jurisdictional opinions noted above which have allowed flexibility in court procedures.

¹⁸*Id.*

¹⁹*Id.*

²⁰Gobert, *Competency to Stand Trial: A pre- and post-Jackson Analysis*, 40 *Tenn. L. Rev.* 659 (1973) cited in ABA Criminal Justice Mental Health Standards, at 7-233.

For example, several jurisdictions allow for pretrial motions,²¹ while other states have allowed procedural changes that go further. Specifically, the ABA Mental Health Standards cited several jurisdictions, including Illinois, as permitting an “innocent only” trial or “discharge hearing.” However, a provision in the Illinois statute enables prosecutors to civilly commit for an indefinite stay within a mental hospital such deaf Primitive Personality Disordered individuals who are not mentally ill even though they do not meet the usual requirements for hospitalization.²²

In another approach used in Philadelphia, deaf relay interpreters have been employed during the court trials of certain deaf people. According to psychiatrist Annie G. Steinberg, who is experienced with deaf individuals, research is needed to determine the effectiveness of this intervention. She indicates that it is presumptive that the use of relay interpreters benefits the defendant’s comprehension of the legal process because of problems associated with translation of legal concepts into ASL. She feels the further translation required with relay interpreters may create communication difficulties that undermine the original purpose of the intervention.²³

In the past, several innovative approaches to resolve this problem have been suggested, but judges have not chosen to implement them. For example, a proposal offered by the ABA Criminal Justice Mental Health Standards reviewers provided that, if the state does prove its case against a defendant charged with a violent crime, that defendant may be subject to a “special commitment” proceeding, one with greater protection for the community than that of ordinary civil commitment.²⁴

Example of a Flexible Court Procedure in the Case of a Deaf Defendant

Rather than a conventional summary, we offer an example of the specific kinds of alterations that can be made in trial procedures which would enable otherwise incompetent deaf defendants to function as competent in their own trials. The case we cite is one in which both authors participated as experts.

²¹See, American Bar Association Standards for Criminal Justice, *First Tentative Draft, Criminal Justice Mental Health Standards* (Washington, DC, 1983). The ABA Criminal Justice Mental Health Standards reviewed a case decrying the failure of the court to continue proceedings for a defendant found not competent. Four defendants were charged with murder of a fellow military prisoner 10 years after the occurrence of the event. The court dismissed the indictment of three of the defendants on the grounds that their constitutional right to a speedy trial had been compromised. The fourth defendant had been found incompetent to stand trial. Applying the rule that all proceedings had to be suspended, the fourth defendant was committed to a hospital as incompetent, and charges were not dropped. See, *U.S. v. Barnes*, 175 F. Supp. 60 (S.D. Cal. 1959), at 7–226.

²²Albert Spikes, *Competence to stand trial and the low functioning deaf defendant*. Paper presented at the Breakout IV Conference, Chicago, IL (May 3, 1996).

²³Annie G. Steinberg, Comment made during presentation of *Competence to stand trial and the low functioning deaf defendant*. Presented at the Breakout IV Conference, Chicago, IL (May 3, 1996).

²⁴See American Bar Association Standards for Criminal Justice, *supra* note 21, at 7-231–32. Most commentators agree that the present system of dealing with permanent incompetents as apparently mandated by *Jackson* is unacceptable; 7-232–33.

Lyman Kirkwood was a young deaf man who came home one night after a heavy bout of drinking and cocaine use. His live-in girlfriend was furious and an altercation ensued. She then departed from the apartment, leaving Mr. Kirkwood to supervise their pre-school-aged son. The youngster started fussing and resisting the angry father's discipline. In a drugged rage, Mr. Kirkwood inflicted fatal head wounds on the child.

It was our opinion with a reasonable degree of psychological certainty that Mr. Kirkwood was competent to stand trial if, and only if, the specific conditions set forth below were followed: He had a rational and factual understanding of the nature and intent of the proceedings against him and had sufficient ability to consult his lawyer with a reasonable degree of rational understanding. This level had been achieved only after 9 months of intense work with Mr. Kirkwood by professional deaf staff, interpreters, and the authors. The locale was a state mental hospital.

Mr. Kirkwood does not suffer from a mental disorder that precludes him from standing trial. He does not experience psychotic, irrational thinking, or otherwise inappropriate affective behavior. He is not mentally retarded (WAIS-R Performance IQ = 78). However, he does have significant linguistic and cognitive deficits that impair his capacity to interact with hearing people. For example, Mr. Kirkwood knows the meaning of many words and shows limited capacity to understand abstract concepts. He comprehends the basic roles and responsibilities of the judge, the defense attorney, the state's attorney, and others. He understands the impact of being found guilty, not guilty, and not criminally responsible for the charges. Mr. Kirkwood is aware that he is being charged with a serious offense.

The defendant's background includes being born into a hearing family who never learned American Sign Language (ASL). Thus, his communication with them is severely constricted, his speech is unintelligible, and he cannot read. Because his family does not know sign language, his only communication with them is through pointing, mime, and iconic gestures.

Over the years Mr. Kirkwood was conditioned, as are many similar deaf youth, to rely upon the influence and direction of hearing people whom he trusted, rather than learning to think critically for himself. Further, he has learned compensation techniques as a means to cover for his inability to communicate orally or in writing. For example, Mr. Kirkwood relies upon the "deaf nod," smiling, shaking his head "yes," or providing neutral "Rogerian-type" expressions that tend to suggest he understands when he does not. Using this passive coping style, Mr. Kirkwood does not assert himself. For example, he does not indicate when he does not understand, nor does he ask an interrogator to repeat a question or rephrase it in a manner that he can comprehend.

Mr. Kirkwood is almost totally vulnerable to the suggestions of others he trusts. Thus, he would make a poor witness at a trial under the traditional rules of court procedure. For all these reasons, and to help ensure his continued competence at trial, the following recommendations were made:

1. Offering Mr. Kirkwood a court interpreter would not, in itself, cure his deficit in comprehension. For example, if he were asked in the context of the alleged offense, "At the moment you entered the bedroom, who

picked up the baby?," it would be essential for the interpreter to know the intent of the question so as to use the correct sign for "picked up." For this reason, the interpreter would be required to be familiar with Mr. Kirkwood's psychological and communication deficits, some of the facts in the case, and to establish rapport with him prior to the trial. Further, Mr. Kirkwood would have to be given the opportunity to have the benefit of the use of a deaf relay interpreter who would define especially difficult questions in concrete terms. Court procedures would have to be drastically slowed to allow for all this interpreting and to permit him time to process the information.

2. The interpreter would need to see the crime scene, the interrogation room, and other physical environments of the murder and police follow-up in order to accurately depict or paint the picture in ASL for the defendant. This is because Mr. Kirkwood and most deaf persons with Primitive Personality Disorder would identify situations in an idiosyncratic visual manner, e.g., "a big fat officer with a mustache," rather than referring to "Officer Smith." It would also be necessary to rely upon diagrams and photographs of the crime scene, etc., to facilitate understanding further.
3. It would be essential to use an expert witness to educate the judge about deaf culture. This would enable the court to require the attorneys who might question Mr. Kirkwood to phrase questions to him in a nonintimidating, understandable manner, e.g., eliminating the use of compound sentences, conditionals, and other syntactical structures that are usually impossible for those with Primitive Personality Disorder to understand.
4. The court would need to accept the fact that the trial process may well take as much as four or five times longer than usual owing to the extra time required for interpreting and clarification for a deaf defendant with Mr. Kirkwood's limited communication.
5. Mr. Kirkwood would need someone to sit beside him and to watch the proceedings, preferably a deaf person, identified as a special needs consultant. This consultant would keep his or her eye out for Mr. Kirkwood's reactions. In this way, if Mr. Kirkwood became confused or lost attention, the court would be aware of it and take appropriate action. For example, in a Florida homicide case, the judge, who at a pretrial competency hearing had declared the defendant competent, reversed himself midway in the trial because it was evident the defendant could not respond coherently to the questions asked of him.²⁵
6. Reading sign language is a far more fatiguing process than listening to speech. It requires much greater concentration. Therefore, it was recommended that Mr. Kirkwood be permitted to take periodic "eye breaks," analogous to conventional coffee breaks in order to permit him some "down" time and to give the interpreters a rest.
7. It was recommended that Mr. Kirkwood's "mental blocks" not be regarded as an incapacity or unfitness for trial, but as a psychological im-

²⁵Steven Holmes, *Appellant v. State of Florida*, Appellee 83-1055 District Court of Appeals of Florida, Third District (August 12, 1986).

pediment to the process. This impediment is best coped with by the use of court recesses during which Mr. Kirkwood could consult with hospital staff who are experienced in calming him and enabling him to respond to the rigors of the courtroom process. From past experience during his hospitalization, it was anticipated that the "mental block" episodes would be characterized by repeated statements to the effect that he wants to go home, to be free of the circumstances of a court trial, and so forth.

8. Further, it was recognized that in law many procedural issues, such as evidentiary hearing on the admissibility of his statement to the police, the validity of testimony of witnesses against him, such as that of his girlfriend, etc., may occur without Mr. Kirkwood's direct involvement or full understanding. In a case in which Mr. Kirkwood denied guilt and in which no one directly observed his son being injured, circumstantial evidence might not be sufficient to find a prima facie case for first degree murder. Mr. Kirkwood's competence to stand trial or lack thereof does not preclude the attorneys from defining pretrial motions, etc.

These adjustments in court proceedings are time-consuming and expensive. However, neither the inconvenience nor the cost compares to that involved in years of confinement in prison or other state facilities or to releasing a defendant who, from all appearances, is guilty of murder. As can be seen in Table 2, these have frequently been the consequences when courts have failed to make adjustments such as those described in Mr. Kirkwood's case.