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SO CRAZY HE THINKS HE IS SANE: THE COLIN FERGUSON TRIAL AND THE COMPETENCY STANDARD

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The bizarre trial of Colin Ferguson was an obscene spectacle, a cross between bear-baiting and some weird skit in which inmates take over a mental institution and perform a play, the theme of which is a trial. In early December of 1994, we spent our final efforts as Mr. Ferguson's trial counsel in an unsuccessful attempt to convince Judge Donald E. Belfi that Mr. Ferguson was not mentally competent to stand trial—that his mental illness was so severe that he could not assist in his own defense in any meaningful way.

A defense psychiatrist diagnosed Mr. Ferguson as suffering from delusional disorder, persecutory subtype, a classic psychosis well-recognized by the Bible of psychiatric disorders, the Diagnostic and Statistic Manual ("DSM"). Persons so afflicted suffer from firm, fixed, immovable and false beliefs, colored by an overwhelming concern that people are plotting against them. Although the prosecution's own psychiatrist agreed that Mr. Ferguson could be delusional, he was not sure and wanted to do more tests (which Mr. Ferguson would not permit). In any event, opined the prosecution's psychiatrist, "Mr. Ferguson is very, very paranoid."

Not that one needed a medical degree to ascertain Mr. Ferguson's extreme mental illness; his past actions, including the Long Island Railroad massacre itself, seemed ample proof of that. During the period of time we spent with Mr. Ferguson and his other attorneys, we witnessed his irrational belief that there existed multiple conspiracies against him. For example, during his incarceration at the Nassau County Jail, Mr. Ferguson accused many of the officials of various crimes against him, varying from stealing his

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[††] William Kunstler died on September 4, 1995. This is one of the last articles he wrote and to his dying day he felt that the Ferguson case made a mockery of the criminal justice system.

commissary to plotting against his life. At one point, he even targeted us as the conspirators. Mr. Ferguson stated that we staged a phony emergency at the jail in order to have him released from the hospital, where he had been admitted for an alleged eye injury. Mr. Ferguson claimed that we staged this emergency to subvert his medical treatment and increase the possibility of his becoming blind, thereby making it impossible for him to identify the actual Caucasian perpetrator of the Long Island incident.

Mr. Ferguson's mental problems did not occur only subsequent to the shooting; his paranoia existed prior to the event and included as alleged conspirators those outside the legal realm. For example, he accused officials at Adelphi University and Nassau Community College of conspiring to deprive him of an education. He accused the guards at the Worker's Compensation Board of being members of a "violent cult group of Hebrew Israelites led by Yahweh Ben-Yahweh," and claimed that their actions should be viewed as "attempted murder of a foreign 'black' born Negro." Mr. Ferguson also accused black civil rights leaders of conspiring to take his car. Considering his long-standing history of paranoia, it is not difficult to conclude that Mr. Ferguson lacked the mental competence to represent himself in court.

Despite the overwhelming weight of evidence, on December 8, 1994, Judge Belfi found that Mr. Ferguson could understand the nature of the charges against him and could assist in his own defense. After this ruling, Mr. Ferguson discharged us as his counsel, struck his insanity defense and proceeded *pro se* on the theory that a mysterious "white Caucasian" gunman committed the massacre.

Unfortunately, the people's response to Mr. Ferguson's case has been outrage that Ferguson was allowed to represent himself, rather than outrage that he was being tried at all while in a paranoid and delusional state. In response to cases such as this one, various proposals have been made by legislators and pundits alike to create another tier of competency—competency to proceed *pro se*—that would be higher than simple mental competency to stand trial. But the problem of the Colin Ferguson trial was *not* that Mr. Ferguson was representing himself; that was only a symptom of the problem. The problem was that Ferguson was psychotic and should not have been tried in the first place.

Even if the courts had forced counsel upon Mr. Ferguson over his objections, this case would not have been appreciably saner; the incorporeal existence of the mysterious white gunman, who inhabited only Mr. Ferguson's

sick and deluded imagination, could not have been made any more apparent through the efforts of counsel. Of course, the trial may have looked better in the eyes of the public if the defendant was seen and not heard, but the content would have been the same. The trial would still have been choreographed by a madman. A lawyer would have merely served as the fig leaf.

Thus, any proposal to force counsel on an otherwise competent defendant should also include a proposal to transfer the power to select a defense from the defendant to the attorney. However, for a variety of reasons, practical, theoretical, and legal, such a proposal would be ineffective, unwise, and unconstitutional.

Most discussions of allowing the attorney to interpose a defense over the objections of the client occur in the same context as Mr. Ferguson's—a defendant who is too crazy to accept an insanity defense; the client who is so crazy that he thinks he is sane. But as a practical matter, it is impossible to force a psychiatric defense on an unwilling defendant. A defendant cannot be compelled, by his own counsel, to consult with, confide in, or even meet with a psychiatrist.[3] Mr. Ferguson, after an initial meeting with the defense psychiatrist, refused to see him or speak with him again, making a complete examination impossible.[4] Mr. Ferguson refused to meet with the prosecution's psychiatrist under any circumstances. When Judge Belfi ordered a second psychiatric examination under NYCPL Section 730.30, Mr. Ferguson refused to come out of his cell[5].

In New York, as well as in many other jurisdictions, a major statutory impediment exists with a psychiatric defense when the defendant refuses to

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[3] A defendant can, however, be ordered to undergo a psychiatric examination, in a federal proceeding, before a competency hearing takes place. 18 U.S.C. § 4241(b); *cf.* United States v. Huguenin, 950 F.2d 23, 27 (1st Cir. 1991), *reh'g denied*, 953 F.2d 633 (1st Cir. 1992) (per curiam) (trial court may order defendant's psychiatric examination without defendant's consent); United States v. Watson, 1 F.3d733, 735 (8th Cir. 1993) (per curiam) (trial court does not violate the defendant's rights by ordering competency examination on defense counsel's motion where defendant refused to assist counsel and failed to appear before trial). A defendant may also be compelled to consult with, confide in or meet with a psychiatrist via a psychiatric examination in New York state courts, as well. *See* Matter of Custody of Sloan, 84Misc.2d 306, 307 (N.Y. City Fam. Ct. 1975). *See also* People v. Atwood, 101 Misc.2d 291 (N.Y. Sup. Ct.. 1979); People v. Whitfield, 97 Misc.2d 236 (N.Y. Co. Ct. 1978).

[4] Mr. Ferguson explained that the only reason he met with the defense psychiatrist in the first place was that he mistakenly believed that the psychiatrist was the eye doctor whom he had requested.

[5] N.Y. CRIM. PROC. LAW § 730.30.

talk to a psychiatrist. For example, if a court "finds that the defendant has willfully refused to cooperate fully in the examination . . . it may preclude introduction of testimony by a psychiatrist or psychologist concerning mental disease or defect of the defendant at trial."[6] Furthermore, if the defendant has other evidence of mental illness besides such expert testimony, it is admissible, but "the court must instruct the jury that the defendant did not submit to or cooperate fully in the pretrial psychiatric examination ordered by the court . . . and that such failure may be considered in determining the merits of the affirmative defense." [7]

This section, like comparable sections in the codes of other states, seeks to prevent a defendant from gaining an unfair advantage by providing the defense psychiatrist with information not available to the prosecution's expert. However, the section applies equally to a defendant who refuses to be interviewed by *any* psychiatrist. Thus, a defendant wishing to reject a psychiatric defense maintains the ability to cripple such a defense pursued by his attorney.

Even if these hurdles are somehow surmounted, a further *practical* problem is raised by imposing counsel and a defense upon an unwilling defendant. A defendant has an absolute Fifth,[8] Sixth,[9] and Fourteenth[10] Amendment right to take the witness stand in his own defense. This right cannot be waived by counsel, nor can it be abridged by the States.[11] As a result, a defendant in Mr. Ferguson's position who is forced to accept a lawyer and a defense not of his choosing, could take the witness stand and proclaim his sanity, while condemning the insanity defense as a trick cooked up by his lawyer and the court. Defense counsel would be powerless in these circumstances and the prosecution, during cross-examination of the defendant, would be able to further undermine the defense that neither the prosecutor nor the defendant wanted in the first place. Such a proceeding would be a mockery of the adversarial system.

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[6] N.Y. CRIM. PROC. LAW § 250.10(5) (McKinney's 1994).

[7] *Id.*

[8] U.S. CONST. amend. V.

[9] U.S. CONST. amend. VI.

[10] U.S. CONST. amend. XIV.

[11] Rock v. Arkansas, 483 U.S. 44 (1987).

There are also serious *theoretical* problems in stripping a defendant of the right to choose his or her own defense. It is not uncommon for a competent, rational and fully informed defendant to reject the "best" defense. A defendant has, and should have, the right to reject a defense that runs contrary to a deeply held ethical, religious, or political viewpoints. From the narrow perspective of the criminal defense lawyer, Dr. Martin Luther King, Jr. would have had a stronger legal argument pleading insanity rather than arguing that his civil disobedience was justified.[12] Similarly, the "best" defense was not forwarded by the young people who burned the American flag atop of the Times Square recruiting station to protest the Gulf War.[13] These defendants should have mounted a technical argument that the government could not prove they knew that flag to be government property, rather than asserting a defense of necessity. Even Jesus would have been better off to have pleaded diminished capacity based on excessive exposure to the desert sun than to remark "thou hast said it" when asked if he was the son of God. As the New York Court of Appeals has held, a "criminal defendant is entitled to be master of his own fate[,] and 'respect for individual autonomy requires that he be allowed to go to jail under his own banner if he makes the choice "with eyes open."'"[14]

Lastly, there exists good reason to doubt that any legislative body has the *power* to create a higher standard for self-representation than for simply standing trial. In *Godinez v. Moran*,[15] the Supreme Court held that the standard for self-representation and for standing trial were one and the same. The *Dusky* formulation states that a defendant is competent to stand trial when he 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."[16] In *dicta*, however, the *Godinez* Court did say that the "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation."[17] It is on the slender

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[12] *See* Walker v. City of Birmingham, 388 U.S. 307, *reh'g denied*, 389 U.S. 894 (1967).

[13] *See* United States v. Eichman, 957 F.2d 45 (2d Cir. 1992).

[14] People v. Vivenzio, 62 N.Y. 2d 775, 776 (4th Dept. 1984).

[15] __ U.S. __, 113 S.Ct. 2680 (1993).

[16] Dusky v. United States, 362 U.S. 402, 402 (1960).

[17] *Godinez*, 113 S.Ct. at 2680.

reed of this *dictum* that proponents of "competent to stand trial but not competent to proceed *pro se*" rely.

This *dictum*, in the context of the holding of *Godinez*, means only that the States may require a higher standard for competence generally, but not different standards for standing trial and waiving counsel. Indeed, *Faretta* and it progeny have made it clear that the right to self-representation is a fundamental, Sixth Amendment right belonging to the accused. Therefore, once a defendant is found competent to stand trial, he or she is competent to waive or invoke all of the other rights guaranteed by the Constitution, such as the right to testify, to confront witnesses, and to be present at all material proceedings. A legislative body has no right or power to legislate in a fashion that makes it more difficult for a defendant to invoke one of these rights.

The Constitution of the State of New York also bars legislation in this area. Article I, Section 6 provides that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel."[18] Thus, New York's constitution *explicitly* guarantees the right of self-representation.[19] In *People v. Reason*,[20] the Court of Appeals held, as a matter of State constitutional law, that the standard of competence to waive the right to counsel is the same as the standard to stand trial.[21]

In light of these considerations, we do not recommend a bifurcated standard for competency. However, our experience representing Mr. Ferguson, as well as other mentally ill defendants, has led us to conclude that the present definition of competency to stand trial can and must be overhauled.

Popular wisdom maintains that clearly guilty defendants routinely and improperly use the excuse of mental illness to evade justice. The reality, however, is quite different. As demonstrated by the Ferguson case, psychotic, delusional individuals can be dragged through show trials that are mockeries of justice. The Ferguson case is a good example of just how insane one can be and yet be found competent to stand trial.

New York's present single standard for determining competency is also inadequate. Section 730.10 of New York's Criminal Procedure Law holds a

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[18] N.Y. CONST. art. I, § 6.

[19] People v. Rosen, 81 N.Y. 2d 237 (1993).

[20] 37 N.Y. 2d 351 (1975).

[21] *Id.* at 371.

person incompetent to stand trial only when he or she, "as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense."[22] In practice, this standard has proven woefully inadequate to prevent such debacles as the Ferguson case. If the defendant knows he is in a courtroom and can tell the difference between a judge and a grapefruit, he is deemed competent to stand trial.

Colin Ferguson was clearly incapable of assisting in his own defense *in any meaningful way*. He lacked the capacity to trust any attorney enough to actually and rationally evaluate the advice the attorney provided. Ferguson perceived everyone who tried to help him as partaking in a conspiracy against him. Hence, everything that he was told was filtered through the dark, murky and distorting lens of his own paranoia. Colin Ferguson was so delusional and so paranoid that he was incapable of knowing what was in his own best interests, let alone of acting in accordance with his own interests.

Section 730.10 of New York's Criminal Law describes an incapacitated person as follows:

> "Incapacitated person" means a defendant, who as a result of mental disease or defect, is *substantially impaired in his or her ability to* understand the nature of the proceeding against him/her or to assist in his/her own defense.[23]

This standard is a functional, utilitarian one. It focuses on the practical difficulties of representing a defendant whose mental state is so aberrational that it substantially interferes with the conduct of the defense. The views of defense counsel about his or her client's impairment would be entitled to considerable weight. The "substantially impaired" standard would direct the experts' testimony to determining the degree the defendant's mental illness affects his ability to make rational judgments about his own defense. The requirement that the impairment be "substantial" prevents spurious or contrived attempts to avoid trial. Furthermore, an ample body of case law exists that can be imported from N.Y. Penal Law § 40.15, which defines "substantial" in the context of mental impairment[24].

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[22] N.Y. CRIM. PROC. LAW § 730.10 (McKinney's 1994).

[23] *Id.* (emphasis added).

[24] N. Y. PENAL LAW § 40.15 (McKinney's 1994).

There is an inherent tension between our interest in having a trial and our interest in insuring that the trial actually be a reasoned search for the truth, rather than an exercise in mental illness. It is our hope and belief that the "substantially impaired" standard, if conscientiously applied by the courts, will provide the balance necessary to avoid further debacles like the Colin Ferguson case. While the standard would give due deference to the defense counsel's reportage of the difficulty in reasoning with his or her client, it will also give the courts tools to prevent ambitious prosecutors and deranged defendants from turning our courts into theaters of the insane.