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CRIMINAL LAW — AMNESIA AS TO THE EVENTS OF THE CRIME CHARGED DOES NOT BY ITSELF JUSTIFY A FINDING OF INCOMPETENCE TO STAND TRIAL. *Morrow v. State*, 293 Md. 247, 443 A.2d 108 (1982).

Defendant's passenger was killed as a result of a head-on collision with another vehicle. Before trial, the Circuit Court for Baltimore County held a competency hearing in response to the defendant's claim of amnesia as to the events leading up to the accident. The court determined that the defendant was competent to stand trial and he was subsequently convicted by a jury of manslaughter by automobile.¹ Upon appeal,² the Court of Appeals of Maryland considered for the first time whether an amnesic defendant is competent to stand trial. In interpreting the state's competency statute³ the court held that amnesia alone, as to the events of the crime charged, does not justify a finding of incompetence.⁴

The competency doctrine has its genesis in the common law prohibition against trials *in absentia*.⁵ Founded on the belief that fairness requires the accused to be mentally as well as physically present at trial,⁶ the common law rule developed that an accused was considered

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1. *Morrow v. State*, 293 Md. 247, 443 A.2d 108 (1982). Amnesia is generally defined as a disturbance or impairment of memory. 8A L. CHAPMAN, COURTROOM MEDICINE § 123.10 (1982). An expert psychiatrist testified that Morrow suffered post-traumatic amnesia as a result of the head injuries he sustained in the accident. Thus, Morrow was unable to recall events before, during, and after the accident as the result of genuine and permanent amnesia. However, the psychiatrist testified that, with the exception that Morrow would be unable to answer his attorney's questions concerning the events surrounding the accident, Morrow understood the nature and object of the proceedings against him and would be able to consult with his attorney. 293 Md. at 249, 443 A.2d at 110.
 2. The Court of Special Appeals of Maryland affirmed Morrow's conviction by holding that his post-traumatic injury did not prevent him from assisting in his defense and, moreover, did not preclude him from receiving a fair trial. 47 Md. App. 296, 423 A.2d 251 (1980), *aff'd*, 293 Md. 247, 443 A.2d 108 (1982).
 3. MD. HEALTH-GEN. CODE ANN. §§ 12-101 to -106 (1982). In particular, the statute provides that "[i]f, before or during a trial, the defendant in a criminal case appears to the court to be incompetent to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." *Id.* § 12-102(a). The statute defines "incompetent to stand trial" as "not able: (1) [t]o understand the nature or object of the proceeding; or (2) [t]o assist in one's defense." *Id.* § 12-101(c). At the time of the *Morrow* decision the preceding statute was codified at MD. ANN. CODE art. 59, § 23 (1979). The revision resulted in no substantive change to the statute.
 4. 293 Md. at 253, 443 A.2d at 112. Morrow was found not guilty of both driving while intoxicated and driving while ability was impaired. *Id.* at 249, 443 A.2d at 110. In addition, the court ruled that Morrow's failure to make a timely objection to a jury instruction in accordance with MD. R.P. 757(f) barred appellate review of two allegedly erroneous jury instructions. 293 Md. at 258, 443 A.2d at 114.
 5. See generally Gobert, *Competency to Stand Trial: A Pre- and Post- Jackson Analysis*, 40 TENN. L. REV. 659, 660 n.11 (1973) [hereinafter cited as Gobert].
 6. See generally Comment, *An End to Incompetency to Stand Trial*, 13 SANTA CLARA L. REV. 560, 561 (1973); Note, *The Identification of Incompetent Defendants: Sepa-*

mentally competent to stand trial if he was able to conduct a rational defense⁷ and could understand the nature and object of the proceedings against him.⁸ The doctrine is concerned with the accused's present mental competency as opposed to his mental condition at the time of the alleged offense.⁹ Of the several policy considerations underlying the competency doctrine, most fundamental is that it ensures the accuracy of the adjudication.¹⁰

Many American jurisdictions readily adopted the common law competency doctrine,¹¹ although it was not until 1967 that Maryland adopted the doctrine by amending its competency statute.¹² Prior to 1967, Maryland utilized the *M'Naghten* test as the standard for ascertaining both competency to stand trial and criminal responsibility at the time of the alleged offense.¹³ The 1967 amendments, therefore,

rating Those Unfit for Adversary Combat From Those Who Are Fit, 66 KY. L.J. 666, 669-71 (1978).

7. *E.g.*, Frith's Case, 22 How. St. Trials 307, 318 (1790); *see also* 1 HALE, PLEAS OF THE CROWN 34-35. The principle embodied in these materials—that an incompetent defendant not be tried until he regains his competency—was later codified by Parliament in the Criminal Lunatics Act of 1800, 39 & 40 Geo. 3, ch. 94 (1800), reprinted in 5 HALSBURY'S STATUTES OF ENGLAND 593 (2d ed. 1948).
8. Commentators have given several explanations for the development of this common law rule. First, social policy requires that the accused understand what he is being punished for. Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967) [hereinafter cited as Note]. Second, fairness requires that the accused understand that he is being tried in a criminal court, that he understand the proceedings, and that he know what offense he committed. Lindsay, *Fitness to Stand Trial in Canada: An Overview in Light of the Recommendations of the Law Reform Commission of Canada*, 19 CRIM. L.Q. 303, 306 n.10 (1976-77). Third, the competency doctrine also ensures the accuracy of the fact-finding process by safeguarding several rights afforded the accused, such as the constitutional right to a jury trial, the right to confront witnesses, and to call witnesses in his own behalf. *See* U.S.CONST. amend. VI. Lastly, the accused has the right to have his guilt determined beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *see* Gobert, *supra* note 5, at 659.
9. *Swisher v. United States*, 354 F.2d 472, 474 (8th Cir. 1966).
10. Note, *supra* note 8, at 457.
11. The first reported American case to acknowledge the common law competency doctrine was in 1835. *United States v. Lawrence*, 26 F. Cas. 887, 889-90 (D.C. Cir. 1835) (No. 15,577) (defendant assaulted President Andrew Jackson by attempting to shoot him as he left the Capitol).
12. Act of May 4, 1967, 1967 Md. Laws 709. The precursor to the present competency statute, MD. ANN. CODE art. 59, § 7 (1964), originally enacted in 1827, Act of Mar. 9, 1827, 1827 Md. Laws 197, was modeled after England's Criminal Lunatics Act of 1800. *See supra* note 7. For an excellent historical survey of the evolution of the Maryland competency statute prior to the 1967 amendments see Rowe v. State, 234 Md. 295, 199 A.2d 785, cert. denied, 379 U.S. 924 (1964).
13. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). Maryland adopted the *M'Naghten*, or right-wrong, test in 1888 as the standard for determining criminal responsibility. *Spencer v. State*, 69 Md. 28, 37-39, 13 A. 809, 812-14 (1888). The present Maryland competency statute, MD. HEALTH-GEN. CODE ANN. §§ 12-101 to -106 (1982), mirrors both the federal competency statute, 18 U.S.C. § 4244 (1976), and the Model Penal Code rule regarding competency. MODEL PENAL CODE § 4.04, 10 U.L.A. 492 (1974).

brought Maryland in line with the federal¹⁴ and state¹⁵ statutes governing competency. In *Dusky v. United States*,¹⁶ a 1960 decision interpreting the federal competency statute, the United States Supreme Court held that an accused is competent to stand trial "if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him."¹⁷ Known as the *Dusky* standard most jurisdictions, including Maryland,¹⁸ have utilized it in analyzing the competency of defendants to stand trial.¹⁹

*Morrow v. State*²⁰ thus confronted the court with an issue of first impression in Maryland: whether a defendant suffering from amnesia as to the events of the crime charged is competent to stand trial within the meaning of the state's competency statute.²¹ Writing for a unanimous court, Judge Cole emphasized that the issues of competency and the right to a fair trial are separate.²² With respect to competency, the court applied the *Dusky* standard to the Maryland competency statute and held that amnesia alone, as to the events of the crime charged, does not justify a finding of incompetence.²³ Since Morrow could understand the nature and object of the proceedings against him and could assist his counsel, the court deemed him competent.²⁴ In support of its holding the court reasoned that everyone is amnesic to some degree,²⁵ and that amnesia is analogous to being home, asleep in bed at the time of the crime²⁶ or to the loss of memory due to drugs or intoxication.²⁷ In addition, the court believed that there is the potential for fraud in a

14. 18 U.S.C. § 4244 (1976). Enacted in 1949, this statute provides in pertinent part that a person is mentally incompetent if he is "unable to understand the proceedings against him or properly to assist in his own defense. . . ." *Id.*

15. Note, *Amnesia: The Forgotten Justification for Finding an Accused Incompetent to Stand Trial*, 20 WASHBURN L.J. 289, 290 n.17 (1981).

16. 362 U.S. 402 (1960) (per curiam).

17. *Id.* at 403.

18. *Raithel v. State*, 280 Md. 291, 297-98, 372 A.2d 1069, 1072 (1977).

19. *E.g.*, *Commonwealth v. Griffin*, 622 S.W.2d 214, 216 (Ky. 1981); *Barnett v. State*, 618 S.W.2d 735, 737 (Mo. 1981). *See generally* Annot., 46 A.L.R.3d 544, 553 (1972).

20. 293 Md. 247, 443 A.2d 108 (1982).

21. In a 1976 case involving a defendant who alleged amnesia, the court of special appeals did not address the issue presented here since the jury in that case found that the defendant was not suffering from genuine amnesia. *James v. State*, 31 Md. App. 666, 688 n.9, 358 A.2d 595, 608 n.9, *cert. denied*, 278 Md. 725 (1976).

22. *Morrow v. State*, 293 Md. 247, 256, 443 A.2d 108, 113 (1982).

23. *Id.* at 253, 443 A.2d at 112.

24. *Id.* at 256, 443 A.2d at 113.

25. *See State v. Willard*, 292 N.C. 567, 577, 234 S.E.2d 587, 593 (1977); Note, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109, 111 (1961) [hereinafter cited as *Amnesia*].

26. *See United States v. Stevens*, 461 F.2d 317, 320 (7th Cir.), *cert. denied*, 409 U.S. 948 (1972) (quoting *Amnesia*, *supra* note 25, at 128).

27. *Morrow v. State*, 293 Md. 247, 253, 443 A.2d 108, 112 (1982). *See State v. Willard*, 292 N.C. 567, 577, 234 S.E.2d 587, 593 (1977).

claim of amnesia.²⁸

The court's holding in *Morrow* is well-reasoned and reflects a pragmatic yet sensitive approach to the issue of whether an amnesic defendant is competent to stand trial. The *Morrow* court makes clear that an amnesic defendant will have to establish a defect other than his amnesia to come within the purview of the competency statute.²⁹ What that additional defect is was left unanswered by the court. However, implicit in the court's opinion is that a finding of incompetence may be justified by a defect which coalesces with a defendant's amnesia so as to render him unable to assist his counsel or to understand the nature and object of the proceedings against him. This approach is in concert with that taken by other jurisdictions³⁰ and represents the more analytically sound approach since it ensures the integrity of the competency statute.

The court's pragmatism is illustrated by its view that everyone is amnesic to some degree.³¹ In sharing this view, other jurisdictions³² and commentators³³ have emphasized that the loss of memory alone should not provide the basis for interrupting the adjudicatory process. Underlying this view is the contention that evidentiary and procedural rules are calculated to ensure a workable balance of the interests of the parties involved.³⁴ In light of these safeguards, two serious problems would have arisen had the court reversed *Morrow*'s conviction by finding him incompetent solely on the basis of his amnesia. First, *Morrow* could not have been institutionalized since amnesia is not a mental illness.³⁵ Second, *Morrow* would have avoided criminal liability because his permanent amnesia rendered him incompetent.³⁶ Therefore, the practical effect would have been to permit *Morrow* and other amnesic defendants to avoid responsibility for their criminal conduct. As a result, the state's interest in the prosecution of those who engage in criminal conduct would have been unduly hampered and the safety and

28. See sources cited *supra* note 27.

29. *Morrow v. State*, 293 Md. 247, 253, 443 A.2d 108, 112 (1982).

30. For a list of jurisdictions, see Annot., 46 A.L.R.3d 544, 553 (1972). Cf. *People v. Jackson*, 88 A.D.2d 604, 606, 449 N.Y.S.2d 759, 761 (1982) (a defect which impairs the defendant's reason and comprehension or hampers his ability to consult with his counsel may be physical as well as mental).

31. *Morrow v. State*, 293 Md. 247, 254, 443 A.2d 108, 112 (1982).

32. E.g., *United States v. Stevens*, 461 F.2d 317, 320 (7th Cir.), cert. denied, 409 U.S. 948 (1972); *United States ex rel. Parson v. Anderson*, 354 F. Supp. 1060, 1072-73 (D.Del. 1972), cert. denied *sub nom.* *Parson v. Anderson*, 414 U.S. 1072 (1973); *State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977).

33. E.g., *Amnesia*, *supra* note 25, at 136.

34. *Id.*

35. See, e.g., *State v. Williams*, 375 So.2d 1379, 1383 (La. 1979). See generally Lewin, *Incompetency to Stand Trial: Legal and Ethical Aspects of an Abused Doctrine*, 1969 ARIZ. ST. L.J. 233.

36. Under the Maryland competency statute, an individual found incompetent cannot be tried until he regains his competency. MD. HEALTH-GEN. CODE ANN. §§ 12-101 to -106 (1982).

security of society would have been jeopardized.³⁷ The *Morrow* court thus struck a judicious balance between the societal interest in the efficient administration of its criminal justice system and the rights afforded the criminally accused.³⁸ In sum, as the court noted, the integrity of the judicial process is not compromised since all amnesic defendants will be tried.³⁹

Courts have taken two basic approaches in determining the competency of amnesiacs to stand trial. A minority of jurisdictions have adopted a case-by-case approach in analyzing the competency of amnesic defendants to stand trial. For example, in *Wilson v. United States*,⁴⁰ a federal court set forth six factors to be used on a case-by-case basis to determine the competency of an amnesic defendant to stand trial.⁴¹ While other courts have considered varying factors,⁴² a majority of jurisdictions have dismissed the case-by-case approach and have instead held that amnesia alone, as to the events of the crime charged, does not constitute incompetence.⁴³ Of the several policy jus-

37. See *Commonwealth ex rel. Cummins v. Price*, 421 Pa. 396, 401, 218 A.2d 758, 763, cert. denied, 385 U.S. 869 (1966).

38. *Morrow v. State*, 293 Md. 247, 256, 443 A.2d 108, 113 (1982).

39. *Id.*

40. 391 F.2d 460 (D.C. Cir. 1968).

41. The factors set forth by the *Wilson* court are:

(1) the extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer; (2) the extent to which the amnesia affected the defendant's ability to testify in his own behalf; (3) the extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi; (4) the extent to which the Government assisted the defendant and his counsel in that reconstruction; (5) the strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so; and (6) any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

Id. at 463-64.

42. See *United States v. Swanson*, 572 F.2d 523, 526-27 (5th Cir. 1978); *Aldridge v. State*, 247 Ga. 142, 146, 274 S.E.2d 525, 530 (1981). The courts utilizing a factor-type approach are not in harmony as to the stated factors. Compare *Thompson v. State*, 364 So.2d 683, 684 n.1 (Ala. Crim. App. 1978) (factors include existence of history of irrational behavior, prior medical opinion, and accused's demeanor at trial) and *Davis v. State*, 354 So.2d 334, 338 (Ala. Crim. App. 1978) (same) with *Aldridge v. State*, 247 Ga. 142, 146, 274 S.E.2d 525, 530 (1981) (factors include defendant's present ability to testify on matters other than the event he cannot remember, presence or absence of other logical conditions that would hinder his present ability to assist his counsel, the ability of the parties to reconstruct events without defendant's testimony, the strength of the prosecution's case against the defendant, and access to the prosecution's files in assisting the defendant to prepare his defense).

43. *E.g.*, *United States v. Mota*, 598 F.2d 995, 998 (5th Cir.), cert. denied sub nom. *Flores v. United States*, 444 U.S. 1084 (1979); *State v. Willard*, 292 N.C. 567, 577, 234 S.E.2d 587, 593 (1977).

tifications given in support of the latter approach,⁴⁴ most pervasive is the contention that amnesia neither affects the accused's ability to comprehend his position nor his ability to consult intelligently with counsel in preparing a defense.⁴⁵ Consequently, although these courts generally view amnesia as an unfortunate condition, it does not warrant a finding of incompetence.⁴⁶

The *Morrow* court also rejected the case-by-case approach in favor of the majority view that amnesia alone does not justify a finding of incompetence. In fashioning no new analytical models or approaches, the court gleaned its rationale from other jurisdictions which have held the same. For instance, in *Reagon v. State*,⁴⁷ a case factually analogous to that of *Morrow*, the Indiana Supreme Court explained that since an amnesic defendant is no more handicapped than a defendant who has lost evidence or who has been prejudiced by the death of a material witness, the amnesic defendant must stand trial.⁴⁸ In embracing this rationale as a major basis for rejecting *Morrow's* argument for a case-by-case approach, the Court of Appeals of Maryland sensibly reasoned that it would be inequitable to carve an exception in the competency doctrine for amnesic defendants. To be sure, the universal incidence of amnesia makes it impossible to consider amnesiacs as a class deserving special protection.⁴⁹

Another equally compelling reason cited by the court is the problem of fraud which necessarily accompanies a claim of amnesia. One court has held that the high potential for fraudulent allegations of memory loss can provide the sole basis for not expanding the compe-

44. One court has set forth three policy reasons for not expanding the competency doctrine: (1) society cannot permit amnesia to serve as a basis for permanently, completely, and absolutely negating all criminal liability; (2) the amnesic defendant may escape criminal liability on the basis of self-serving statements made to the jury; and (3) expansion of the doctrine will greatly jeopardize the safety and security of society and render the protection of society from crime and criminals far more difficult. *Commonwealth ex rel. Cummins v. Price*, 421 Pa. 396, 401, 218 A.2d 758, 763, *cert. denied*, 385 U.S. 869 (1966). In *Morrow*, the court of special appeals indicated that the defendant is not precluded from exercising his sixth and fourteenth amendment constitutional rights, such as his right to challenge jurors and to confront the witnesses against him, to summon witnesses in his favor, and to have the assistance of counsel. *Morrow v. State*, 47 Md. App. 296, 301, 423 A.2d 251, 254 (1980), *aff'd*, 293 Md. 247, 443 A.2d 108 (1982). In addition, the amnesic defendant can still be informed of the nature and cause of the accusation and make rational decisions regarding his defense. 47 Md. App. at 301, 423 A.2d at 254.

45. *See, e.g.*, *United States v. Alley*, 661 F.2d 718, 722 (8th Cir. 1981); *United States ex rel. Coleman v. Hicks*, 498 F. Supp. 636, 644 (D.N.J. 1980).

46. *See Commonwealth v. Griffin*, 622 S.W.2d 214, 217 (Ky. 1981). As the *Griffin* court explained, "[m]emory is, after all, only one source of ascertaining the facts surrounding the event for which a crime is charged." *Id.*

47. 253 Ind. 143, 251 N.E.2d 829 (1969).

48. *Id.* at 147, 251 N.E.2d at 831.

49. *See United States v. Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969).

tency doctrine to include amnesia.⁵⁰ While not going to this extreme, the court of appeals nonetheless indicated that this is a valid policy consideration since it is difficult to distinguish between an individual suffering from genuine amnesia and one who is merely feigning it.⁵¹ Holdings in accordance with that in *Morrow* invariably cite this policy consideration.⁵²

With respect to the right to a fair trial, the court found that Morrow received a fair trial because his amnesia did not thwart the accuracy of the fact-finding process.⁵³ Indeed, since the great weight of evidence against Morrow was physical, such as a blood alcohol test which revealed that he was legally intoxicated, it is quite doubtful whether Morrow's amnesia would have significantly affected his ability to assist in his defense. Moreover, together with the full pre-trial access Morrow had to the evidence the state intended to introduce at trial and the strong evidence against him, the court correctly concluded that Morrow was not denied a fair trial.

In *State v. Austad*,⁵⁴ a recent decision analyzing this issue, the court intimated that an amnesic defendant receives a fair trial when the bulk of the evidence against him is physical; his mental state and his alibi have little effect upon the evidence; the circumstantial evidence against him is strong; and he receives much prosecutorial assistance.⁵⁵ The court of appeals applied this same logic in *Morrow*. However, it is unclear whether the court's holding in *Morrow* indicates that only when the evidence against the accused is weak will the court seriously entertain the accused's argument that he did not receive a fair trial. It is unfortunate that the *Morrow* court left this question unanswered for there may be future instances when a trial court will be confronted with a case supported entirely by weak evidence against the amnesic defendant. In such a case, since it is unclear what steps a court should take in ensuring that the amnesic defendant receives a fair trial, there is the potential for inconsistent results. However, in *United States v. Borum*,⁵⁶ the Tenth Circuit indicated that when the evidence of guilt is

50. *Fajeriak v. State*, 520 P.2d 795, 802 (Alaska 1974). *But cf.* *State v. McClendon*, 103 Ariz. 105, 108, 437 P.2d 421, 424 (1968) (specious to base decision solely on the possibility that the defendant may be feigning amnesia).

51. *Morrow v. State*, 293 Md. 247, 254, 443 A.2d 108, 112 (1982).

52. *See Fajeriak v. State*, 520 P.2d 795, 802 (Alaska 1974). American military courts have been particularly suspect of all cases involving amnesiacs due to this very reason. *United States v. Watson*, 18 C.M.R. 391, 401 (1954); *United States v. Olvera*, 4 C.M.A. 134, 142, 15 C.M.R. 134, 142 (1954); *United States v. Lopez-Malave*, 4 C.M.A. 341, 346-47, 15 C.M.R. 341, 346-47 (1954).

53. *Morrow v. State*, 293 Md. 247, 256, 443 A.2d 108, 114 (1982).

54. 641 P.2d 1373 (Mont. 1982).

55. *Id.* at 1379. Interestingly, the *Austad* court cogently noted that no federal courts dealing with the issue of the competency of amnesic criminal defendants to stand trial in the decade after *Wilson* adopted the *Wilson* standard. *See supra* note 41. Instead, those courts, as did the *Austad* court, adopted the less stringent *Dusky* standard. *Id.* at 1378.

56. 464 F.2d 896 (10th Cir. 1972).

less than overwhelming, it is incumbent upon the court to determine whether the defendant was deprived of any defense which would have otherwise been available to him but for his amnesia.⁵⁷ Although the overwhelming evidence against Morrow made it unnecessary for the Court of Appeals of Maryland to set forth guidelines, it nonetheless would have been helpful had the court established criteria to assist trial courts in making a determination of what types of evidence will ensure that an amnesic defendant receives a fair trial.

The court's decision in *Morrow* makes clear that a defendant will not be able to avoid criminal liability on the basis of amnesia alone. Equally clear is that for a defendant to be found incompetent he will have to establish a defect other than his amnesia. The impact of *Morrow*, although substantial in terms of addressing whether an amnesic defendant is competent under the state competency statute, is necessarily limited due to the infrequency with which amnesia is raised as a basis of incompetence in Maryland. Nevertheless, the court's accurate interpretation of the competency statute will provide helpful guidance in future cases.

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57. *Id.* at 900.