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## Compelling Competence Through the Use of Psychotropic Drugs: A Due Process Analysis

The United States Constitution has long been construed to require that criminal defendants be competent to stand trial.<sup>1</sup> Recent advances in the science of psychiatry have clouded significantly the issue of competency by making it possible to compel a defendant to become competent through the forced administration of drugs.<sup>2</sup> The legal repercussions of compelled competency have been addressed by a significant number of courts, and the issue was raised before the North Carolina Court of Appeals in *State v. Monk*.<sup>3</sup> Although the court declined to decide the issue, it noted that compelled competency, when presented squarely, will raise issues of constitutional significance. These issues include the right to bodily integrity free from unwarranted infringement by the state,<sup>4</sup> the right to control one's own thought processes,<sup>5</sup> and the right to appear before the jury free from drugs that affect one's thought, expression, and manner.<sup>6</sup> This note analyzes the issues surrounding compelled competency, and recommends an approach for resolving them. The proposed resolution requires the courts to apply a strict scrutiny due process analysis to determine if the administration of psychiatric drugs has been conducted in the least restrictive manner consistent with bringing the defendant to trial.

The issue of compelled competency in *State v. Monk* arose when James Levone Monk was committed to Dorothea Dix Hospital for a competency examination.<sup>7</sup> At a hearing following his examination Monk was found incompetent to stand trial.<sup>8</sup> The court ordered defendant returned to Dorothea Dix for treatment and authorized the administration of drugs.<sup>9</sup>

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1. See *infra* notes 19-23 and accompanying text.

2. See generally Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RESEARCH J. 769.

3. 63 N.C. App. 512, 305 S.E.2d 755 (1983).

4. *Id.* at 516, 305 S.E.2d at 758.

5. *Id.*

6. *Id.*

7. Defendant was committed for evaluation pursuant to N.C. GEN. STAT. § 15A-1002 (1983). *Monk*, 63 N.C. App. at 515, 305 S.E.2d at 758. The North Carolina statutory scheme allows the question of a defendant's capacity to proceed to be raised at any time on motion by the defendant, defense counsel, prosecutor, or court. N.C. GEN. STAT. § 15A-1002(a) (1983). Once raised, the judge may commit the defendant to a state mental health facility for observation and treatment for a period not to exceed 60 days. *Id.* § 15A-1002(b)(2). Following the defendant's release from the facility, the judge must hold a competency hearing. *Id.* § 15A-1002(b)(3).

8. *Monk*, 63 N.C. App. at 513, 305 S.E.2d at 757.

9. *Id.* at 513-14, 305 S.E.2d at 757.

The treating physician in his or her discretion shall administer such medication at such times as is necessary to make the defendant likely to become competent to assist in preparation of his defense and to participate in his trial so long as such medications do not create a substantial risk of serious or long term side effects. If the defendant refuses to voluntarily take the required and necessary medication, the attending physician or physicians and their staff assistants, are authorized and are directed by this court to utilize such medically safe procedures as they reasonably believe necessary to compel the patient to take the medication . . . .

*Id.* at 515, 305 S.E.2d at 758.

Monk's second commitment to Dorothea Dix lasted fifty-three days,<sup>10</sup> during which time the drugs Haldol<sup>11</sup> and Artane<sup>12</sup> were administered to him by the hospital staff. After this treatment, he was returned to court for a second competency hearing, at which time he was adjudged competent to stand trial.<sup>13</sup> Following his second commitment, Monk moved for the discontinuance of medication to enable him to appear before the jury free from the influence of drugs.<sup>14</sup> Such a motion was unnecessary, however, because the trial court's order did not contemplate compelled medication following his release from Dorothea Dix.<sup>15</sup> The administration of Haldol and Artane terminated three months prior to Monk's trial.<sup>16</sup> Consequently, the issue raised in Monk's motion, whether he had a right to appear before the jury unmedicated, was rendered moot before it reached the North Carolina Court of Appeals.<sup>17</sup> Monk was tried for slaying his father and was convicted of voluntary manslaughter.<sup>18</sup>

When the issue is raised properly the court will be forced to confront the constitutional issues surrounding compelled competency. Competency to stand trial refers to the mental capacity required of a defendant by the due process clause of the fourteenth amendment.<sup>19</sup> In North Carolina the standard for competency is set out in *State v. Buie*.<sup>20</sup>

"The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate

10. *Id.* at 514, 305 S.E.2d at 757.

11. *Id.* Haldol is one of a group of drugs known as the "major tranquilizers." See, e.g., Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 Nw. U.L. Rev. 461, 474 n.77 (1978). The major tranquilizers are antipsychotic drugs used primarily to treat schizophrenia. The major tranquilizers (e.g., Thorazine, Stelazine, Trilafon, Prolixin, Navane, Mellaril, and Haldol) together with antidepressant (e.g., Elavil and Aventyl), anti-anxiety (e.g., Vistaril and Valium), and sedative-hypnotic (e.g., chloral hydrate) medications comprise the field of psychotropic or psychoactive drugs. See, e.g., Winick, *supra* note 2, at 778.

Antipsychotic drugs influence the chemical transmissions in the brain, affecting both activity and inhibitory functions. They are mind-altering drugs used to reduce the level of psychotic thinking. See, e.g., Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). The psychotic symptoms suppressed by the major tranquilizers include hallucinations and delusions; the drugs do not affect the cortex—the "thinking" part of the brain. See, e.g., Note, *The Case of the Tranquilized Defendant*, 28 LA. L. REV. 265, 266 (1968).

12. *Monk*, 63 N.C. App. at 514, 305 S.E.2d at 757. Artane is a drug used to control the side effects of psychotropic medication. For a discussion of the side effects associated with chemical competence see *infra* note 57.

13. *Monk*, 63 N.C. App. at 514, 305 S.E.2d at 757.

14. *Id.* at 516, 305 S.E.2d at 758.

15. *Id.* See *supra* note 9.

16. *Monk*, 63 N.C. App. at 516, 305 S.E.2d at 759.

17. *Id.* at 517, 305 S.E.2d at 759.

18. *Id.* at 514, 305 S.E.2d at 757.

19. See, e.g., *Dusky v. United States*, 362 U.S. 402 (1960); *People v. Bilyew*, 55 Ill. App. 3d 69, 370 N.E.2d 585 (1977), *rev'd*, 73 Ill. 2d 294, 383 N.E.2d 212 (1978); *State v. Buie*, 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971 (1979).

20. 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971 (1979).

with his counsel to the end that any available defense may be interposed."<sup>21</sup>

The right to be competent during trial is guaranteed by the sixth amendment's command that the accused be permitted to confront adverse witnesses.<sup>22</sup> The right to be present and confront witnesses includes not only physical presence in the courtroom, but mental "presence" as well.<sup>23</sup> An incompetent defendant is afforded no meaningful opportunity to defend himself.

The mental state necessary to defend oneself may be achieved through the use of medication. In spite of some early resistance to "synthetic sanity" and "chemical competence,"<sup>24</sup> courts now agree that the method by which the defendant attains the requisite mental standard does not affect the finding of present competency.<sup>25</sup> "Any other holding would constitute an atavistic repudiation of the advances made in the treatment of the mentally ill during the past two decades."<sup>26</sup>

In determining whether a defendant may use a drug to become competent to stand trial, the scope of the court's inquiry should be limited to whether the medication adversely affects the "thought, expression, manner and content of the person using the drugs."<sup>27</sup> If the medication has a substantial effect, then the defendant is not competent to stand trial under its influence.<sup>28</sup> If the medication administered enhances the defendant's cognitive abilities, however, he

21. *Id.* at 161, 254 S.E.2d at 28 (quoting *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975)). The requirement that the defendant have the capacity to proceed, and the definition of capacity, are codified at N.C. GEN. STAT. § 15A-1001(a) (1983).

22. *See, e.g.*, *State v. Hancock*, 247 Or. 21, 28, 426 P.2d 872, 875 (1967).

23. *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (some view the prohibition against trying an incompetent as a by-product of the ban against trials *in absentia*); *State v. Hancock*, 247 Or. 21, 28, 426 P.2d 872, 875 (1967).

24. *See State v. Hampton*, 253 La. 399, 218 So. 2d 311 (1969); *see generally* Winick, *supra* note 2.

25. *See United States v. Hayes*, 589 F.2d 811 (5th Cir.) (Aventyl and Mellaril), *reh'g denied*, 591 F.2d 1343, *cert. denied*, 444 U.S. 847 (1979); *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86 (3d Cir.) (Equanil and Thorazine), *cert. denied*, 435 U.S. 928 (1978); *Mines v. State*, 390 So. 2d 332 (Fla.), *cert. denied*, 451 U.S. 916 (1981); *People v. Jackson*, 57 Ill. App. 3d 809, 373 N.E.2d 583 (1978); *State v. Lawrence*, 368 So. 2d 699 (La. 1979) (Mellaril); *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379 (1978) (Lithium, Stelazine and Valium); *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976) (Thorazine); *State v. Buie*, 297 N.C. 159, 254 S.E.2d 26, *cert. denied*, 444 U.S. 971 (1979); *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974) (Haldol); *State v. Norris*, 40 Or. App. 505, 595 P.2d 1261 (1979); *State v. Hancock*, 247 Or. 21, 426 P.2d 872 (1967) (Valium); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978) (Haldol and Loxatoin); *State v. Stacy*, 556 S.W.2d 552 (Tenn. Crim. App. 1977) (Haldol), *aff'd*, 601 S.W.2d 696 (Tenn. 1980); *In re Pray*, 133 Vt. 253, 336 A.2d 174 (1975) (Thorazine, Phenobarbitol, Tofranil, and Chlorohydrate); *State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971); *State v. Gwaltney*, 77 Wash. 2d 906, 468 P.2d 433 (1970); *State v. Murphy*, 56 Wash. 2d 761, 355 P.2d 323 (1960) (Equanil and Trancopal).

The principle that drug use does not render one per se incompetent applies to controlled substances as well as psychotropic medication. *See, e.g.*, *Lewis v. United States*, 542 F.2d 50 (8th Cir.) (heroin), *cert. denied*, 429 U.S. 837 (1976); *United States ex rel. Fitzgerald v. LaValle*, 461 F.2d 601 (2d Cir.) (heroin), *cert. denied*, 409 U.S. 885 (1972); *Grennet v. United States*, 403 F.2d 928 (D.C. Cir. 1968) (heroin and methedrine).

26. *State v. Stacy*, 556 S.W.2d 552, 555 (Tenn. Crim. App. 1977) (quoting *People v. Parsons*, 82 Misc. 2d 1090, 1093, 371 N.Y.S.2d 840, 842 (1975)), *aff'd*, 601 S.W.2d 696 (Tenn. 1980).

27. *State v. Maryott*, 6 Wash. App. 96, 97, 492 P.2d 239, 240 (1971).

28. *Id.* *See also Whitehead v. Wainwright*, 447 F. Supp. 898 (M.D. Fla. 1978) (defendant so heavily sedated he fell asleep at counsel table).

is competent to stand trial while medicated.<sup>29</sup>

The inquiry is more complex, however, when the state seeks to compel the defendant to become competent to stand trial. The first point of inquiry must be the nature of the defendant's interest in being free from medication. The courts that have addressed this issue have found that the defendant's interest in being free from compelled medication is a fundamental right.<sup>30</sup> This right has its roots in a number of constitutional protections that the courts have identified.

The most frequently identified source of the right to be free from the compelled administration of psychotropic drugs is the first amendment.<sup>31</sup> The first amendment protects not only the communication of ideas, but also the freedom to generate ideas.<sup>32</sup> Psychotropic drugs are mind-altering chemicals that potentially may infringe on the defendant's right to control his own thought processes.<sup>33</sup>

The administration of drugs against the defendant's will also interferes with his right to bodily integrity.<sup>34</sup> Although not specifically protected by the Constitution, bodily integrity falls squarely within the right to privacy the Supreme Court has recognized surrounding the first, fourth, fifth, ninth, and fourteenth amendments.<sup>35</sup> One court has found that this right to privacy encompasses the right to protect one's mental processes from governmental interference.<sup>36</sup> Courts also have noted that the coerced administration of psychotropic drugs may infringe upon the right to freedom of religion<sup>37</sup> and

29. See, e.g., *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976) (no evidence presented that Thorazine affected defendant's thought processes or the content of defendant's thoughts); *State v. Hancock*, 247 Or. 21, 426 P.2d 872 (1967) (Valium did not affect defendant's ability to communicate with other people, did not affect his memory, and did not impair his mental functioning); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978) (evidence indicated that the medication was beneficial to defendant's thought processes).

30. See, e.g., *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976) (civil action); *Winters v. Miller*, 446 F.2d 65 (2d Cir.) (civil action), *cert. denied*, 404 U.S. 985 (1971); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979) (civil action), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (civil action), *modified*, 653 F.2d 836 (3d Cir. 1981), *cert. granted*, 102 S. Ct. 3506 (1982); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978); *State v. Mayott*, 6 Wash. App. 96, 492 P.2d 239 (1971); *Winick, Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331 (1981); *Winick, supra* note 2.

31. See *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976); *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971); *State v. Maryott*, 6 Wash. App. 96, 98, 492 P.2d 239, 240 (1971).

32. *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979) (first amendment's protection of the right to communicate ideas presupposes the capacity to produce ideas), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982).

33. *Winick, supra* note 30, at 366 (psychotropic drugs intrude directly upon mental processes).

34. See *State v. Law*, 270 S.C. 664, 674, 244 S.E.2d 302, 307 (1970); *Winick & DeMeo, Competence to Stand Trial in Florida*, 35 U. MIAMI L. REV. 31, 63-64 (1980).

35. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

36. *Rennie v. Klein*, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("[T]he right of privacy is broad enough to include the right to protect one's mental processes from governmental interference."), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *reheard*, 720 F.2d 266 (3d Cir. 1983).

37. *Winters v. Miller*, 446 F.2d 65 (2d Cir.) (court held that state must have compelling interest to administer psychotropic drugs to an unwilling Christian Scientist), *cert. denied*, 404 U.S. 985 (1971).

the eighth amendment's proscription of cruel and unusual punishment.<sup>38</sup>

Once the court has determined that the defendant has a fundamental right to be free from compelled psychotropic medication, due process<sup>39</sup> requires that any infringement of the right be strictly scrutinized.<sup>40</sup> Strict scrutiny demands that the state have a compelling interest that is furthered by the restriction,<sup>41</sup> and that the restriction be the least restrictive means to achieve that end.<sup>42</sup>

The state's interest in compelling the administration of psychotropic drugs is to try currently incompetent defendants. The Supreme Court has noted that the "Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace."<sup>43</sup> The state's interest in bringing to trial one accused in good faith and with probable cause lies at the very heart of its police power.<sup>44</sup> If the state is unable to try those accused, it will be forced to release them or institute civil commitment proceedings.<sup>45</sup> In light of these considerations the state's interest in forcing defendants to become competent is compelling.

Although the presence of a compelling interest does permit the state to infringe upon the fundamental right of an incompetent accused, the infringement must be tailored by the courts to achieve the permissible end in the least restrictive manner.<sup>46</sup>

The method chosen for returning the defendant to competence is the first consideration in determining whether the compelled competence of a defendant comports with the least restrictive means test. If there is any indication

38. See *Scott v. Plante*, 532 F.2d 939, 946-47 (3d Cir. 1976); but see *Rennie v. Klein*, 462 F. Supp. 1131, 1143 (D.N.J. 1978) (no eighth amendment claim because psychotropic drugs are a justifiable method of treatment; side effects of psychotropic drugs not disproportionately harsh compared to benefits), modified, 653 F.2d 836 (3d Cir. 1981), cert. granted, 102 S. Ct. 3506 (1982). For a discussion of the side effects of psychotropic medication see *infra* note 57.

Compelled competency may infringe on a defendant's eighth amendment rights in the situation hypothesized by the Louisiana Supreme Court in *State v. Burrows*, 250 La. 658, 659, 198 So. 2d 393, 394 (1967). The trial judge asked: "Can he be compelled to take drugs that will produce sanity sufficient for him to stand trial and, if found guilty of the death penalty, [sic] compelled to take drugs so that he may remain sane in order that his life may be taken?" *Id.* The court never resolved the issue, however, because the trial court's finding of competency was interlocutory and not appealable. *Id.* at 667, 198 So. 2d at 395-96.

39. "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) or are 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." *Rochin v. California*, 342 U.S. 165, 169 (1952) (footnote omitted).

40. *United States v. O'Brien*, 391 U.S. 367 (1968).

41. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

42. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

43. *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring).

44. *Winick & DeMeo*, *supra* note 34, at 64.

45. See *State v. Stacy*, 556 S.W.2d 552, 558 (Tenn. Crim. App. 1977), *aff'd*, 601 S.W.2d 696 (Tenn. 1980). The state may not deprive indefinitely the incompetent defendant of his liberty without due process. See *Jackson v. Indiana*, 406 U.S. 715 (1972); Steinberg, *Summary Commitment of Defendants Incompetent to Stand Trial: A Violation of Constitutional Safeguards*, 22 St. Louis U.L.J. 1 (1978).

46. *Shelton v. Tucker*, 364 U.S. 479 (1960).

that the defendant can be returned to competence within a reasonable time using a less intrusive method of therapy,<sup>47</sup> such as traditional verbal psychotherapy, that does not violate the defendant's right to bodily integrity, or a less potent drug, that is less violative of defendant's freedom of thought, then the defendant should be permitted to try that mode of treatment until it is clear that improvement is not being made.<sup>48</sup> A significant factor that must be weighed in determining the least restrictive mode of treatment is the likelihood and potential severity of side effects from the use of psychotropic medication.<sup>49</sup>

If treatment with psychotropic drugs is the least restrictive means for returning a given defendant to competency,<sup>50</sup> the trial judge must conduct the defendant's trial in a manner that minimizes the effects of compelled medication. The least restrictive means standard mandates that the medication be used only to effect the defendant's return to competency and not to infringe on any of the defendant's other rights. Consequently, sensitivity to the effects of psychotropic medication is essential when the defendant is to be tried before a jury.<sup>51</sup>

At the very least, the jury must be informed that the defendant is receiving psychotropic medication and of the effects of the medication.<sup>52</sup> This may be done through the defendant's testimony or through an expert witness.<sup>53</sup> The jury must be made aware that the demeanor of the defendant in the courtroom, particularly if he appears calm, callous, and incapable of feeling remorse,<sup>54</sup> does not reflect the defendant's personality, but is a result of the state's action in medicating him against his will.<sup>55</sup> Because the effect of the medication may go beyond merely returning the defendant to competence and may affect adversely his demeanor before the jury, an explanation that the defendant is medicated should be required to minimize any unnecessary in-

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47. For a discussion of the various modes of psychotherapy and an evaluation of the degree of intrusiveness of each method, see Winick, *supra* note 30, at 351-73.

48. Winick & DeMeo, *supra* note 34.

49. See *infra* note 57.

50. The decision to medicate a defendant never should be made without informing counsel. Should the state try a medicated defendant without revealing the details of his medication to counsel, the defendant will have a claim against the state under *Brady v. Maryland*, 373 U.S. 83 (1963), for withholding exculpatory evidence. See *United States ex rel. Trantino v. Hatrack*, 563 F.2d 86, 93 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978) (court did not reach the *Brady* issue in habeas corpus petition because defendant had not exhausted state remedies).

51. These considerations are no less important in trying a defendant who is voluntarily medicated.

52. *In re Pray*, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975); see also FLA. R. CRIM. P. 3.214(c)(2) (requiring that the jury be instructed before trial and in the charge regarding the medication and its effects).

53. See *United States v. Hayes*, 589 F.2d 811, 824 (5th Cir. 1979); *State v. Jojola*, 89 N.M. 489, 493, 553 P.2d 1296, 1300 (1976); *State v. Gwaltney*, 77 Wash. 2d 906, 909, 468 P.2d 433, 435 (1970) ("The inability of a defendant to effectively express to a judge or jury his true emotional feelings on a subject is a fact that can be adequately explained to a trier of fact by either the defendant himself or another witness.").

54. See Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. FORENSIC SCI. 568, 574 (1972).

55. *State v. Murphy*, 56 Wash. 2d 761, 766, 355 P.2d 323, 326 (1960).

fringement on his right to appear and testify on his own behalf.<sup>56</sup>

The trial judge dealing with a medicated defendant also must familiarize himself with the side effects of psychotropic drugs<sup>57</sup> so that he can act to minimize any prejudicial effect on the jury that may deprive the defendant of a fair trial.<sup>58</sup> A liberal recess policy during trial may be sufficient to accommodate minor side effects after administration of medication.<sup>59</sup> Serious side effects, however, may require more drastic measures. In cases in which the defendant's symptoms from psychotic medication are so severe as to be distracting or prejudicial, the trial court may excuse the defendant's presence during trial.<sup>60</sup>

The defendant's right to testify in his own behalf and present evidence will be infringed most seriously in cases in which the defendant places his mental state in issue by raising the defense of insanity or diminished capacity. When the mental state of the defendant is in issue, it is the mental state at the time of the alleged crime, and not at the time of trial, that is relevant.<sup>61</sup> The

56. The defendant's right to testify in his own behalf derives from statutes that make the defendant competent to testify, contrary to the common-law rule making defendants incompetent because of interest. *See, e.g.*, N.C. GEN. STAT. § 8-54 (1981); *see generally* *Washington v. Texas*, 388 U.S. 14 (1967).

57. The toxic side effects of psychotropic medication vary from individual to individual and with the particular drug, the dosage, and the length of treatment. The most serious side effect of antipsychotic drugs is tardive dyskinesia, which some studies indicate strikes about 50% of chronically hospitalized schizophrenics and about 40% of those treated on an out-patient basis. *Rogers v. Okin*, 478 F. Supp. 1342, 1360 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). Tardive dyskinesia produces involuntary motor movements, particularly of the face and lips. Involuntary movements also may strike the fingers, hands, legs, and pelvic area. *Id.* *See also* Plotkin, *supra* note 11, at 476. "In its most progressive state, the disease can interfere with swallowing and can affect all motor activity. Although in mild cases the disease can simply be a source of embarrassment, it can be physically and psychologically disabling." *Rogers*, 478 F. Supp. at 1360. There is no known effective treatment for tardive dyskinesia. Winick, *supra* note 30, at 366.

A group of less severe neurological side effects of antipsychotic drugs are known as extrapyramidal effects. The symptoms include: akathisia (motor restlessness and agitation); akinesia (physical immobility and lack of spontaneity); dystonic reactions (muscle spasms in face, neck, and arms characterized by irregular flexing or writhing); and pseudoparkinsonian syndrome (mask-like face, drooling, muscle rigidity, and tremors). These extrapyramidal effects cease when the drug is terminated. *See Rogers*, 478 F. Supp. at 1360; Plotkin, *supra* note 11, at 475.

In addition to tardive dyskinesia and the extrapyramidal effects, a variety of nonmuscular side effects may occur. These include drowsiness, blurred vision, lack of sexual desire, frigidity, depression, constipation, diarrhea, rashes, and menstrual changes. *See Scott v. Plante*, 532 F.2d 939, 945 n.8 (3d Cir. 1976); *See Plotkin, supra* note 11, at 476; Winick, *supra* note 30, at 366. More serious nonmuscular side effects include ocular changes, cardiovascular changes, convulsions, and sudden death. *See Plotkin, supra* note 11, at 476; Winick, *supra* note 30, at 366.

58. Due process requires that the defendant receive a fair trial by an impartial jury free from improper influences. *See, e.g.*, *Estell v. Williams*, 425 U.S. 501 (1976) (fourteenth amendment prohibits state from compelling defendant to stand trial in prison garb due to prejudicial effect on jury); *United States v. Garcia*, 456 F. Supp. 1354 (D.P.R. 1978) (right to fair trial requires suppression of right to free speech when trial publicity will prejudice jury or potential jurors).

59. *See Winick, supra* note 2, at 789.

60. *State v. Larson*, 94 N.M. 795, 797, 617 P.2d 1310, 1313 (1980) (although denying defendant's motion to excuse his presence during trial, the court indicated that the trial judge may have discretion to excuse a defendant in appropriate circumstances). *See also In re United States*, 597 F.2d 27, 27-28 (2d Cir. 1979) ("We think, however, that there is a residue of judicial discretion in unusual circumstances where good cause is shown such as physical endangerment of the defendant to permit temporary absence.").

61. *State v. Law*, 270 S.C. 669, 671-72, 244 S.E.2d 302, 306 (1978) (jury was well aware that issue was mental state at time of alleged crime, not time of trial).

demeanor of the defendant at the time of trial, however, is probative evidence of his mental state at the time of the offense.<sup>62</sup> Consequently, by compelling the defendant to take medication that alters his attitude, appearance, and demeanor, the state can determine the evidence the jury will see on the issue of the defendant's mental state.<sup>63</sup>

Precluding the defendant from presenting evidence relevant to his mental state does not comport with the least restrictive means standard. Such an imbalance in the adversary system may be remedied in part by permitting the defendant to appear before the jury unmedicated for some portion of the trial<sup>64</sup> if he so requests.<sup>65</sup> The Supreme Court of Vermont noted the importance of such an opportunity in *In re Pray*:<sup>66</sup> "Yet his deportment, demeanor, and day-to-day behavior during the trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity."<sup>67</sup>

The trial judge should arrange for the defendant to be free from medication, to the extent it is consistent with the progress of the trial and the safety of the public,<sup>68</sup> whenever evidence of the defendant's demeanor will be probative of a fact in issue or help the jury make a decision, including whether to impose the death penalty.<sup>69</sup> Denial of such a request is an infringement of the defendant's right to testify effectively in his own behalf and is a denial of due process.

Finally, the trial judge should not hesitate to appoint an independent psychiatric expert, at the defendant's request or sua sponte, to review the defendant's medication records to ensure that he is receiving the proper drug, correct dosage, and any medication necessary to combat disabling side effects. This will provide the trial judge with the information necessary to determine if the defendant's competence is being maintained in the least restrictive manner during trial.

In summary, the use of psychotropic drugs to compel competency in-

62. See, e.g., *State v. Babin*, 336 So. 2d 780, 781 (La. 1976); *State v. Bundridge*, 294 N.C. 45, 49, 239 S.E.2d 811, 815 (1978); *In re Pray*, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975); *State v. Maryott*, 6 Wash. App. 96, 101-02, 492 P.2d 239, 242 (1971); 4 J. WIGMORE, EVIDENCE § 1160 (Chadbourn rev. ed. 1972).

63. *State v. Maryott*, 6 Wash. App. 96, 102, 492 P.2d 239, 242 (1971).

64. See, e.g., *State v. Hayes*, 118 N.H. 458, 462, 389 A.2d 1379, 1382 (1978). Of course, a request to appear before the jury unmedicated should be granted only if the defendant was, in fact, unmedicated at the time of the alleged offense. *Id.* at 462, 389 A.2d at 1382. (Hayes had been taking psychotropic drugs until the day before the alleged crime; he requested to be taken off psychotropic medication seven days before trial.)

65. That the defendant will be incompetent for a portion of the trial if his request is granted will not violate due process in this context. If the defendant chooses, while competent, to become incompetent, then he effectively waives his right not to be tried while incompetent. See *State v. Maryott*, 6 Wash. App. 96, 103, 492 P.2d 239, 243 (1971) (construing *Illinois v. Allen*, 397 U.S. 337, 350 (1970)).

66. 133 Vt. 253, 336 A.2d 174 (1975).

67. *Id.* at 257, 336 A.2d at 177.

68. *Id.*

69. *State v. Murphy*, 56 Wash. 2d 761, 766, 355 P.2d 323, 326 (1960) (defendant's demeanor was "casual, cool, [and with a] somewhat lackadaisical attitude"; a new trial was necessary because court could not know to what extent the defendant's appearance as a witness affected the jury).

fringes on the defendant's fundamental rights, including his right to testify in his own behalf. Given the state's compelling interest in bringing the defendant to trial, this infringement will not amount to a denial of due process of law as long as the use of the psychotropic drugs is necessary and is implemented in the least restrictive manner. Reviewing courts must examine each instance of compelled medication to determine whether psychotropic drugs have been used solely to bring the defendant to trial and in the least intrusive manner. If a reviewing court finds that the only effect of the medication is the defendant's return to competence, there has been no denial of due process. If the court finds, however, that, in spite of protective measures, the influence of psychotropic drugs has precluded the defendant from presenting relevant evidence or confronting the witnesses against him, the defendant has been denied due process and his conviction must be reversed.

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