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“UNSPEAKABLE JUSTICE”:¹ THE OSWALDO MARTINEZ CASE AND THE FAILURE OF THE LEGAL SYSTEM TO ADEQUATELY PROVIDE FOR INCOMPETENT DEFENDANTS

INTRODUCTION

On January 3, 2005, a man in James City County, Virginia, was leaving for work in the early hours of the morning.² He noticed what appeared to be a body lying on the side of the road.³ He called the police, who discovered the body of sixteen-year-old Brittany Binger. She had been attacked, raped, and strangled to death on January 2.⁴ Binger’s body was found in a position that made it almost appear as if she had been posed: her arms were stretched out to each side, making a cross, and her pants were partially pulled down.⁵ The police concluded that her assailant attacked her “from behind, covering her mouth with one hand while cutting off her air supply with the other.”⁶ Her assailant raped Binger and left her for dead, leaving with some of her possessions.⁷

The investigation began immediately, and important evidence was gathered in the first two days. The scene contained valuable clues: semen found inside Binger’s body, DNA under her fingernails,

1. This title was taken from an episode of CNN’s “Paula Zahn Now,” which detailed the Oswaldo Martinez case. *Paula Zahn Now: Unspeakable Justice* (CNN television broadcast Aug. 24, 2005) (transcript available at 2005 WLNR 13337923) [hereinafter *Paula Zahn Now*].

2. Commonwealth Attorney Mike McGinty provided most of the details about this case and investigation. He assisted in this project by providing insights into some of the legal issues involved.

3. Interview with Mike McGinty, Commonwealth Attorney for Williamsburg and James City County, in Williamsburg, Va. (Nov. 23, 2005). This Note’s description of the investigation is based on the interview with Mr. McGinty unless otherwise noted. For a thorough discussion of the crime and the investigation, see Paul Duggan, *The Unspeakable*, WASH. POST, Aug. 2, 2005, at C1.

4. Sue Lindsey, *Man Charged with Rape, Murder Deemed Not Ready To Stand Trial*, VIRGINIAN-PILOT, Sept. 30, 2005, at B4; *Paula Zahn Now*, *supra* note 1.

5. Interview with Mike McGinty, *supra* note 3.

6. *Court Will Judge if Man Can Be Tried; Deaf Mute Illiterate Suspect Charged with Raping and Killing Teen*, RICHMOND TIMES-DISPATCH, July 23, 2005, at B4 [hereinafter *Court Will Judge*].

7. Lindsey, *supra* note 4.

and a juice bottle left next to her body which contained the same DNA.⁸ A tracking dog was brought in to follow the killer's scent. The dog led police first to a nearby convenience store, from which police obtained a security tape, and then to a local bar, and even to a specific booth.⁹ The bartender, when questioned, knew only that there was a "Mexican" who often sat there.¹⁰ Police tracked down the man about whom the bartender was talking and found Oswaldo Martinez.¹¹ Police took a picture of Martinez and added his picture to the growing list of suspects.¹² The original suspect list was enormous. Police obtained DNA samples from nineteen different men, none of which matched the DNA taken from the body.¹³

A few weeks into the investigation, police officers, who initially had trouble viewing the surveillance tape from the convenience store because it was encoded, were finally able to view the tape.¹⁴ The first thing they noticed was the same man whom they had found in the bar, Oswaldo Martinez, buying a bottle of juice that exactly matched the bottle found next to the body.¹⁵ Police then noticed that the picture of Martinez, which was taken during the investigation and only two days after the attack, showed a long scratch on the left side of his face.¹⁶ Brittany Binger had skin under her fingernails.¹⁷ Nonuniformed police officers then went back to the local bar, waited while Martinez drank a beer, and took the empty bottle when he left. They swabbed DNA from the bottle and sent it to the lab for testing.¹⁸ A few days later, the results came back. The

8. Keith Rushing, *For Now, Deaf-Mute Beats Trial*, DAILY PRESS (Newport News, Va.), Sept. 30, 2005, at A1; Interview with Michael McGinty, *supra* note 3; Paula Zahn *Now*, *supra* note 1.

9. Paula Zahn *Now*, *supra* note 1.

10. Interview with Mike McGinty, *supra* note 3; Paula Zahn *Now*, *supra* note 1.

11. Interview with Mike McGinty, *supra* note 3.

12. *Id.*; Paula Zahn *Now*, *supra* note 1.

13. Interview with Mike McGinty, *supra* note 3.

14. *Id.*; Paula Zahn *Now*, *supra* note 1.

15. See Duggan, *supra* note 3; Paula Zahn *Now*, *supra* note 1.

16. Interview with Mike McGinty, *supra* note 3; Paula Zahn *Now*, *supra* note 1.

17. Interview with Mike McGinty, *supra* note 3.

18. *Id.* This type of search is constitutional and does not violate the Fourth Amendment because Martinez, when he was finished with the bottle, no longer had a reasonable expectation of privacy in its contents. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that search of garbage set out on curb was constitutional because owner no longer had a reasonable expectation of privacy in the contents of the garbage once it was set out in

DNA from the beer bottle was the same DNA that had been taken from Brittany Binger's body.¹⁹

Police then arrested Oswaldo Martinez, a thirty-three-year-old illegal immigrant from El Salvador.²⁰ This would seem to be an easy case for the prosecution: "[a]n outrageous crime and an obvious suspect."²¹ Martinez was indicted for the robbery, rape, and murder of Brittany Binger on May 19, 2005.²² The evidence has been described as "overwhelming" against Martinez.

Oswaldo Martinez is, however, an illiterate deaf-mute with virtually no communication skills.²³ It is likely that he has been deaf since birth or shortly thereafter.²⁴ He knows very little sign language and does not even seem to have many "home signs."²⁵ Police used his brother when trying to interrogate Martinez, and found that even family members have surprisingly little ability to communicate with him. Martinez has survived since he arrived from El Salvador by completing various labor jobs, usually learning what to do after having a supervisor point to other workers who were performing similar tasks, and imitating their behavior.²⁶

Once Martinez had been formally charged, his attorneys quickly objected to the continuation of the case, based on the defendant's

public where anyone could access it).

19. Rushing, *supra* note 8; Interview with Mike McGinty, *supra* note 3.

20. Lindsey, *supra* note 4; Rushing, *supra* note 8; Interview with Mike McGinty, *supra* note 3.

21. Paula Zahn Now, *supra* note 1.

22. *Jury Indicts Man on Murder, Rape Charges*, RICHMOND TIMES-DISPATCH, May 20, 2005, at B4.

23. Andrew Petkofsky, *Capital-murder Suspect Unable To Stand Trial; A Judge Rules that the Man Charged in James City Teen Girl's Death Is Incompetent*, RICHMOND TIMES-DISPATCH, Sept. 30, 2005, at B7; Paula Zahn Now, *supra* note 1.

24. See Duggan, *supra* note 3 (describing Martinez as "[e]nveloped in silence since birth"); Keith Rushing, *Lack of Language Skills Will Delay Suspect's Trial; Oswaldo Martinez, Who Can't Hear or Speak, Is Accused of Raping and Killing a James City Teenager in 2005*, DAILY PRESS (Newport News, Va.), Apr. 6, 2006, at C2 (describing Martinez's limited communication skills).

25. "Home signs" are signs created specifically for one person. Sometimes home signs are created if a deaf person wants to communicate something but has not yet learned the sign for it. See Maurice Belote, *Communication Systems To Last a Lifetime: Implications and Strategies for Adolescents and Young Adults*, RESOURCES (Cal. Deaf-Blind Servs.), Summer 2002, at 1, 2. In Martinez's case, because he never formally learned sign language, virtually all of his communication consists of home signs. Interview with Mike McGinty, *supra* note 3.

26. See Duggan, *supra* note 3.

inability to communicate with them,²⁷ and argued that he was not competent to stand trial. A competency hearing was held on September 29, 2005. The prosecution, although not arguing that Martinez was competent in his present state, did present a strong case that he both understands and can communicate more than it may at first appear.²⁸ For example, the prosecution noted that while being interrogated, Martinez recognized a picture of Binger, and subsequently imitated sexual acts using anatomic dolls.²⁹ He also wrote down "\$60" in relation to the dolls, thus implying that he had paid Binger for sex.³⁰ This admission has even been called a confession on Martinez's part.³¹ Despite the prosecution's arguments, at the conclusion of the hearing a James City County judge found Martinez incompetent to stand trial because of his inability to communicate with his attorneys.³² Under Virginia law, he has to be reevaluated every six months to determine whether he remains incompetent.³³ In April 2006, Martinez had another competency hearing and was again found incompetent.³⁴ His attorney stated that his client had learned approximately 150 signs, but the clinical psychologist who is working with Martinez testified that he may never learn enough to be found competent.³⁵ He was reevaluated, and again found incompetent, in an October 2006 competency

27. VA. CODE ANN. § 19.2-169.1 (2004 & Supp. 2006) (providing that a defendant is incompetent to stand trial if he "lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense," and not requiring any determination as to the defendant's mental state or mental health in order to declare him incompetent).

28. See Petkofsky, *supra* note 23.

29. Interview with Mike McGinty, *supra* note 3.

30. Petkofsky, *supra* note 23; Interview with Mike McGinty, *supra* note 3.

31. See *Paula Zahn Now*, *supra* note 1. Whether Martinez could legally confess to the murder through gestures is an interesting issue but one that is beyond the scope of this Note. See generally ERNEST TIDYMAN, DUMMY 182-83 (1974) (reciting the story of a similar "confession" from deaf-mute suspect Donald Lang and noting the differing views on how to interpret the suspect's gestures and drawings).

32. Specifically, the Court found that "the defendant can not assist in his defense." *Commonwealth v. Martinez*, No. CR 050 14512-00 slip op. (Va. Cir. Williamsburg & James City County, Sept. 30, 2005); see also Lindsey, *supra* note 4; Petkofsky, *supra* note 23; Interview with Mike McGinty, *supra* note 3.

33. VA. CODE ANN. § 19.2-169.3 (2004 & Supp. 2006).

34. See Rushing, *supra* note 8 (mentioning reassessment of competency to be held April 5, 2006); Rushing, *supra* note 24 (discussing the April hearing at which Martinez was found not competent).

35. *Id.*

hearing. During this hearing, his psychologists reported that Martinez is making “great progress” but that he remains incompetent to stand trial.³⁶ Martinez’s next competency hearing is scheduled for May 2007.³⁷

In the meantime, Martinez has been fitted with a hearing aide, and he has been sent to Western State Hospital in Staunton, Virginia, to undergo a rigorous language-immersion program designed to teach him to communicate—either by spoken word or by formal sign language.³⁸ Martinez’s cooperation in learning to communicate may have a good deal to do with how much he does in fact understand about his situation. As a friend of Binger’s commented, “who’s to say he wants to learn how do to it? Because he knows—I know he [has] to know up in his head that, once he learns, he [is] going to die. And that’s all there is to it.”³⁹

Understandably, the community is outraged that this suspected killer might never face a jury.⁴⁰ At the same time, Martinez finds himself in an interesting and complicated legal situation; one that, this Note will argue, the legal system is unprepared to handle.⁴¹ Martinez cannot be held indefinitely, as this Note will discuss more thoroughly, nor can he be civilly committed because he does not have a mental illness, as required by the Virginia civil commitment

36. Danielle Zielinski, *Deaf and Mute Man Still Deemed Unfit for Murder Trial*, DAILY PRESS (Newport News, Va.), Oct. 12, 2006, at A1.

37. *Id.*

38. Amanda Kerr, *Court Can Hold Martinez Indefinitely*, VA. GAZETTE, Oct. 1, 2005, at 1A; Rushing, *supra* note 8; Interview with Mike McGinty, *supra* note 3.

39. *Paula Zahn Now*, *supra* note 1.

40. See, e.g., Tamara Dietrich, *Is It Right To Remain Silent?*, DAILY PRESS (Newport News, Va.), Apr. 9, 2006, at B5 (“Maybe if there were less evidence of guilt ... or some light at the end of the tunnel to sign-language competency, the frustration factor would ease. And maybe if there weren’t this gnawing feeling that Martinez might—just might—be a little savvier than he lets on.... The killing of a 16-year-old girl should not go unresolved because of a failure to communicate.”); *Paula Zahn Now*, *supra* note 1 (quoting Kristen Thurston, Binger’s friend, as saying “[t]here will never be justice for her. And that’s horrible.”).

41. See *Court Will Judge*, *supra* note 6 (noting that the judge has the “difficult job [of] balancing the community’s right to have justice served with Martinez’s right to due process”); see also Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 849 (“Deaf people with limited language skills present a dilemma that is not readily recognized by the legal system. They also present a dilemma that is not readily resolved by the legal system.”).

statute.⁴² He thus finds himself in "legal limbo"⁴³ where the charges against him cannot be resolved.

A defendant like Martinez who is found to be incompetent to stand trial not because of a mental disorder but because of a physical inability to communicate has been termed "linguistically incompetent."⁴⁴ While this is not a common disability, it is more common than one might imagine.⁴⁵ Regardless of what happens at Martinez's May 2007 hearing, therefore, his case is illustrative of serious gaps in the present judicial system in dealing with linguistically incompetent defendants, not only in Virginia, but also across the country. The Martinez case will be used throughout this Note to illustrate the gaps in the current law, to understand how those gaps affect defendants, and to examine what needs to be done to fill the gaps.

Part I of this Note will discuss the case of Donald Lang, a case that is very similar to Martinez's, in order to examine the difficulties involved in a case with a defendant who cannot communicate. Part II will analyze Supreme Court decisions in this area and the ethical and legal implications of requiring Martinez to learn to communicate for the purpose of having him face the death penalty for his alleged crime. Part III will analyze the current standards defendants must meet in order to be found competent to stand trial and the gaps those standards leave regarding linguistically incompetent defendants. Part IV will discuss what can be done with Martinez and with other defendants like him. Finally, this Note will conclude by discussing the failure of the legal system to account for

42. See *infra* notes 96-97 and accompanying text.

43. Bruce J. Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada*, 10 N.Y.L. SCH. J. HUM. RTS. 637, 680 (1993) (discussing defendants whose competency may be restored through medication).

44. The term "linguistically incompetent" refers to any finding of incompetency which is based on language deficiency absent any mental deficiency. The term is used mostly in literature regarding deaf defendants. It will be used throughout this Note to refer to defendants who are incompetent to stand trial and whose incompetency is based not on any mental retardation or mental deficiency, but rather on the inability to communicate with the outside world. For a discussion of linguistic incompetence and the various cases which have implicitly recognized its existence, see LaVigne & Vernon, *supra* note 41, at 903-13. See also Duggan, *supra* note 3; Paula Zahn Now, *supra* note 1.

45. See *infra* notes 180-91 and accompanying text.

defendants who cannot communicate and will offer suggestions for what can be done with future cases like *Martinez*.

I. THE "DUMMY":⁴⁶ THE STORY OF DONALD LANG

Donald Lang's case is remarkably similar to Martinez's story.⁴⁷ Lang's tale is one of an illiterate deaf-mute linked by circumstantial evidence to the brutal killing of a prostitute in the late 1960s.⁴⁸ Lang, like Martinez, knew only a few signs and was virtually unable to communicate anything other than his immediate physical needs.⁴⁹ Like Martinez, he was found incompetent to stand trial and ordered to a treatment center for the purpose of teaching him how to communicate.⁵⁰

Lang's case provides a helpful illustration of the legal system's failure to account for defendants like Martinez and Lang, who are not competent because of their inability to communicate, but who do not suffer from any type of mental deficiency. Lang's case also provides insight into what could potentially happen in Martinez's case, and into the long and difficult legal battle which is likely to ensue.⁵¹

Lang's case is especially interesting because Lang was actually tried while incompetent.⁵² When it became apparent that Lang would not be able to learn enough to communicate with his attorneys at any time in the near future, Lang's attorney, Lowell Myers, asked the court to take the case to trial, stating that he was waiving the defendant's right not to be tried while incompetent.⁵³ The court

46. Lang was known as the "dummy" in his neighborhood because of his communication difficulties. TIDYMAN, *supra* note 31; see also DONALD PAULL, FITNESS TO STAND TRIAL 116 (1993).

47. See PAULL, *supra* note 46, at 115.

48. See *id.* at 115-16.

49. *Id.* at 115.

50. *Id.* at 116.

51. See *id.* at 115, in which the author, one of Lang's defense attorneys, comments that "[Lang's] legal difficulties provide a case which embodies almost every issue surrounding [competency] which can be imagined."

52. *Id.* at 117.

53. *People ex rel. Myers v. Briggs*, 263 N.E.2d 109, 111 (Ill. 1970). Myers made several other motions at the same time, specifically, a motion that the indictment be dismissed because of the time elapsed since Lang's arrest and a motion to enter judgment on an earlier jury verdict regarding Lang's competency to stand trial. *Id.* These motions were also

refused to grant this order, leading one commentator to note that "[the law] was a neat trap, a *Catch-22* of jurisprudence.... [E]ven if the defendant was innocent, he had no right to prove it *because he was incompetent to stand trial*."⁵⁴ In the effort to protect his due process rights, therefore, the state was actually depriving him of his liberty without ever proving him guilty of *any* crime beyond a reasonable doubt.

In 1970, the Supreme Court of Illinois, after receiving a report from the mental institution to which Lang was committed that he was making no progress toward competency,⁵⁵ held that a defendant facing indefinite commitment should be given an opportunity to obtain a trial to determine whether he is guilty or should be released.⁵⁶ The court left it up to the trial court to determine the necessary procedures to ensure that Lang would be given "a reasonable opportunity to obtain the benefit of his constitutional rights."⁵⁷ The prosecution ended up dismissing the charges, however, because after five years its case had fallen apart due to lost evidence and a witness's death. Lang was released⁵⁸ but was again arrested later that same year for the murder of another prostitute. Under the holding in *People ex rel. Myers*, Lang was tried for this second crime despite his incompetence.⁵⁹ In January 1972, Lang was found guilty of murder and sentenced to fourteen to twenty-five years in prison.⁶⁰ The court, on appeal, noted that, in light of *Pate v. Robinson*,⁶¹ in which the U.S. Supreme Court held

denied. *Id.*

54. TIDYMAN, *supra* note 31, at 100 (emphasis in original); see also Bruce J. Winick, *Restructuring Competency To Stand Trial*, 32 UCLA L. REV. 921, 927 (1985) (noting that under current law, even if a defendant wishes to be tried while incompetent he cannot because he is incompetent to make that decision).

55. See *Briggs*, 263 N.E.2d at 110-12.

56. *Id.* at 113; see also *id.* (citing a 1953 British case, *Regina v. Roberts*, (1953) 2 All E.R. 340, in which the court allowed a full trial of a deaf-mute defendant before determining the fitness issue because the court feared that trying the issue of fitness first might result in detaining an innocent).

57. *Briggs*, 263 N.E.2d at 113.

58. PAULL, *supra* note 46, at 117; TIDYMAN, *supra* note 31, at 168.

59. PAULL, *supra* note 46, at 117.

60. *Id.*; see also TIDYMAN, *supra* note 31, at 265.

61. 383 U.S. 375, 377-78 (1966) (holding that court's failure to inquire into defendant's competency when the issue was raised violated defendant's constitutional rights to a fair trial).

that it was a violation of due process to try a defendant while incompetent, the decision by Lang's attorney, Lowell Myers, to go to trial could not be binding on Lang, who was not competent to participate in that decision.⁶²

The catch-22 that is inevitably created in this type of case arose when the state of Illinois, not wanting to release the defendant because he was accused of a serious and violent crime, tried to have him civilly committed.⁶³ In order to have Lang held, the state was required to show that he was dangerous,⁶⁴ which arguably would violate his presumption of innocence, because the only evidence of Lang's dangerousness was the same evidence which had previously been used against him at trial.⁶⁵ The state was also required to make a showing about Lang's mental health or ability in order to civilly commit him.⁶⁶ The exact showing the state was required to make, however, was constantly changing during the years when Lang's case worked its way through the courts. The appellate court in 1975 distinguished the question of fitness to stand trial, based on a mental or physical condition, from the question of competence, which "is a mental health term dealing with whether an individual should be committed to an institution or not."⁶⁷ For this reason, in two hearings in 1976, Lang was found unfit to stand trial,⁶⁸ but not civilly committable because he did not suffer from a mental disorder.⁶⁹ As one commentator has noted, the "situation of someone who is unfit to stand trial but is not subject to involuntary hospitalization [is one that the judge at the civil commitment hearing found]

62. *People v. Lang*, 325 N.E.2d 305, 309 (Ill. App. Ct. 1975); PAULL, *supra* note 46, at 117.

63. See PAULL, *supra* note 46, at 120.

64. *Id.*

65. *Id.* ("Thus, the state had to prove dangerousness to himself or others by [Lang] as a consequence of mental disorder. The major thrust of the prosecution's proof of Donald Lang's dangerousness consisted of going through the same evidence that had been introduced at his criminal trial"). Arguably, the use of an unproven crime to prove dangerousness violates due process, see *United States v. Salerno*, 481 U.S. 739, 763-64 (1987) (Marshall, J., dissenting) (arguing that pretrial detention based on a finding of dangerousness violates due process because it allows an untried indictment to serve as evidence of dangerousness); however, courts have allowed it.

66. See PAULL, *supra* note 46, at 124.

67. *Lang*, 325 N.E.2d at 311.

68. See *People v. Lang*, 391 N.E.2d 350, 352 (Ill. 1979).

69. *Id.* at 352-53; PAULL, *supra* note 46, at 124.

'perplexing' and reflecting 'serious gaps in the present Illinois law.'⁷⁰

In the years that followed, some of those gaps were filled. In 1979, the Supreme Court of Illinois collapsed the legal definitions of unfitness and mental illness somewhat, for determinations of civil commitment, but retained the dangerousness requirement. Citing a report of the Governor's Commission for Revision of the Mental Health Code of Illinois, the court stated that, "[t]he necessary requirement of dangerousness has been retained in the definition of one who is committable, but under this definition no longer need he be afflicted with a mental disorder."⁷¹ The court continued,

[h]ereafter, if a person is found unfit to stand trial, he should be considered mentally ill under the MHDD Code unless his unfitness is due to a solely physical condition. If that person also meets the dangerousness requirement of the Code, he should be considered to be "a person subject to involuntary admission."⁷²

Under this new standard, the state had Lang civilly committed.⁷³ The Supreme Court of Illinois noted also that the pending criminal

70. *Id.* Recognizing that unfitness does not equal incompetence, the law provides that a defendant who is unfit without a substantial probability of becoming fit within the year must be afforded a discharge (innocence only) hearing, released with all charges dropped, or subjected to a civil commitment hearing. If at that hearing, the defendant is not committed, he "shall be remanded to the court having jurisdiction of the criminal matter for disposition pursuant to subparagraph (1) [discharge hearing] or (2) [release] of this Section." 725 ILL. COMP. STAT. ANN. 5/104-23 (West 2006). In 1979, when Lang's case was before the Supreme Court of Illinois, the law, somewhat similarly, provided that "[i]f the defendant is not ordered hospitalized in such hearing, the Department of Mental Health and Developmental Disabilities shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include ... requiring ... treatment for his mental condition." *Lang*, 391 N.E.2d at 352. But as the Supreme Court of Illinois was nonetheless unsure what to do with Donald Lang based on that law, *see id.* at 353-56, neither it nor the current statute can be said to provide sufficient guidance.

71. *Lang*, 391 N.E.2d at 356.

72. *Id.*

73. PAULL, *supra* note 46, at 131. Lang later challenged his confinement on the theory that the definition of "mentally ill" was unconstitutionally vague under the statute that governed civil commitment and under the Supreme Court of Illinois's interpretation. The court rejected his argument, reasoning, in part, that the statute clearly applied only to "those mentally ill who pose a danger to the public or themselves." *People v. Lang*, 498 N.E.2d 1105, 1127 (Ill. 1986). For the civil commitment statute Lang challenged, see 91½ ILL. COMP. STAT. ANN. 1-119 (West Supp. 1979) (current version at 405 ILL. COMP. STAT. ANN. 5/1-119 (West 2006)).

charges did not have to be dismissed, whether or not Lang was ever found competent, because Lang had been found guilty by a jury, and while that conviction had been overturned, the state had offered enough evidence to show that he should not be released as an innocent man.⁷⁴ For that reason, "the due process issue inherent in holding pending charges indefinitely over one who will not have a chance to prove his innocence is not present in this case."⁷⁵ Donald Lang has now been confined for forty years without ever having been validly convicted by a jury of the charges against him.⁷⁶

Lang's case is a fascinating example of the dilemma posed by a defendant who is not competent to stand trial but who does not suffer from a mental disorder. The loophole that fails to account for defendants like Lang also currently exists in Virginia,⁷⁷ which could eventually allow Martinez to go free and to have, in essence, immunity from prosecution.

Although Lang's conviction was overturned because of the Supreme Court's holding that it violates a defendant's due process rights to be tried while incompetent, the Supreme Court has never, as discussed below, defined exactly how much a defendant needs to be able to assist in his own defense before he can be found competent. This question leaves open an argument that even defendants like Lang and Martinez may, in particular cases, be able to provide sufficient assistance.⁷⁸ Such an argument was not explored in the Lang case but might have allowed for a resolution of it—as it may yet in the Martinez case.

74. PAULL, *supra* note 46, at 131.

75. Lang, 391 N.E.2d at 358; PAULL, *supra* note 46, at 127.

76. Duggan, *supra* note 3. Had Donald Lang served the maximum sentence he was given after his 1972 trial, he would have been imprisoned for twenty-five years. See *supra* note 60 and accompanying text. He has therefore already served more time than he faced in prison when first awaiting trial.

77. Virginia law requires that in order to civilly commit a person, the state must make a showing that the person has a mental illness. See VA. CODE ANN. §§ 37.2-816 to -817 (2005). Martinez does not have a mental illness. One psychiatrist who examined him suggested that he might be slightly mentally disabled, Interview with Mike McGinty, *supra* note 3, although it is unclear to what extent this supposed mental disability is actually due to Martinez's inability to communicate his thoughts. The state has noted, however, that any mild retardation he may have would not be enough to civilly commit him. *Id.*

78. See *supra* Part IV.C.

II. THE LEGAL AND ETHICAL ISSUES RAISED BY FORCED TREATMENT OF A DEFENDANT

This Part will discuss the legal and ethical issues created by the mandatory treatment of a defendant like Martinez, and will argue that, for both ethical and legal reasons, the state will not be able to treat Martinez indefinitely,⁷⁹ thus leading to the conclusion that some other solution will have to be reached in order to resolve his case. First, pursuant to both state law and the Supreme Court's decision in *Jackson v. Indiana*,⁸⁰ Martinez cannot be held indefinitely if it becomes apparent that he cannot be restored. Second, there has been a realization that forced medication solely for the purpose of making a defendant competent to stand trial might raise ethical as well as due process concerns, and forced language learning can raise the same issues. Although the permissibility of forced language learning has never been addressed by the Supreme Court, the Court did decide, in *Sell v. United States*,⁸¹ the standard for determining when a state may forcibly medicate a defendant for trial. Third, the treating psychiatrists who work closely with Martinez, or with any defendant in his situation, are faced with serious ethical dilemmas when they are asked to testify as to his competency, knowing that he is facing the death penalty. Finally, pursuant to *Ford v. Wainwright*⁸² and the laws of Virginia, it is unlikely that Martinez will actually receive the death penalty if convicted; accordingly, the state should remove the possibility of the

79. The rest of this Note will be premised on the idea that Martinez will not be able to learn to communicate, even through sign language, well enough to be found competent to stand trial. This assumption is partly due to a belief that his psychiatrists will be unwilling to find him competent, see *infra* Part II.B.2, and partly due to the extreme difficulty Martinez will have in acquiring language at the age of thirty-three. Research suggests that "[t]he prime years for language acquisition—spoken or sign—are over around age five. Even highly intelligent and motivated deaf people will have a difficult time becoming fluent in [American Sign Language] as adults at age twenty-five." LaVigne & Vernon, *supra* note 41, at 861. Furthermore, even if Martinez reaches an adequate level of sign language, there are still innumerable problems associated with translating for a deaf client in the courtroom. For more on this topic, see generally *id.* In addition, even if Martinez is able to learn enough to assist in his trial, it is reasonable to think a case like this could arise again, a possibility illustrating the need for a change in the law.

80. 406 U.S. 715 (1972).

81. 539 U.S. 166 (2003).

82. 477 U.S. 399 (1986).

death penalty in order to ease the ethical dilemma that has been placed on Martinez's treating psychiatrists.

A. *The Legal Issue*

Jackson v. Indiana was a similar case to that of Martinez in that the defendant was a deaf-mute with little communication skill.⁸³ He was also thought to be mentally retarded and probably unable to ever learn the communication skills required to become competent to stand trial.⁸⁴ Jackson was charged with two separate robberies in which the total amount taken was nine dollars.⁸⁵ Because of his lack of communication skills and his mental deficiencies, Jackson was found incompetent to stand trial and was committed to the Department of Mental Health until he could be deemed "sane."⁸⁶ He could, therefore, under the trial court's ruling, be held virtually indefinitely, with no requirement that the state periodically review his progress to ensure that he was in fact becoming competent.⁸⁷ The Supreme Court overturned this ruling, holding that an incompetent defendant "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future."⁸⁸ If the court finds that it is not likely the defendant will attain competency in the foreseeable future, the state must hold him under civil commitment, or release him.⁸⁹

83. See 406 U.S. at 717.

84. *Id.* at 718-19.

85. See *id.* at 717.

86. *Id.* at 719. Demonstrating the classic struggle within the legal system to understand the difference between competency and sanity, the trial court remanded the case until such time as the defendant was found "sane" even though he had never been found insane. It is also notable that Jackson was condemned to the Department of Mental Health until he could face charges despite a psychiatrist's testimony that "Indiana had no facilities that could help someone as badly off as Jackson to learn minimal communication skills." *Id.*

87. See *id.* at 719, 727. Jackson's attorney appealed this ruling, noting that it amounted to a life sentence for his client, but the appeal was denied by the Supreme Court of Indiana. *Id.* at 719.

88. *Id.* at 738.

89. *Id.*; see also Grant H. Morris & J. Reid Meloy, *Out of Mind? Out of Sight: The Uncivil Commitment of Permanently Incompetent Criminal Defendants*, 27 U.C. DAVIS L. REV. 1, 9-33 (1993) (detailing the state-by-state legislative response to *Jackson* and concluding that twenty-eight states and the District of Columbia have responded inappropriately by circumventing or ignoring *Jackson's* rule).

Under Virginia law, Martinez can, in theory, be held indefinitely because he is charged with capital murder.⁹⁰ He can be held indefinitely provided that the following four conditions are met: first, he must be reevaluated every six months to determine his competency; second, he must continue to be found incompetent; third, the court must find “continued treatment to be medically appropriate”; and fourth, he must present “a danger to himself or others.”⁹¹ The best evidence the state could present to make a showing that Martinez is a danger to others is the same evidence that it would have used if he had gone to trial for the murder of Brittany Binger.⁹² Other than that evidence, however, there is no additional evidence that Martinez is a danger. He has never been in trouble with the law before for any violent behavior, and he has been a model student while in the care of Central State Hospital and Western State Hospital.⁹³ Martinez’s best chance to be released is to attack the “medically appropriate” prong of the statute. If, after being treated for a length of time, Martinez is not making sufficient progress so that it is likely that he will ever face a trial, his attorneys may argue that continued treatment is no longer medically appropriate.⁹⁴ They may argue that the state has had the opportunity to restore Martinez to competency, and that, failing to do so, the state has no choice but to release him or to civilly commit him, pursuant to *Jackson*. If this happens, Martinez effectively will have immunity from both the alleged murder of Binger as well as

90. See VA. CODE ANN. § 19.2-169.3(E) (2004 & Supp. 2006); see also Morris & Meloy, *supra* note 89, at 18 (concluding that statutes tying the permissible length of treatment to the crime charged violate *Jackson* and due process because the goal of holding an incompetent defendant is to restore competence, and “[a] defendant charged with a serious crime is not by that fact more difficult to treat or less responsive to treatment than a defendant charged with a less serious crime”); Duggan, *supra* note 3 (noting that Martinez has been charged with capital murder).

91. VA. CODE ANN. § 19.2-169.3(E) (2004 & Supp. 2006).

92. See *supra* notes 64-65 and accompanying text.

93. Interview with Mike McGinty, *supra* note 3. Martinez’s only prior run-in with the law occurred in 2004 when he was arrested for driving under the influence of alcohol. He pled guilty with the assistance of his brother and paid a fine, but was excused from mandatory alcohol counseling classes when it became apparent to those involved that he could not understand the class. *Id.*; see also Duggan, *supra* note 3.

94. See *Jackson*, 406 U.S. at 738 (holding that “continued commitment must be justified by progress toward [the] goal” of restoring the defendant to competency). If Martinez is not making progress, the state cannot continue to hold him.

any future crimes he might commit, assuming his communication skills remain unchanged.⁹⁵

If an offender cannot be restored to competency, the only way the state can continue to detain him is through a civil commitment proceeding.⁹⁶ In Martinez's case, however, this is not possible. Civil commitment under Virginia law requires that the state prove by clear and convincing evidence that "the person presents an imminent danger to himself or others *as a result* of mental illness."⁹⁷ As discussed, the state can present evidence of Martinez's dangerousness using the evidence they would present at trial. There has been, however, no mention of a mental problem on Martinez's part, and certainly no claim that the murder of Binger was *the result* of a mental illness. Because Martinez cannot be civilly committed,⁹⁸ he would have to be released if a judge finds that continued education is no longer "medically appropriate."⁹⁹

The state likely will not be able to hold Martinez indefinitely—probably not more than a few years—if he is unable to attain a sufficient level of communication to be found competent. This is true of almost any defendant like Martinez, because of the difficulties in learning language so late in life.¹⁰⁰ The state will then be forced to either come up with a new argument that he is in fact competent in his current condition, or agree to release Martinez.

With some minor variations, the laws of most states, as well as the federal law,¹⁰¹ mirror those in Virginia regarding both compe-

95. Interview with Mike McGinty, *supra* note 3.

96. *See Jackson*, 406 U.S. at 738 (noting that defendants who cannot be restored should either be civilly committed or released).

97. VA. CODE ANN. § 37.2-817(B) (West 2005) (emphasis added).

98. *See supra* note 77. Under Virginia law, Martinez could be civilly committed if the state could show that he is sufficiently mentally ill "as to be substantially unable to care for himself." VA. CODE ANN. § 37.2-817(B) (West 2005). Because there has been no showing that he is mentally ill, and no showing that he cannot care for himself—indeed, he was completely caring for himself before his arrest—he cannot not be committed under this prong of the statute either.

99. Interview with Mike McGinty, *supra* note 3.

100. *See supra* note 79.

101. In the federal system it is not clear whether Martinez would even qualify as incompetent. The federal competency statute, 18 U.S.C. § 4241 (West, Westlaw through Dec. 20, 2006), titled the "Determination of Mental Competency to Stand Trial," requires that the defendant be found to be suffering from a mental disease or defect in order to qualify him as incompetent to stand trial. In addition, in order to civilly commit a defendant found to be unrestorably incompetent in the federal system, the court would have to find that the defendant suffers from a mental disorder or defect. 18 U.S.C. § 4246 (2006).

tency and civil commitment law.¹⁰² In almost every state, once a defendant has been found to be incompetent without substantial probability that he will be restored in a reasonable period, state statutes require the state to either release the defendant, dismiss the charges against him, or civilly commit him.¹⁰³ The standards for

102. Variations include COLO. REV. STAT. § 27-10-102(5)(a) (2006) (allowing commitment of defendants who are "gravely disabled," but defining gravely disabled in terms of mental illness); CONN. GEN. STAT. ANN. §§ 17a-495(c), -498 (West, Westlaw through 2006 Feb. Reg. Sess.) (allowing commitment for those with "psychiatric disabilities," but defining psychiatric disabilities in terms of mental illness); IOWA CODE ANN. §§ 229.1(9), .6 (West, Westlaw through 2006 Reg. Sess. & 1st Extraordinary Sess.) (allowing commitment for anyone who is "mentally impaired" but defining mentally impaired in terms of mental illness and specifically excluding a finding of incompetency as being proof of mental illness); LA. CODE CRIM. PROC. ANN. arts. 641; 648(B)(3) (2003 & Supp. 2006) (requiring no separate civil commitment hearing because a defendant who is unrestorably incompetent is automatically committed; however, requiring a finding of a mental disorder for any initial incompetency determination); MONT. CODE ANN. §§ 53-20-102(5), -103 (West, Westlaw through 2005 Reg. Sess. of 59th Leg.) (permitting commitment of persons with developmental disabilities but defining developmental disabilities in terms of mental retardation); and TENN. CODE ANN. § 33-7-301 (2001 & Supp. 2006) (allowing "judicial hospitalization" of incompetent defendants but still requiring a finding of mental illness in order to hospitalize). Because all these variations define disabilities in terms of mental abilities, a case of linguistic incompetence in these states would likely have the same result as the Martinez and Lang cases in Virginia and Illinois.

103. Although the language used in each state statute varies, the practical effect of each of the cited statutes for an unrestorably incompetent defendant would be that he would be released with pending charges, released and have the charges dismissed, or civilly committed. ALA. CODE § 22-52-31 (West, Westlaw through 2006 Reg. Sess.); ALASKA STAT. § 12.47.110(b) (West, Westlaw through 2005 legislation); ARIZ. REV. STAT. ANN. § 13-4517 (West, Westlaw through legislation effective June 28, 2006); ARK. CODE ANN. § 5-2-310 (West, Westlaw through 2006 1st Extraordinary Sess. 85th Gen. Assem.); CAL. PENAL CODE § 1370(e) (West Supp. 2006); COLO. REV. STAT. § 16-8-114.5(2) (2006); CONN. GEN. STAT. ANN. § 54-56d(m) (West, Westlaw through 2006 Feb. Reg. Sess.); D.C. CODE § 24-531.04(c) (4) (2001); FLA. R. CRIM. P. 3.213(b) (West Supp. 2007); GA. CODE ANN. § 17-7-130 (2004); HAW. REV. STAT. § 704-406(3) (West, Westlaw through 2005 legislation); IDAHO CODE ANN. § 18-212(4)-(5) (West, Westlaw through 2006 2d Reg. Sess. 58th Leg.); IND. CODE ANN. § 35-36-3-4 (West, Westlaw through 2006 2d Reg. Sess.); IOWA CODE § 812.9(3) (West, Westlaw through 2006 Reg. Sess. & 1st Extraordinary Sess.); KAN. STAT. ANN. § 22-3303(1) (West, Westlaw through 2005 Reg. Sess.); KY. REV. STAT. ANN. § 504.110(2) (LexisNexis 1999 & Supp. 2005); LA. CODE CRIM. PROC. ANN. art. 648(B)(3) (2003); ME. REV. STAT. ANN. tit. 15, § 101-B(4)(A) (West, Westlaw through ch. 552, 2006 2d Reg. Sess. 122d Leg.); MD. CODE ANN., CRIM. PROC. § 3-106(a)-(b) (LexisNexis Supp. 2006); MICH. COMP. LAWS ANN. § 330.2031 (West 1999); MINN. R. CRIM. PROC. 20.01(6) (West 2006); MISS. UNIF. CIR. & COUNTY CT. R. 9.06 (2005); MONT. CODE ANN. § 46-14-221(3) (West, Westlaw through 2005 Reg. Sess. 59th Leg.); NEB. REV. STAT. ANN. § 29-1823(3) (West, Westlaw through 1st Reg. Sess. 99th Leg. (2005)); NEV. REV. STAT. ANN. § 178.460(4)(d) (West, Westlaw through 2005 73d Reg. Sess. & 22d Spec. Sess.); N.H. REV. STAT. ANN. § 135:17-a (West, Westlaw through 2006 Reg. Sess.); N.J. STAT. ANN. § 2C:4-6(b) (West 2005); N.M. STAT. ANN. § 31-9-1.4 (West, Westlaw through Laws effective May 17, 2006 2d Reg. Sess.); N.Y. CRIM. PROC. LAW § 730.70 (Consol. 1996); N.C. GEN. STAT. § 15A-1003, -1008

civil commitment overall require that the defendant suffer from a mental disorder or mental illness,¹⁰⁴ thereby creating "legal limbo"¹⁰⁵

(2005); N.D. CENT. CODE § 12.1-04-08(2) (West, Westlaw through 2005 Reg. Sess.); OHIO REV. CODE ANN. § 2945.39 (West 2006); OKLA. STAT. tit. 22, § 1175.6(A)(4) (West, Westlaw through 2006 2d Extraordinary Sess.); OR. REV. STAT. ANN. § 161.370(9) (West, Westlaw through Reg. Sess. 2005); 50 PA. STAT. ANN. § 7403(d) (2001) (dismissing charges only); R.I. GEN. LAWS § 40.1-5.3-3(i)(3)(v) (West, Westlaw through Pub. L. ch. 441 of the 2005 Jan. Sess.); S.C. CODE ANN. § 44-23-430 (West, Westlaw through 2006 Reg. Sess.); S.D. CODIFIED LAWS § 23A-10A-15 (West, Westlaw through 2006 Reg. Sess.) (allowing an incompetent defendant to be held for treatment only as long as his sentence could have been if he had been convicted, at which point the state must either release him or civilly commit him); TEX. CODE CRIM. PROC. ANN. art. 46B.102 (Vernon 2006); UTAH CODE ANN. § 77-15-6(5)(c) (West 2006); VT. STAT. ANN. tit. 13, § 4820 (Supp. 2006); W. VA. CODE ANN. § 27-6A-2(f) (LexisNexis 2004); WIS. STAT. ANN. § 971.14(6) (West, Westlaw through 2005 Act 491); WYO. STAT. ANN. § 7-11-303(g) (i) (West, Westlaw through 2006 Budget Sess. 2005). *But see* DEL. CODE ANN. tit. 11, § 404(a) (2001 & Supp. 2004) (allowing an incompetent defendant to be held until he is capable of standing trial, making no provision for unrestorably incompetent defendants); MASS. GEN. LAWS ANN. ch. 123, § 15 (West 2003) (same); R.I. GEN. LAWS § 40.1-5.3-3(1)(2)-(3) (West, Westlaw through 2006 Pub. L. ch. 441 of the 2005 Jan. Sess.).

104. ALA. CODE § 22-52-37(a)(7)(a) (West, Westlaw through 2006 Reg. Sess.); ALASKA STAT. § 47.30.700 (West, Westlaw through all 2006 Legis.); ARIZ. REV. STAT. ANN. § 36-520 (West, Westlaw through 47th Leg., 2d Reg. Sess.); ARK. CODE ANN. § 20-47-207(c) (West, Westlaw through 2006 1st Extraordinary Sess. of 85th Revision Comm'n); CAL. WELF. & INST. CODE § 5008(h)(1)(B)(iii) (West 1998 & Supp. 2006); D.C. CODE ANN. § 21-545(b)(2) (2001 & Supp. 2006); FLA. STAT. ANN. § 916.13(1)(a) (West 2001 & Supp. 2007); GA. CODE ANN. § 37-3-81(a) (1995 & Supp. 2006); HAW. REV. STAT. ANN. § 334-60.2 (West, Westlaw through Apr. 13, 2006); IDAHO CODE ANN. § 66-329(b)(c) (West, Westlaw through 2006 1st Extraordinary Sess. of the 85th Leg.); IND. CODE ANN. § 12-26-7-1 (West, Westlaw through 2d Reg. Sess. of the 114th Gen. Assemb.); KAN. STAT. ANN. § 59-2966(a) (West, Westlaw through 2005 Reg. Sess.) (amended by Personal and Family Protection Act, ch. 210, sec. 16, § 59-2966, 2006 Kan. Sess. Laws (2006)); KY. REV. STAT. ANN. § 202A.014 (LexisNexis Supp. 1998); ME. REV. STAT. ANN. tit. 34-B, § 3864(6)(A)(1) (West, Westlaw through 2d Reg. Sess. of the 122d Leg.); MD. CODE ANN., CRIM. PROC. § 3-106(b)(1) (LexisNexis Supp. 2006); MICH. COMP. LAWS ANN. § 330.1401 (West 1999 & Supp. 2006); MINN. STAT. ANN. § 253B.02 (West 2006); MISS. CODE ANN. § 41-21-61 (West 1999); MO. ANN. STAT. § 552.020 (West 2006); NEB. REV. STAT. § 71-925(1) (2005); NEV. REV. STAT. ANN. § 433A.200(1) (West 2005); N.H. REV. STAT. ANN. § 135-C:34 (2006); N.J. STAT. ANN. § 30:4-27.2 (West 2005 & Supp. 2006); N.M. STAT. ANN. § 43-1-11(C)(1) (West 2006); N.Y. CRIM. PROC. LAW § 730.70 (Consol. 1996); N.C. GEN. STAT. § 122C-261(9-b) (2005 & Supp. 2006); N.D. CENT. CODE § 25-03.1-02(12) (2005); OKLA. STAT. ANN. tit. 43A, § 5-101 (West, Westlaw through 2006 2d Extraordinary Sess.); OR. REV. STAT. ANN. § 426.070(3)(c) (West 2006) (addressing the mentally ill); OR. REV. STAT. ANN. § 427.235 (West, Westlaw through 2005 Reg. Sess.) (addressing the mentally retarded); R.I. GEN. LAWS § 40.1-5-8 (West, Westlaw through Pub. L. ch. 441 of the 2005 Jan. Sess.); S.C. CODE ANN. § 44-17-510 (West, Westlaw through 2006 Reg. Sess.); TENN. CODE ANN. § 33-6-403 (2001) (addressing involuntary commitment); TENN. CODE ANN. § 33-6-502 (2001) (providing for judicial hospitalization still requiring a finding that the defendant is mentally ill); VT. STAT. ANN. tit. 18, § 7612(d)(2) (2000); W. VA. CODE ANN. § 27-5-3(a) (LexisNexis 2004 & Supp. 2006); WYO. STAT. ANN. § 25-10-110(a)(i)(C) (West, Westlaw through 2006 Budget Sess.).

105. Winick, *supra* note 43, at 680.

not only for Martinez, but for any defendant who is incompetent to stand trial but who does not suffer from a mental disorder or mental illness.¹⁰⁶ There are some states that allow for civil commitment of a defendant with a “developmental disability,” or that define mental illness in terms of a substantial life impairment. In this minority of states, a linguistically incompetent defendant might be eligible for involuntary commitment, depending on the exact wording of the statute.¹⁰⁷ In Washington State, for example, the legislature has made explicit findings regarding the inappropriateness of civil commitment for a developmentally disabled defendant, and has made special provisions in the law to deal with this situation.¹⁰⁸ The majority of states, however, have not adequately dealt with this possibility.

B. The Ethical Issues

1. Ethical Issues Raised by Forced Treatment

The Supreme Court has never decided what can be done with a defendant like Martinez who is not mentally ill but who cannot stand trial. It is unclear what kind of treatment a state can force

106. As discussed *infra* notes 180-91 and accompanying text, these types of cases occur much more often than one might imagine. In some states, there is no indication of what would happen to a defendant like Martinez because the state laws make no provisions regarding permanently incompetent defendants. See, e.g., DEL. CODE ANN. tit. 11, § 404(a) (2005).

107. See KY. REV. STAT. ANN. § 202A.011(9) (LexisNexis Supp. 2006) (defining “mentally ill person” in terms of an impaired capacity to function as a result of “physiological, psychological, or social factors”); MONT. CODE ANN. §§ 46-14-221(3)(b)-(c), 53-20-102(5), 53-20-103, 53-20-112 (West, Westlaw through 2005 Reg. Sess. of 59th Leg.) (providing for civil commitment of defendants not only with “mental disorders” but also with “developmental disability[ies]”); defining “developmental disability” in terms of life impairment; and affording those “admitted to ... publicly supported residential institution[s] ... “all the rights [of] a person subject to involuntary commitment proceedings”); OHIO REV. CODE ANN. §§ 5123.01(Q), .011 (West 2001 & Supp. 2006) (defining developmental disability for purpose of statute governing institutionalization); S.D. CODIFIED LAWS § 27B-1-18 (West, Westlaw through 2006 Reg. Sess.) (defining developmental disability); TEX. CODE CRIM. PROC. ANN. art. 46B.104 (Vernon Supp. 2006) (allowing civil commitment for defendants charged with serious crimes who have been found to be violent without a finding of mental illness or mental retardation); UTAH CODE ANN. § 62A-5-101(9)(a) (West, Westlaw through 2006 3d Spec. Sess.) (defining disability in terms of physical disability that results in impairment of life functions); WIS. STAT. ANN. § 55.06(11) (West, Westlaw through 2005 Act 343) (governing “protective placement” of those with developmental disabilities).

108. WASH. REV. CODE ANN. § 10.77.095 (West, Westlaw through 2006 legislation).

him to undergo or how long the state can mandate such treatment. One possible analogy to a situation the Court has decided is the issue of forced medication used to make defendants who are mentally ill competent to stand trial. The permissibility of forcing language learning will therefore be compared to the Supreme Court's holding allowing forced medication to understand the extent to which this treatment is likely permissible.¹⁰⁹ For some of the same reasons already discussed, a state cannot forever force a defendant like Martinez to participate in such a program.

Although the argument has been made that forced medication should never be permitted solely to allow a defendant to be prosecuted,¹¹⁰ the Supreme Court has rejected that view. Recently, in *Sell v. United States*,¹¹¹ the Court set the standard for determining when a state can forcibly medicate a defendant in order to make him competent to stand trial. The Court held that medication cannot be forcibly administered for the sole purpose of restoring the defendant to competency without the consideration of several important questions.¹¹² First, is there an important governmental interest at stake?¹¹³ The Court has already held that the government's interest in bringing to trial an individual accused of committing a serious crime is considered an important interest.¹¹⁴ Second, will involuntary medication "significantly further those concomitant state interests"?¹¹⁵ For medication, this requirement also means that the drugs must be unlikely to have side effects that may undermine the fairness of the trial, a factor that does not have to be considered in the situation of language learning. Third, forced medication must be *necessary* to further state interests.¹¹⁶ Finally, the treatment must be medically necessary, which the Court defined as "in the patient's

109. One important difference between medication and language learning is that side effects of medication can also impair the defendant's ability to assist or communicate with counsel and to participate in his own defense. In this case the required treatment will only assist the defendant to communicate with his counsel.

110. Winick, *supra* note 43, at 645 (citing a dissenting opinion in a Supreme Court of Nevada case).

111. 539 U.S. 166 (2003).

112. *Id.* at 186.

113. *Id.* at 180.

114. See Brandy M. Rapp, *Sell v. United States: Involuntary Administration of Antipsychotic Medication to Criminal Defendants*, 38 U. RICH. L. REV. 1047, 1057 (2004).

115. *Sell*, 539 U.S. at 181.

116. *Id.*

best medical interest in light of his medical condition.”¹¹⁷ This factor is usually evaluated in terms of the potential side effects that the drug may cause, as well as any less intrusive alternatives to medication.¹¹⁸ *Sell* was decided based on the reasoning of two prior cases. The first, *Washington v. Harper*,¹¹⁹ held that a state can forcibly administer antipsychotic drugs to an inmate with a serious mental illness against his will only if he is a danger to himself or others, and the treatment is in his medical interest. *Riggins v. Nevada*¹²⁰ held that it was a violation of due process to order the defendant be administered antipsychotic drugs during the course of trial over his objection, absent the proper findings. The U.S. Supreme Court held that in order to forcibly medicate, the trial court must determine that there are no less-intrusive alternatives, that the medication is medically appropriate, and that it is essential for the safety of the defendant or others.¹²¹

The *Sell* case has settled the area of forcible medication of defendants; however, “[t]he Court did not consider [in *Sell*] criminal defendants who fail to regain competence after long periods of time,”¹²² nor has the Court ever considered the plight of defendants who are incompetent but not in need of medication. The same factors the Court considered, however, can be analogized to mandatory language learning. If a court were to apply the *Sell* test to *Martinez*, the court would first consider the government interest in restoring Martinez to competency and putting him on trial, which is very high because he is charged with very serious crimes. Furthermore, the Court has already decided that taking a criminal defendant who is accused of a serious crime to trial is an important governmental interest.¹²³ Next, because the ability to communicate is essential to Martinez being found competent to stand trial, forced language learning, if successful, is both necessary to further state interests and likely to significantly further them.

117. *Id.*

118. *See id.*

119. 494 U.S. 210, 227 (1990).

120. 504 U.S. 127, 129 (1992).

121. *Id.* at 135.

122. Rapp, *supra* note 114, at 1068.

123. *See supra* note 114 and accompanying text.

The last factor raises a more difficult question: whether learning a language is in the patient's best medical interest. Martinez has survived for thirty-three years without communication skills, and learning to communicate now will certainly be to his detriment.¹²⁴ Considering the nature of the crime, the state's interest in prosecuting Martinez is high enough that it could probably outweigh any concerns about whether language skills are in Martinez's best medical interest. Nevertheless, given the difficulty in teaching language to a person of his age, if he is not making progress after a few years and the psychiatrists have no additional programs that they can use to educate him, continued treatment probably would not be considered to be in his best medical interest any longer.¹²⁵

124. Arguably, language learning will be a useful tool for Martinez and will enable him to do exactly what the state proposes it will let him do—assist in his own defense. What is in Martinez's "medical interest," however, can also be evaluated in terms of what will happen to him after achieving these skills. In light of the overwhelming physical evidence against Martinez, it is highly unlikely that Martinez would be acquitted if he were to stand trial, notwithstanding any defense he may be able to offer. Martinez's brother interpreted Martinez's actions, during the interrogation by police, to be a defense that he had consensual sex with the girl and then left her, sleeping. If this is the defense that Martinez will be offering, it will most likely not be enough to overcome the physical evidence that indicates his guilt. This Note will therefore discuss the language learning as detrimental to Martinez for two reasons. The first is that he is facing a death penalty charge. While it is unlikely that he will face the death penalty, *see infra* Part II.C, he is certainly facing life in prison without parole if convicted of murder and rape, so he would be acquiring these language skills at the price of his freedom. The second is that Martinez has survived for thirty-three years without the use of formal language—he has managed to sneak into the country, keep himself alive, perform odd jobs, and even have a semblance of a social life at the local bar. It is not necessary, therefore, that he learn to communicate in order to survive. *See* Henry F. Fradella, *Competing Views on the Quagmire of Synthetically Restoring Competency To Be Executed*, 41 CRIM. L. BULL. 447 (2005) (arguing that what is in the patient's best medical interest must necessarily be evaluated in light of the "underlying governmental actions" of impending death); Douglas Mossman, *Is Prosecution "Medically Appropriate"?*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15, 20 (2005) ("How can it be proper conduct ... for a physician to treat a patient when 'success' makes the patient eligible for prosecution, a guilty verdict, and punishment?").

In the case of mentally ill patients, it seems that the decision whether treatment is medically appropriate is easier to make, because the alternative to treatment, a life of severe mental illness, is as bad as or worse than facing trial. *See* Brian J. Kane, Student Article, *The Charles Singleton Dilemma: Sane Enough To Die?*, 28 LAW & PSYCHOL. REV. 149, 164-65 (2004). In Martinez's case, the considerations are not the same as those for mentally ill defendants and the decision of what is medically appropriate is harder to make.

125. *See* Mossman, *supra* note 124, at 50 (discussing the different uses of the term "medically appropriate" and concluding that the most common meaning is that the drug or procedure is the right way to treat a condition without regard to the legal ramifications that might result from such treatment). Even under this restrictive view, the treatment of

In the words of one scholar:

Defendants placed in this subcategory of incompetent defendants thought unlikely to regain their competency are thus caught in an unhappy legal limbo: Although they cannot be tried, their criminal charges continue to remain unresolved and will be revived if and when they become competent. This possibility provides a strong disincentive to their successful response to treatment. This can be seen as an example of what therapeutic jurisprudence terminology calls a "law-related psychological dysfunction."¹²⁶

The degree of cooperation Martinez offers in his treatment likely depends on how well he in fact understands what is happening to him. One study noted that "[d]eath row inmates facing execution upon successful treatment would inevitably be motivated to attempt to resist and, indeed, to frustrate such treatment. Even organic treatment like psychotropic drugs may require a degree of patient compliance to succeed."¹²⁷ It is not known for sure how much Martinez understands. He appears to understand the seriousness of the charges pending against him,¹²⁸ and he has been found to understand the nature of the proceedings against him,¹²⁹ and may

Martinez will be medically appropriate only for as long as it appears to be working. If he is treated for several years without noticeable improvement, it will no longer be medically appropriate treatment, and thus, can no longer be mandated by the court.

126. Winick, *supra* note 43, at 680 (footnotes omitted).

127. Bruce J. Winick, *Competency To Be Executed: A Therapeutic Jurisprudence Perspective*, 10 BEHAV. SCI. & L. 317, 333 (1992). Winick cites as support for this statement events from Florida, which after an apparent misreading of *Jackson v. Indiana*, 406 U.S. 715 (1972), required that all permanently incompetent defendants be adjudicated not guilty by reason of insanity. Winick, *supra*, at 334. Defendants subsequently had a greater incentive to remain incompetent, and the number of defendants who were so adjudged increased noticeably. *Id.*

128. At his arraignment, Martinez's brother was present and attempted to explain the charges to Martinez. The judge noted that Martinez faced the death penalty, and Martinez's brother pointed to Martinez and made a motion like he was cutting a throat. Martinez began to cry and made gestures which his brother interpreted to be a plea for mercy, meaning "I have two small children." Interview with Mike McGinty, *supra* note 3.

129. The court order found that Martinez was incompetent because he would not assist in his defense, therefore, presumably finding by omission that he does understand the nature of the proceedings against him. *Commonwealth v. Martinez*, No. CR 050 14512-00, slip op. (Va. Cir. Williamsburg & James City County Sept. 30, 2005); Interview with Mike McGinty, *supra* note 3.

therefore be more likely to resist learning the language skills that will allow him to be found competent. If Martinez refuses to cooperate and to learn to communicate, interesting issues will be raised as to whether he can waive the right to assist in his own defense.¹³⁰ The state has no way to force him to learn the way it can force a defendant in need of medication to take his medicine.

Requiring Martinez to participate in a language learning program only to then put him on trial to potentially face the death penalty thus raises interesting ethical issues. How long can the state hold him before the treatment is no longer considered to be "medically appropriate"? What redress does the state have if it becomes apparent that Martinez is refusing to cooperate? These issues have not been resolved by the Court nor by state legislatures, and will likely have to be answered by the court in the Martinez case on an ad hoc basis.

2. The Ethical Dilemma Created for the Treating Physicians

In addition to the ethical implications created in treating Martinez and defendants like him, there are ethical dilemmas created for the psychiatrists who work with such defendants. The treating psychiatrists know that if they are successful, Martinez will face the death penalty. Psychiatrists, as physicians, take the Hippocratic Oath,¹³¹ in which they pledge to do a patient no harm.¹³² In the case of language learning, the job of the therapist is even

130. See Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1071-72 (1977). If a defendant is found to be competent to stand trial, but refuses to cooperate with his attorney, the courts have treated the refusal as a relinquishment by the defendant of his right to assist in his own defense. *Id.* at 1072 ("So long as a defendant is mentally able to assist in his defense, the criminal proceeding should not be prevented from going forward because the defendant voluntarily chooses not to do so."); see also *Ferry v. Indiana*, 453 N.E.2d 207, 212 (Ind. 1983) (holding that a defendant who refused to assist his attorney, but who was able to do so, was competent).

131. The Hippocratic Oath reads, in part, "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death." See Kane, *supra* note 124, at 163.

132. *E.g.*, Fradella, *supra* note 124, at 449. This ethical dilemma is usually discussed in the cases of prisoners who have become incompetent since they were sentenced to death. See *id.* at 447-49. In light of the strong case against Martinez, discussed in the introduction, similar issues are raised in the current case.

more difficult than in the case of forced medication because the interaction between the patient and the therapist in this case requires much more than the injection of medicine. Learning a language requires a much higher degree of cooperation on the patient's part than does the administration of psychotropic medication. Therapists will be working very closely with Martinez in order to teach him to communicate; they are, therefore, not likely to want to send him to face a possible death sentence. Consequently, it might be difficult to get a therapist to testify that Martinez is competent to assist in his defense.¹³³

In the words of the American Psychiatric Association:

Having taken the Hippocratic Oath, all physicians are duty bound ... to employ their treatment arts for the benefit of their patients and ... to alleviate the patient's suffering. In the present situation, however, those ethical norms are in conflict, for alleviation of present suffering by giving medication will lead, by restoration of competence, to death.¹³⁴

On the other hand, psychiatrists have an interest in teaching Martinez, who for thirty-three years has been completely unable to communicate by signing or speaking, and they will likely want him to succeed.¹³⁵ For any psychiatrist involved in a mandatory language learning program there are irreconcilable goals of both restoring the patient to competency and abiding by the Hippocratic Oath's admonition to "do no harm" to a patient.

The forcible treatment of Martinez thus raises ethical concerns, not only for the legal system, but also for the psychiatrists with whom he works. Under the Supreme Court's decision in *Sell v. United States*, Virginia can hold Martinez for language learning only as long as such treatment remains justified by continued progress toward competency.¹³⁶ For this reason, the argument arises

133. Even in the event that the psychiatrists find Martinez to be a difficult or unlikable student, the Hippocratic Oath would still make it difficult for them to testify knowing that Martinez will be sent to face the death penalty. Interview with Mike McGinty, *supra* note 3.

134. Brief for the American Psychiatric Ass'n & the American Medical Ass'n as Amici Curiae in Support of Petitioner at 7, *Perry v. Louisiana*, 498 U.S. 38 (1990) (No. 89-5120) (citations omitted).

135. See Interview with Mike McGinty, *supra* note 3.

136. See 539 U.S. 166, 181 (2003).

that it may in fact be in the best interest of both Martinez and the state to have Martinez found competent to stand trial on the basis of only a limited ability to communicate.

C. The Death Penalty Issue

It is not likely that Martinez will in fact receive the death penalty. For this reason, the possibility of capital punishment should be withdrawn from the case in order to ease the ethical dilemma that faces the psychiatrists charged with his restoration.¹³⁷

The reason Martinez will not likely receive the death penalty even in the event that he is restored to competency and convicted at trial is that the issue of the death penalty may never reach the jury. In order to allow the issue to go to the jury, the state must make a preliminary showing that one of two factors is present. First, it could show that the defendant's conduct in committing the crime was "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim."¹³⁸ Or, the death penalty could reach the jury after a showing that the defendant poses a serious threat to society, in light of his criminal convictions.¹³⁹ If Martinez is convicted of this crime, his conviction could be considered as evidence of future danger, but there is no other evidence of his past dangerousness, so one conviction might not be sufficient. Furthermore, Martinez has been a model prisoner while in jail and at Western State Hospital so far.¹⁴⁰ If Martinez is convicted and the judge does not allow the death penalty issue to go to the jury, Martinez probably would be sentenced to life in prison without the possibility of parole.

In *Ford v. Wainwright*, the Court held that it was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment to execute a convicted defendant who had become incompe-

137. See *supra* Part II.B.2.

138. VA. CODE ANN. § 19.2-264.2 (2004 & Supp. 2006). It does not appear that the state can show this. Although it seems that the murder of Binger would fit into this category, when practically applied, the standard is higher than it may at first seem. The state is required to show that the defendant "did more than was necessary to kill his victim," for instance, torture, an element that is not present in this case. Interview with Mike McGinty, *supra* note 3.

139. VA. CODE ANN. § 19.2-264.2 (2004 & Supp. 2006).

140. Interview with Mike McGinty, *supra* note 3.

tent.¹⁴¹ This standard requires defendants to have the mental capacity to “know the fact of their impending execution and the reason for it.”¹⁴² Although the state court has so far found that Martinez understands the nature of the proceedings against him, it would be difficult to know with certainty that he is making the connection between the attack on Brittany Binger and his execution. Furthermore, one of the hardest aspects of language learning is understanding tenses; one psychiatrist has already testified that Martinez does not have a sign for the word “future,” nor did he “show any ability to understand concepts or link a series of drawings that conveyed a story.”¹⁴³ It may therefore be difficult to explain to Martinez in advance of his execution that he is being executed and the reasons for the execution. Furthermore, the Court recently held that there are cases in which a defendant may be competent to stand trial based on a limited understanding, but may not be competent to be executed.¹⁴⁴ The argument can be made that Martinez would fit into this category. If Martinez were convicted and sentenced to death, serious questions could be raised as to whether he was able to make the connection between his crime and his sentence.¹⁴⁵

The lower courts have been split over whether *Ford* allows the state to forcibly medicate a prisoner in order to make him competent to be executed,¹⁴⁶ and the Supreme Court has not resolved the issue. In *Perry v. Louisiana*, the Supreme Court granted certiorari on the issue,¹⁴⁷ but later remanded the case without issuing an

141. 477 U.S. 399, 409-10 (1986).

142. *Id.* at 422 (Powell, J., concurring in part and concurring in the judgment).

143. Rushing, *supra* note 8. He did, however, relate one story, about hurting his back in an accident in El Salvador. *Id.*

144. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that mentally retarded persons may be competent to stand trial but may also have diminished personal culpability warranting lesser sanctions).

145. Admittedly, the Supreme Court, in the *Ford* decision, seemed concerned mostly with mental deficiency, not communicative deficiency, that might prohibit a prisoner from understanding why he was being executed. *Ford*, 477 U.S. at 409-10. It seems, however, that the argument could be made that without knowing for sure how much Martinez understands, he cannot be executed for his alleged crime.

146. *Compare* *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003) (allowing forcible medication to make a prisoner competent to be executed), *with* *Louisiana v. Perry*, 610 So. 2d 746 (La. 1992) (forbidding medication for the sole purpose of making an inmate competent to be executed).

147. 494 U.S. 1015, 1015-16 (1990).

opinion¹⁴⁸ in light of the recent decision in *Washington v. Harper*.¹⁴⁹ The American Psychiatric Association and the American Medical Association recommended to the Supreme Court as amici in the *Perry* case that the only constitutionally permissible option, should the Court find that it was not permissible to medicate the defendant for execution, was to commute the defendant's sentence to life imprisonment, thereby allowing him to be provided with necessary medical treatment without being forced to choose between his life and proper treatment.¹⁵⁰ In the case of language learning, it is not clear whether a defendant's education would or could continue until the time of his execution in order to communicate to him the reason for his punishment.

Because Martinez is unlikely to receive the death penalty, and even if he does at the trial level, that punishment is likely to be challenged on appeal, the state should drop this possibility from the charges pending against Martinez. Doing so will enable the psychiatrists who work with Martinez to testify as to his competency without worrying that they are violating the Hippocratic Oath, allowing Martinez to learn to communicate without paying the price with his life.

III. THE INADEQUACY OF THE CURRENT COMPETENCY STANDARD FOR LINGUISTICALLY INCOMPETENT DEFENDANTS

The current competency standard was first articulated in *Dusky v. United States*,¹⁵¹ in which the Supreme Court decided that a finding that the defendant has some recollection of events is an insufficient basis for a judge's determination of competency.¹⁵² The Court held that the "test must be whether he has sufficient present

148. 498 U.S. 38, 38 (1990) (per curiam).

149. 494 U.S. 210 (1989). *Harper* did not deal specifically with treatment to be executed but rather with the state's ability to forcibly medicate an inmate in general. See *id.*

150. Brief for American Psychiatric Ass'n & American Medical Ass'n as Amici Curiae in Support of Petitioner, *supra* note 134, at 9; see also Lindsay A. Horstman, Comment, *Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society*, 36 U.S.F. L. REV. 823, 849 (2002) (recommending that in the case of prisoners who are on death row but, since being sentenced, have been found to be incompetent, their sentences be commuted to life so that their illness may be treated without raising many of the ethical dilemmas already discussed).

151. 362 U.S. 402 (1960) (per curiam).

152. *Id.* at 402.

ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”¹⁵³ The Court did not define what was meant by consulting with a lawyer with a reasonable degree of rational understanding,¹⁵⁴ thereby leaving that issue open for clarification within later cases involving linguistic incompetence.

Notably, the *Dusky* Court did not include any language relating to mental illness or mental disorders when articulating the competency standard;¹⁵⁵ some states have added that requirement to their definitions of incompetency,¹⁵⁶ and it is not clear whether a defendant like Martinez could ever qualify as incompetent in those states, regardless of his ability, or inability, to assist in his own defense.

The Supreme Court has clarified aspects of its competency standards in decisions since *Dusky*. In *Pate v. Robinson*, the Court held that the State’s refusal to grant a hearing on the issue of the defendant’s competence to stand trial amounted to a violation of due process¹⁵⁷ and required that a competency hearing be held when there is a “bona fide doubt” as to the defendant’s competency.¹⁵⁸ The State in *Pate* conceded that the conviction of an incompetent defendant violates due process.¹⁵⁹ Later, in *Drope v. Missouri*,¹⁶⁰ the

153. *Id.*

154. *See id.*

155. *See id.*

156. *See, e.g.*, DEL. CODE ANN. tit. 11, § 404(a) (2001 & Supp. 2004); D.C. CODE § 24-531.01 (Supp. 2006); IDAHO CODE § 18-210 (LEXIS through 2006 Reg. Sess.); IOWA CODE § 812.3 (West, Westlaw through 2006 Reg. Sess. & 1st Extraordinary Sess.); KAN. STAT. ANN. § 22-3301 (LEXIS through 2005 Supp.); LA. CODE CRIM. PROC. ANN. art. 641 (2003 & Supp. 2006); S.C. CODE ANN. § 44-23-410 (West, Westlaw through 2005 Reg. Sess.).

157. 383 U.S. 375, 384-86 (1966) (finding a violation of the defendant’s constitutional right to a fair trial as guaranteed by the Due Process clause of the Fifth Amendment and applied to the states through the Fourteenth Amendment).

158. *Id.* at 385.

159. *Id.* at 378. This is the case that was used to overturn Donald Lang’s 1972 conviction. He was tried while incompetent—neither side made the argument that he was able to “assist” enough through gestures to be found competent to assist in his defense. Furthermore, Lang’s case was complicated by the fact that it was also doubted whether he understood the proceedings against him and by the fact that the case against him was largely circumstantial. The court has already found that Martinez understands the proceedings against him. *See supra* note 128 and accompanying text.

160. 420 U.S. 162 (1975).

Court clarified that under the *Dusky* standards defendants cannot go to trial unless they possess “the capacity to understand the nature and object of the proceedings against [them], to consult with counsel, and to assist in preparing [their] defense.”¹⁶¹ The Court has made it clear that facing trial while incompetent amounts to a violation of the defendant’s due process rights.¹⁶²

The Court, however, has never decided how much assistance or consultation the defendant needs to be able to offer to his attorneys. Arguably, communication through gestures sufficient to convey a basic theory of the case could be enough to satisfy due process. For example, a federal district court in *United States v. Sermon* held that a defendant who had severe memory loss related to the alleged crime was competent to stand trial despite his limited ability to assist in his defense.¹⁶³ The court noted that the amount of assistance required may vary depending on the facts of each case, and that the specific inquiry for the court should be whether the defendant was able to provide his attorneys with his knowledge of those facts that were in “legitimate dispute.”¹⁶⁴ If so, he was competent to assist in his defense.¹⁶⁵

At Martinez’s competency hearing, the judge clearly found that, under the two-prong test of *Dusky*, Martinez was incompetent under only one of the prongs.¹⁶⁶ The judge stated, both in court and in the order, that Martinez was unable to assist his own defense; therefore presumably finding by his omission that Martinez does in fact understand the nature of the proceedings against him.¹⁶⁷

161. *Id.* at 171.

162. *See supra* notes 157-61 and accompanying text; *see also* *Cooper v. Oklahoma*, 517 U.S. 348, 354-56 (1996) (holding that requiring a defendant to prove incompetency by clear and convincing evidence violates due process); *Medina v. California*, 505 U.S. 437, 450-51 (1992) (holding that a state may require defendants to demonstrate their incompetence by a preponderance of evidence).

163. 228 F. Supp. 972, 978 (W.D. Mo. 1964).

164. *Id.*

165. *Id.*

166. *Commonwealth v. Martinez*, No. CR 050 14512-00, slip op. (Va. Cir. Williamsburg & James City County Sept. 30, 2005).

167. *Id.*; interview with Mike McGinty, *supra* note 3; *see also* *Rushing*, *supra* note 8 (noting that Judge Powell found Martinez incompetent after “defense and prosecution experts said he lacked the communication skills to assist in his own defense”).

Can competency in fact be evaluated on a case-by-case basis?¹⁶⁸ The Supreme Court has never been faced with a case like Martinez's, and has therefore never decided how much communicative ability is required to find a defendant competent. Indeed, it is easy to find cases in which the defendant was not able to assist very much in his or her own defense and yet was held competent to stand trial.¹⁶⁹ The standard, in writing, seems to be fairly high, painting the picture of a defendant who actively participates in his case, makes weighty decisions about what to do with his case, and grasps broad constitutional concepts. In real life, however, defendants are not always so involved.¹⁷⁰ Some argue that the standard for competency is, in reality, minimal.¹⁷¹ For example, in 2005, a nine-year-old girl in New York City pled guilty to second-degree manslaughter in the stabbing death of her best friend.¹⁷² The issue of her competency, it appears, was never raised.¹⁷³ One scholar of the law of incompetency has noted that "many criminal defendants who are not mentally ill may lack a meaningful understanding of the nature of criminal prosecution. Defendants generally are willing to defer to

168. Other issues may be raised by this flexible determination of "competent," such as issues related to whether a plea bargain would be valid, for example. As it has already been determined that Martinez is capable of understanding the nature of the proceedings against him, this discussion will proceed only in the context of actually taking the case to trial. There are many other complications that would arise in the event the defense wished to plea bargain. For a discussion of some of these issues, see *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996). The *Cooper* court also discussed some of the problems inherent in proceeding to trial with a defendant who is less able than most to assist in his defense. *Id.* at 364. There are, however, likely many defendants who are found competent, or for whom the issue is never raised, who cannot possibly live up the Supreme Court's idealistic view of a defendant who actively participates in his defense and makes weighty decisions about the way his case is handled.

169. See Winick, *supra* note 54, at 971.

170. *Id.* (noting that "[t]he competency doctrine ... is built on an unrealistic model of the attorney/client relationship"); see also Dietrich, *supra* note 40 (noting the inconsistency between the manner in which Martinez is being treated and the way that other defendants, especially juveniles, are often treated). Dietrich said, "[w]e freely ramrod the feeble-minded into confessions, even when they didn't do it.... We charge teenagers as adults all the time, even though child development experts tell us that you can't depend on teenage brains for rational thought." *Id.*

171. See PAULL, *supra* note 46, at 132 (noting that one of Donald Lang's treating psychologists thought, until 1984, that the goal of "fitness" he was working toward required Lang to be able to testify—a goal much more onerous than the true "understand and assist" test).

172. *Brooklyn: Girl, 9, Pleads Guilty in Fatal Stabbing*, N.Y. TIMES, Oct. 8, 2005, at B7.

173. See *id.*

their attorneys.”¹⁷⁴ At Martinez’s competency hearing, one of the defense experts offered her opinion that Martinez would not be competent to stand trial until he had the ability to rebut the DNA evidence which would be offered against him.¹⁷⁵ This expansive view of the competency standard, however, is not supported by the case law.¹⁷⁶

Based on the Supreme Court decisions, it is clear that Martinez cannot go to trial until he can “assist in his own defense.”¹⁷⁷ The battle, then, will be over how much he is in fact assisting in his own defense and how much he needs to be able to assist to go to trial. Because of the issues already discussed, the state cannot hold Martinez indefinitely.¹⁷⁸ He will eventually have to be tried or be released, and the state’s main argument to allow him to be tried will be that he is in fact “assisting” his counsel enough to be found competent.

IV. SUGGESTIONS FOR IMPROVEMENT

“It is estimated that for each defendant found not guilty by reason of insanity, at least a hundred defendants are determined to be incompetent to stand trial.”¹⁷⁹ Although cases like *Martinez* may appear to occur once in a lifetime, they are actually far more

174. Bruce J. Winick, *Reforming Incompetency To Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 589 (1995) (footnote omitted).

175. Interview with Mike McGinty, *supra* note 3.

176. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that mentally retarded defendants are frequently found competent to stand trial); *Walton v. Johnson*, 407 F.3d 285, 287 n.1 (4th Cir. 2005) (noting that “retarded individuals may be competent to stand trial”); *United States v. McDonald*, 43 Fed. App’x 330, *332 (10th Cir. 2002) (upholding a finding of competency despite defendant’s “occasional delusional verbalizations”); *State v. Heptinstall*, 306 S.E.2d 109, 110 (N.C. 1983) (finding defendant with long history of mental illness and paranoid schizophrenia competent to stand trial); *State v. Woodland*, 945 P.2d 665, 668 (Utah 1997) (noting that the law only requires the defendant to have the ability to consult with his lawyer, and does not require that he “help or assist”); Winick, *supra* note 54, at 971 (“‘Normal’ defendants in our criminal courts frequently suffer from linguistic, educational, and social problems that severely impair their ability to function competently”).

177. See *Drope v. Missouri*, 420 U.S. 162, 173 (1975) (quoting MO. REV. STAT. § 552.020(1) (1969)).

178. See *supra* Part II.A.

179. PAULL, *supra* note 46, at vii; see also NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 37 (1982) (noting that the incompetency plea is successfully invoked far more often than the insanity plea, at a rate of about 100 to 1).

common. In addition to the cases of Martinez and Donald Lang, there are several other cases of deaf-mutes with little or no communication skills who have found themselves in a legal system which did not know how to deal with them.¹⁸⁰ The case of "Jesse R.," for example, is one of a twenty-four-year-old deaf-mute with "language skills so limited that they rank in the bottom ten to fifteen percent of the entire deaf population."¹⁸¹ At the age of nineteen, Jesse R. entered a plea of no contest to second degree assault and was sentenced to fifteen years in prison.¹⁸² Jesse's attorney questioned his competence, but the trial court found that he was competent "so long as he was provided a good interpreter."¹⁸³ Under Wisconsin law, incompetency required a finding that the defendant suffered from a mental disorder.¹⁸⁴ For the court, Jesse's inability to communicate was therefore an "interesting issue" but ultimately irrelevant to the question of competency.¹⁸⁵ The trial court later held a postconviction hearing and reversed the conviction, finding that Jesse was unlikely to ever be found competent.¹⁸⁶ LaVigne and Vernon also discuss the case of Maryellen H., who was deaf since birth but whose family never learned sign language, which resulted in Maryellen being severely language deprived. Maryellen became involved in the legal system when the county tried to take her daughter away from her. The case was eventually dismissed when the court acknowledged that Maryellen did not understand what she was supposed to do to get her daughter back.¹⁸⁷

In the case *Graham v. Jenne*,¹⁸⁸ the court granted a habeas corpus petition of a deaf-mute defendant with few communication skills. In *Graham*, the court found that because the defendant could not communicate, he was not competent, but he also could not be civilly committed because he did not have a mental disorder; therefore, the

180. See, e.g., *supra* Part II (discussing *Jackson v. Indiana*, 406 U.S. 715 (1972)).

181. See LaVigne & Vernon, *supra* note 41, at 844 (explaining the case of "Jesse R.," whose real identity the authors have kept confidential).

182. *Id.* at 845.

183. *Id.*

184. *Id.* at 904.

185. *Id.* at 904-05. There are still several state statutes, as well as the federal law, which require a finding of mental disability in order to find the defendant incompetent. See *supra* note 156.

186. LaVigne & Vernon, *supra* note 41, at 846.

187. *Id.* at 846-47.

188. 837 So. 2d 554, 558-59 (Fla. Dist. Ct. App. 2003).

state's only option was to hold him for one year for treatment, at which point the state would have to release him if he had not been restored to competence.¹⁸⁹ These are only a few of the numerous cases of linguistically incompetent defendants who have challenged the legal system.¹⁹⁰ One scholar has observed, "[j]udges and lawyers are very likely to encounter language-deficient deaf or hard-of-hearing individuals because deaf and hard-of-hearing people are substantially overrepresented in the criminal ... justice system."¹⁹¹

The legal system has failed to account for linguistically incompetent defendants like Donald Lang and Oswaldo Martinez.¹⁹² It has been established that they cannot be tried without meeting a threshold of competency, and the standards for determining they have reached that threshold have been articulated, but it has never been decided what to do with those who do not meet the standards. The legal system has failed to provide for defendants who are not competent and who cannot easily be restored to competency with medication. In the end, the legal system's effort to vigorously protect the due process rights of a defendant has actually deprived him of due process. Donald Lang now will be held indefinitely without ever receiving a valid trial; he has been deprived of his liberty *without*

189. *Id.*

190. *See, e.g.,* Ferrell v. Estelle, 568 F.2d 1128 (5th Cir. 1978); Shook v. Mississippi, No. 2:93CV118-D-B (N.D. Miss. June 8, 2000) (denying habeas relief to a deaf-mute with diminished communication skills serving thirty year sentence for aggravated assault); Holmes v. State, 494 So. 2d 230 (Fla. Dist. Ct. App. 1986); State v. Smith, 471 So. 2d 954 (La. Ct. App. 1985) (reversing the trial court's determination that a deaf-mute could be convicted for armed robbery because he did not have a "mental defect" and therefore did not qualify as incompetent); State v. Burnett, No. Civ.A. 1638, 2005 WL 32797 (Ohio Ct. App. Jan. 7, 2005) (affirming that a deaf-mute with little communication ability properly was found incompetent).

191. LaVigne & Vernon, *supra* note 41, at 867. The authors also note that a study of prison populations "revealed that hearing loss severe enough to interfere with everyday functioning is *two to five* times more prevalent among prison inmates than among the regular population." *Id.*

192. Indeed, some have argued that the legal system is flawed in the way that it deals with the entire deaf population. *See* LaVigne & Vernon, *supra* note 41, at 849. They write that fundamentally flawed assumptions about the interpreting process are depriving many, and perhaps even most, deaf defendants of critical information both in and out of court.... When the legal system confronts an individual ... whose language skills are below average even for the deaf population, its faith that the interpreter will be able to make the deaf defendant understand is a surefire recipe for disaster of constitutional proportions.

Id.

due process of law¹⁹³ Martinez may have a similar fate. Something needs to be done to prevent that outcome.¹⁹⁴ A defendant's due process rights to a fair trial, as well as the community's right to be safe from predators, must both be protected. In the words of one scholar:

[T]he laws that govern competency, confrontation, due process, effective assistance of counsel, provision of interpreters, and other accommodations are overall more than adequate to meet the needs of practically every deaf defendant. What is lacking are the flexibility, understanding, and creativity to apply those laws in a manner that is relevant to deaf individuals who were unable to acquire sufficient language.¹⁹⁵

The following Section will make several suggestions for what can be done in cases with defendants like Martinez who are unable to assist in their own defense. The section also will offer specific suggestions for the Martinez case.

A. *The Discharge Hearing*

The first proposal is to allow the defense to seek a discharge hearing, which permits the defendant to establish his innocence without allowing the state to convict him.¹⁹⁶ Discharge hearings are already allowed in several states.¹⁹⁷ If the defense can make a

193. See *supra* notes 74-78 and accompanying text; see also *Jackson v. Indiana*, 406 U.S. 715, 740 (1972) (noting that charges are normally dismissed against an incompetent defendant once it becomes apparent he will never be able to stand trial because of the risk of the "denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence").

194. An easy solution to this problem would be to change the language of the state statutes to make it easier to commit a defendant on the basis of not only mental disorders but also linguistic incompetence as Illinois did following the *Lang* case. See *supra* notes 71-72. But because of serious considerations regarding the lack of proper treatment for these defendants, it would not be the best option to simply treat linguistically incompetent defendants in the same way that the legal system treats mentally incompetent defendants. The proposals offered are therefore aimed more at specific and long-term solutions to the problem, rather than simply changing the statutes to make them apply to defendants like Martinez.

195. LaVigne & Vernon, *supra* note 41, at 850.

196. See *Jackson*, 406 U.S. at 740-41, in which the Court seems to cite with approval the practice of allowing a defendant to have a trial to establish his innocence without permitting the state to convict.

197. See, e.g., DEL. CODE ANN. tit. 11 § 404(a) (2001 & Supp. 2004); 725 ILL. COMP. STAT.

preliminary showing of innocence, or create reasonable doubt, then the defendant should be granted a trial, despite his incompetence. Not granting a trial “might result in the grave injustice of detaining as a criminal lunatic a man who was in actuality innocent.”¹⁹⁸

B. A Guardian ad Litem

Second, a guardian ad litem should be appointed for the defendant. A guardian ad litem is a person appointed to advocate for the defendant's best interests and to make medical decisions on his behalf.¹⁹⁹ This appointment will allow his attorneys to focus on only his legal issues, ensure that his attorneys do not have a conflict of interest, and provide the defendant with an advocate who can represent what is in his medical interest, apart from his legal quandary.²⁰⁰ Some have advocated creating a federal law whereby a guardian ad litem would be appointed for mentally incompetent criminal defendants when the prosecution seeks to medicate the defendant against his will.²⁰¹ There is already a similar rule in the civil arena, which allows for the appointment of guardians in civil cases for incompetents.²⁰² There is not yet a corresponding criminal

5/104-23(a) (1992 & Supp. 2006); MD. CODE ANN. CRIM. PROC. § 3-106(d) (LexisNexis Supp. 2005); MASS. GEN. LAWS ANN. ch. 123, § 17(b) (West 2003 & Supp. 2006); MONT. CODE ANN. § 46-14-221(4) (West, Westlaw through 2005 Reg. Sess. of the 59th Leg.); N.M. STAT. ANN. § 31-9-1.5 (West, Westlaw through 2d Reg. Sess. of the 47th Leg.) (for the most serious crimes); S.C. CODE ANN. § 44-23-440 (2005); W. VA. CODE § 27-6A-6 (LexisNexis 2004); WIS. STAT. ANN. § 971.14(1)(c) (West 2006).

198. TIDYMAN, *supra* note 31, at 137 (quoting the English case of *Regina v. Roberts* [1953] 2 Q.B. 329).

199. A guardian ad litem is a substitute decision maker, appointed when a person is unable to make decisions for him or herself. Winick, *supra* note 54, at 979. See *id.* at 977-79 for a thorough discussion of the role of a guardian ad litem for an incompetent defendant in a criminal case.

200. See Sarah Wolf, *The Mentally Incompetent Criminal Defendant: United States v. Weston and the Need for a Guardian ad Litem*, 10 GEO. MASON L. REV. 1071 (2002) (discussing the case of Russell Weston, whose attorneys objected to his being forcibly medicated in order to stand trial). As a result of the legal battle which ensued, Weston sat in a prison for years without receiving much-needed medication, and became extremely sick. *Id.* at 1072. This article provides an excellent discussion of the ethical dilemma posed to Weston's attorneys, who have to make medical decisions for their client based on what is in his legal interest, and discusses how appointing a guardian ad litem would eliminate this difficulty. *Id.* at 1072-73.

201. *Id.* at 1094.

202. FED. R. CIV. P. 17(c).

federal statute which exists to protect mentally ill criminal defendants; however, some federal courts have alluded to the fact that it would be permissible and within the district court's powers to appoint a guardian if the court felt it was necessary.²⁰³

C. A More Flexible Determination of Competency

Finally, the very concept of "competency" should be more flexible, especially in cases in which the defendant is able to understand the charges against him but is not able to communicate, in the traditional sense, with his attorneys. The question, overall is one of fairness.²⁰⁴ What is required by the Due Process Clause in a case like this? Should the fact that a case is based almost entirely on physical and scientific evidence make a difference in determining competency?²⁰⁵ The state may argue that the "able to assist in his defense" standard should be evaluated based on the type of case. Some have argued that one standard of competency for all criminal proceedings is overinclusive, and that the standard of competency should vary depending on the phase of the criminal process²⁰⁶ or on the type of case and the "skills that will be required of the defendant in that [particular] case."²⁰⁷

203. See *United States v. Brandon*, 158 F.3d 947, 961-62 (6th Cir. 1998); *United States v. Charters*, 829 F.2d 479, 499 (4th Cir. 1987).

204. Similarly, the standard for reviewing whether a defendant received adequate interpretation services during a trial often boils down to two questions: (1) Could the defendant understand? and (2) was it fair? *LaVigne & Vernon*, *supra* note 41, at 890. These seemingly simple questions, however, are in reality not so simple, because what is "fair" is not easy to determine. Nor is it clear how much the defendant needs to understand. It is certain that in no case will Martinez understand every word that is spoken at his trial. Is it enough that he understands the "substance and meaning" of what each witness reports or what the charges against him are? *Id.* at 891.

205. Winick, *supra* note 174, at 594 ("[I]n some cases, the defense strategy does not require the defendant's participation or understanding, and in other cases the defendant's participation does not help significantly.").

206. See generally Jason R. Marshall, *Two Standards of Competency Are Better than One: Why Some Defendants Who Are Not Competent To Stand Trial Should Be Permitted To Plead Guilty*, 37 U. MICH. J.L. REFORM 1181 (2003-2004).

207. Winick, *supra* note 54, at 974; see also *People ex rel. Myers v. Briggs*, 263 N.E.2d 109, 113 (Ill. 1970) ("[Donald Lang] need only give such aid to intelligent appreciation of the proceeding as sound discretion may suggest. The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial."); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 561 (1993)

This is not a case that would require Martinez to tell his attorneys when he believes that witnesses against him are lying or have reason to lie. The state's case will consist almost entirely of expert witnesses who will explain the significance of each piece of physical evidence.²⁰⁸ In numerous cases, less-than-cooperative or mildly retarded defendants have been convicted on the basis of strong physical evidence, and the issue of whether they truly understood this evidence sufficiently to assist in their defense was never raised.²⁰⁹ Overall, Martinez has been found to understand the charges against him, and although he cannot assist in his defense in a traditional sense, he has certainly presented his "theory" of the case when interviewed by the police, and could, presumably, do the same with his lawyers.²¹⁰ The question is, can he assist *enough* to get a fair trial? In addition, the prosecution is willing to stipulate to anything that the defense wishes to offer as what Martinez *would* say if he were able to testify, or what he has communicated to his attorneys as his "theory" of the case.²¹¹

Martinez should be held for a period of not more than a few years, and attempts should continue to be made to teach him to communicate (because there is a possibility that he could surprise everyone and learn). The process of teaching him, however, should be aimed not just at teaching him "language" in the abstract, as he is almost

(suggesting the competency standard must be linked to each defendant's particular situation).

208. Interview with Mike McGinty, *supra* note 3. The only lay witnesses the state is likely to present will be Brittany's friends, testifying as to the last time they saw her the night of her death, and someone from the convenience store who can authenticate the tape. *Id.*

209. See *supra* note 176 and accompanying text.

210. Interview with Mike McGinty, *supra* note 3; see *Shook v. Mississippi*, No. 2:93CV118-D-B, 2000 WL 877008 at *3 (N.D. Miss. June 8, 2000) (holding that defendant who was deaf but who could read was presented fair trial with aide of an interpreter who transcribed the entire trial for him). The court in *Shook* wrote, "[w]e can appreciate that it was not easy for counsel to discuss the defense with him, but, clearly it could be done. A trial should not be postponed indefinitely if any reasonable alternative exists." *Id.*; see also *supra* note 163 and accompanying text (discussing *United States v. Sermon*, 228 F. Supp. 972 (W.D. Mo. 1964), which noted that defendants only need to be able to communicate their knowledge of the facts which are in legitimate dispute).

211. Interview with Mike McGinty, *supra* note 3; see also TIDYMAN, *supra* note 31, at 260 ("[n]o conviction can constitutionally be based on circumstantial evidence when the defendant is not able to get up and explain that evidence."). In Martinez's case, the case is not being built on circumstantial evidence, but rather consists almost entirely of physical evidence. See *supra* note 208 and accompanying text.

certainly past the point of being able to learn that, but rather teaching him to communicate about this specific case.

The psychiatrists who are working with Martinez, or with future defendants like him, should attempt to communicate through facts of the case and not abstract ideas of "murder," "rape," and "trial." The task of learning a language is much more difficult than would be the task of communicating what happened through the use of pictures, gestures, and signs. Scholars have observed that, "[i]n an extreme case [of language deprivation], a person will have the ability to understand sexual function, food, and whatever else it takes to get by, but dealing in the abstract will be virtually impossible."²¹² Also, the treatment must be tailored to fit the defendant's needs; therefore, the doctors should not try to teach "ubiquitous competency classes" designed to teach a deaf person about the abstract concepts in the criminal justice system, but rather should create "a program centered on the slow, laborious process of building a linguistic foundation."²¹³

One critic of the incompetency process has advocated abolishing the entire plea, and instead allowing an incompetent defendant a continuance, at the end of which, when he is "as fit as we can help [him] to be," the state must either try him or release him.²¹⁴ If a criminal trial is to take place, he advocates special rules to "minimize" the handicap that the accused's disabilities impose on him.²¹⁵ The author acknowledges that this approach might result in the trial of an incompetent, but maintains that this is better for both society and the accused.²¹⁶ Because the Supreme Court has already clearly stated that trying a defendant while incompetent violates

212. LaVigne & Vernon, *supra* note 41, at 865.

213. *Id.* at 934.

214. MORRIS, *supra* note 179, at 43, 46-47.

215. *Id.* But see John H. Robinson, *Madness and the Criminal Law*, 59 NOTRE DAME L. REV. 297, 306 (1983) (book review) (noting that Morris makes no effort to articulate what these special rules would be, nor does he indicate how they will be adequate to prevent the trial from being a "constitutional farce").

The Illinois Appellate Court that reversed Donald Lang's 1972 conviction did not appear to think that such a trial would never be constitutional; in fact, it stated that in this case the decision by his attorney to go to trial was not binding on Lang because the trial court failed to establish trial procedures which effectively compensated for the defendant's disabilities. *People v. Lang*, 325 N.E.2d 305, 309 (Ill. App. Ct. 1975).

216. MORRIS, *supra* note 179, at 49.

due process,²¹⁷ however, the better route is not to advocate such a trial while the defendant remains incompetent, but rather to urge that he is “competent” under a more flexible standard.²¹⁸

In addition, there are steps that can be taken to ensure that deaf defendants get a fair trial. LaVigne and Vernon recommend the use of certified interpreters, counsel table interpreters, videotaping the trial for the purpose of record preservation, allowing for an ongoing review of communication, and changing courtroom procedure to allow more time to interpret.²¹⁹ The defendant would, of course, have to be provided with an interpreter for his trial. Ideally, the interpreter would be the psychiatrist who has been working with him and who understands the gestures that he makes.²²⁰ In this way, the defendant could be adjudged guilty or innocent, the criminal trial would be resolved, and the due process issues inherent in holding someone indefinitely without providing him with a trial²²¹ (or the opportunity to plead guilty) would be eliminated.

CONCLUSION

The case of *Commonwealth v. Martinez* is full of fascinating legal and ethical issues. It is easy to forget, however, that stuck in the middle of it all is a person who cannot communicate, in any traditional way, his thoughts to the outside world. In order to resolve the criminal issue without holding Martinez indefinitely, this Note has urged that Martinez be found competent to stand trial based on a limited ability to communicate. With enough effort, Martinez may be able to communicate more than it might at first

217. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). *But see* MORRIS, *supra* note 179, at 49 (arguing that the “unconstitutional” holding of *Pate* was in fact dictum, and that the Court hinted in *Jackson* that the trial of an unrestorably incompetent defendant might be constitutional).

218. Winick, *supra* note 174, at 595.

219. Lavigne & Vernon, *supra* note 41, at 914-27.

220. *See id.* at 879 (encouraging interpreters for deaf clients with minimal language skills to use pantomime and gestures, including the person’s own store of gestures, as well as any other props which might be useful). This view is also becoming more acceptable to those in the community who would like to see Martinez tried but understand the reality of his disability. *See* Dietrich, *supra* note 40 (“If it comes to it, use stick-figure drawings. Use hand puppets. Use Muppets, if you have to.”).

221. *Jackson v. Indiana*, 406 U.S. 715, 740 (1972).

appear, and any method that can be used to communicate with him, should be. In this way, he can be afforded the due process that all defendants are owed, and the state can resolve the murder of Brittany Binger.

The legal system has not adequately dealt with linguistically incompetent defendants like Martinez, who cannot stand trial, but who do not suffer from a mental disorder. More should be done to establish uniform standards of treatment, and to establish time limits addressing how long the state can hold such a defendant before it becomes apparent that he will never become competent to stand trial. There are more cases like this that come through the legal system than one would expect. Perhaps the reason that we do not hear more about these defendants is because they are swept under the rug and forgotten about in a legal system that does not know what to do with them.

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