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Capacity To Stand Trial: The Amnesic Criminal Defendant - Commonwealth ex rel. - Cummins v. Price1 State v. McClendon

Capacity To Stand Trial: The Amnesic Criminal Defendant

Commonwealth ex rel. Cummins v. Price[1]
State v. McClendon[2]

In *Cummins,* the appellant, defendant below, was indicted for the murder of one Nancy Flowers, whom the police discovered in the defendant's automobile, severely wounded. The defendant was standing about 100 feet away, suffering from a head wound. Both the defendant and his victim were hospitalized; Nancy Flowers died, and the defendant was found to be suffering from retrograde amnesia, possibly caused by his head wound. After his indictment but prior to trial, the defendant petitioned for a writ of habeas corpus on the grounds that he had suffered a permanent loss of memory of all events prior to, at the time of, and subsequent to, his arrest, and that for him to stand trial would "violate his constitutional rights."[3] He therefore asked that his indictment be dismissed, or alternatively that his trial be continued until such time as he should regain his memory. The trial court dismissed the petition, although it found as a matter of fact that the defendant's alleged amnesia was genuine but that the evidence of its

1. 421 Pa. 396, 218 A.2d 758 (1966), *cert. denied,* 385 U.S. 869 (1966).
2. 101 Ariz. 285, 419 P.2d 69 (1966).
3. He did not specify which rights, but probably was referring to the right not to be deprived of liberty without due process of law or to the right to counsel.

permanence was inconclusive. On appeal, the Supreme Court of Pennsylvania affirmed. In doing so, it expressly disavowed, as overly broad, statements in earlier decisions that amnesia is an affirmative defense to a criminal charge.[4] Noting that at no time since the inception of the proceedings had the defendant asserted that he was insane, the court held that the defendant was competent to stand trial under both the common law[5] and statutory[6] tests in force in Pennsylvania. The court stated that:

> . . . [The defendant] is able to comprehend his position as one accused of murder, is fully capable of understanding the gravity of the criminal proceedings against him, and is as able to co-operate with his counsel in making a rational defense as is any defendant who alleges that at the time of the crime he was insane or very intoxicated or completely drugged, or a defendant whose mind allegedly went blank or who blacked out or who panicked and contends or testifies that he does not remember anything.[7]

The court further reasoned that inasmuch as the defendant's amnesia was allegedly permanent, granting a continuance of the proceedings against him would in effect ". . . require Courts to hold that such amnesia will permanently, completely, and absolutely *negate all* criminal responsibility," would turn over the determination of criminal liability to psychiatrists, and would ". . . greatly jeopardize the safety and security of law-abiding citizens."[8]

The decision was rendered by a seven-member court, of which two judges separately concurred in the result and two others dissented. The latter were of the opinion that the court erred in not granting "reasonable continuances" in the absence of a definitive determination that the defendant's amnesia was permanent. Furthermore, reasoned the dissenters, the constitutional right to counsel would be a sham if

4. 218 A.2d at 761. See Commonwealth v. Iacabino, 319 Pa. 65, 167 Atl. 823 (1935); Commonwealth v. Myma, 278 Pa. 505, 123 Atl. 486 (1924); Commonwealth v. Morrison, 266 Pa. 223, 109 Atl. 878 (1920); Commonwealth v. Dale, 264 Pa. 362, 107 Atl. 743 (1919).

5. "The test at common law and employed by the courts in determining the mental capacity of a defendant to stand trial or to be sentenced or executed is not the M'Naghten 'right or wrong' test but whether the defendant is able to comprehend his position and make a rational defense." Commonwealth v. Novak, 395 Pa. 199, 205, 150 A.2d 102, 105 (1959).

6. Mental Health Act of 1951, 50 P.S. §§ 1071, 1222, 1072(11) (1954). This act provides that:

> Whenever any person charged with crime, upon production or appearance before the court, appears to be mentally ill or in need of care in a mental hospital, the court shall designate a responsible person to apply for his commitment, or for his commitment for observation, treatment and diagnosis, by order of such court. . . .

50 P.S. § 1222.

The act defines "mental illness" as:

> . . . an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. . . .

50 P.S. § 1072(11).

The court held this act inapplicable in the absence of a claim that the defendant was mentally ill or in need of care in an institution.

7. 218 A.2d at 763.

8. *Ibid.*

the defense counsel could not prepare a proper defense because of defendant's amnesia.

In the *McClendon* case, the defendant was convicted of second degree murder on facts nearly identical to those in *Cummins*. The body of the defendant's wife was discovered in the defendant's automobile at the Grand Canyon; the defendant was lying on the ground nearby, bleeding from a self-inflicted bullet wound in his head. Throughout his trial, the defendant claimed to have no memory of events surrounding his wife's death. On appeal, he argued that his amnesia rendered him unable to assist his counsel and that the trial court erred in failing to grant a continuance. The Supreme Court of Arizona agreed with the defendant and held that where a defendant's exact mental condition is unknown, the trial court must grant time for a thorough examination. If it then appears that the defendant's memory could be regained by a reasonable amount of treatment, a continuance of the trial should be granted to permit such treatment.[9] The court did not indicate what would be the result should the defendant's amnesia be found to be permanent.

The problem confronting both courts has seldom been reviewed at the appellate level. When it has, the courts have almost invariably held against the amnesic defendant, frequently without due consideration of whether the defendant would in fact be capable of adequately defending himself or whether trying an amnesic defendant constitutes a denial of due process of law or of the right to counsel.

Amnesia is the loss, either temporarily or permanently, of memory of conscious experience.[10] It may be caused by a wide variety of conditions, but among criminal defendants it most often results from alcoholism, hysteria, epilepsy, and head injury.[11] Alcohol is the most frequent cause of amnesia among criminal defendants;[12] it may be partial or complete, the severity of the amnesia being directly proportional to the blood alcohol level.[13] Hysterical amnesia, on the other hand, is always temporary. Caused by the inability of the mind to endure extreme emotional stress (such as that associated with the commission of a serious crime), the loss of memory is cured in time by the subsidence

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9. It is our belief it would be a reproach to justice if a man, while suffering from a temporary amnesic condition which could be alleviated by a reasonable amount of treatment, was compelled to go to trial at a time when he was not sufficiently in possession of his memory to enable him to properly assist his counsel. It would be a similar reproach if a man, while suffering from amnesia of an uncertain type and extent, was compelled to go to trial when the possibility existed that a further examination would reveal his condition to be temporary and susceptible to treatment.

419 P.2d at 72. One should note, however, that the Arizona court did not cite any authority in support of its reasoning.

10. Gray, *Amnesia In Criminal Trials,* 1 J. OF SOCIAL THERAPY 100 (1955).

11. In addition, amnesia may be caused by drug reaction, diabetes, malaria, somnambulism, senility, and may be a by-product of certain mental disorders, such as depression, paranoia, and, rarely, schizophrenia. Good general surveys of amnesia as it relates to legal matters are found in Hopwood & Snell, *Amnesia in Relation to Crime,* 79 J. OF MENTAL SCIENCE 27 (1933); Parfitt & Gall, *Psychogenic Amnesia: The Refusal to Remember,* 90 J. OF MENTAL SCIENCE 511 (1944).

12. Lennox, *Amnesia, Real and Feigned,* 99 AM. J. OF PSYCHIATRY 732, 733 (1943) (hereinafter cited as "Lennox").

13. Gray, *supra* note 10, at 101.

of the emotional distress.[14] Hysterical amnesia is the most common form of amnesia and the most easily feigned. Its detection, however, is possible through careful examination, hypnosis, and drugs.[15] The amnesia associated with epilepsy, more particularly psychomotor epilepsy (a variety of epilepsy in which the victim may be unconscious of his acts and yet capable of performing as an intelligent, normal person), is permanent.[16] Events which occurred during the attack are completely eradicated from the victim's memory, the limits of the "blank spot" being sharply defined by the onset and termination of the attack. Finally, a head injury sufficient to cause unconsiousness may also result in retrograde amnesia "with loss of memory for events which preceded the injury, as well as for a considerable period after consciousness is apparently regained."[17]

The status of the amnesic defendant under common law is unclear. The early English courts were unwilling to force one "disabled by act of God" to defend himself in a criminal proceeding.[18] This repugnance found expression in the principle that a defendant found to be insane could neither plead nor be tried. The classic statement of this principle is as follows:

> . . . [I]f a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution as he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense. If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of non-insane memory, execution shall be stayed: for peradventure, says the humanity of English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. . . .[19]

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14. Coburn & Fahr, *Amnesia and the Law*, 41 IOWA L. REV. 369, 370 (1956); MACDONALD, PSYCHIATRY AND THE CRIMINAL 93 (1958).

15. *Id.* ch. 7. In fact, most feigned amnesia is detectable by a trained psychiatrist. See Lennox at 741.

16. Lennox at 734; Coburn & Fahr, *supra* note 14, at 372.

17. Lennox at 732. An idea of the incidence of amnesia among criminal defendants may be gained from an essay by the late Dr. Manfred Guttmacher, in which he reports that among thirty-six consecutive defendants indicted for the murder of family members whom he examined, eight suffered a complete loss of memory of the crime and three a partial loss. Guttmacher, *Criminal Responsibility in Certain Homicide Cases Involving Family Members*, in PSYCHIATRY AND THE LAW 73, 81, 83 (Hoch & Zubin ed. 1955).

18. See *Ex parte* Emery [1909] 2 K.B. 81. An early American expression of this view is found in Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911):

> It would be inhuman, and to a certain extent a denial of the right of trial upon the merits, to require one who has been disabled by the act of God from intelligently making his defense to plead or be tried for his life or liberty. There may be circumstances in all cases of which the defendant alone has knowledge, which may prove his innocence, the advantage of which, if insane to such an extent that he did not appreciate the value of such facts, or the propriety of communicating them to his counsel, he would be deprived.

See also *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120 (1900); Commonwealth v. Braley, 1 Mass. 102 (1804); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 429 (1954).

19. 4 BLACKSTONE, COMMENTARIES § 24 (Lewis ed. 1898); 1 Hale's P.C. 34.

In 1800 this principle was embodied in the Criminal Lunatics Act,[20] which provided that a defendant found to be insane by a jury should be detained in an institution until he should regain his sanity and thus be able to stand trial. Standards by which the jury could judge sanity under this act were detailed in *Rex v. Pritchard,*[21] including ". . . whether [the defendant] is of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defense . . . and to comprehend the details of the evidence."[22]

The common law principles governing capacity to stand trial are universally accepted by American courts[23] and have been codified or supplemented by statute in most American jurisdictions.[24] These statutes, based upon the Criminal Lunatics Act of 1800, generally embody a test of capacity similar to that put forth in *Pritchard,* but establish as individual criteria that the defendant (1) be able to understand the nature of the proceedings against him and (2) be able to assist in his defense. It has been left to the courts, however, to give substance to these broadly stated tests. The former criterion is not an issue in the amnesic defendant cases. However, with respect to the latter test, there are no definitive judicial explanations of how to assess a defendant's ability to assist in his own defense, but there are indications. The early American courts, like the English, seemed to emphasize the role of sound memory.[25] Thus in *United States v. Chisolm,*[26] an early leading case, the court stated:

> . . . [The question is] whether the prisoner at this time is possessed of sufficient mental power, and has such understanding

20. 39 & 40 Geo. 3 c.94 (1800), reprinted in 5 Halsbury's Statutes of England (2d ed. 1948) 593. This statute states, in part, that:

> . . . [I]f any person indicted for any offense shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, or if upon the trial of any person so indicted such person shall appear . . . [to be] insane, it shall be lawful for the court . . . to order such person to be kept in strict custody until his Majesty's pleasure shall be known.

21. 7 Car. & P. 304, 173 Eng. Rep. 135 (1836). It should be noted that this case became the definitive interpretation of the Criminal Lunatics Act even though the defendant therein was not insane, but merely a deaf mute.

22. *Ibid.*

23. United States v. Chisolm, 149 Fed. 284 (C.C.S.D. Ala. 1906); People v. Perry, 14 Cal. App. 2d 387, 94 P.2d 559 (1939); *Ex parte* Wright, 74 Kan. 406, 89 Pac. 678 (1907); *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120 (1900).

24. See, *e.g.,* CAL. PENAL CODE § 1367 (West 1956); 38 ILL. ANN. STAT. § 104-1 (1964); N.Y. CRIMINAL CODE § 658 (McKinney 1958). MD. CODE ANN. art. 59, § 9 (1957), proscribes the trial of anyone ". . . of such incapacity as to prevent such person from properly conducting his or her defense. . . ." The test of incapacity, however, has been held to be the *M'Naghten* rule. See Rowe v. State, 234 Md. 295, 199 A.2d 785, *cert. denied,* 379 U.S. 924 (1964). See MODEL PENAL CODE § 40.4 (Proposed Official Draft, 1962), comment at 194 (Tent. Draft No. 4, 1955).

25. An early California judge commented on the common law of capacity to stand trial as follows:

> In the absence of any *sensible loss of memory* or mental impairment of the intellectual faculties a man was counted sane. *If he could remember events* and could reason logically, he was not within the letter or the reason of the rule which suspended proceedings against a madman or lunatic. (Emphasis supplied)

In re Buchanan, 129 Cal. 330, 61 Pac. 1120, 1121 (1900). There are indications, however, that this construction of the common law authorities may be incorrect. It appears that the word "memory" as used by the early writers ". . . does not relate to recollection, but to a state of mind." R. v. Podola [1959] 3 All E.R. 418, 431. See United States v. Boylen, 41 F. Supp. 724 (D. Ore. 1941).

26. 149 Fed. 284 (C.C.S.D. Ala. 1906).

> of his situation, such coherency of ideas, control of his mental faculties, and *the requisite power of memory,* as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense.[27]

The issue came before the United States Supreme Court in *Dusky v. United States.*[28] In this case, the defendant, a schizophrenic, claimed inability to stand trial under the federal statutory standard.[29] He denied all memory of events surrounding an alleged kidnapping with which he was charged, but did not rely on this point in bar of trial. In reversing and remanding for a new competency hearing (and new trial, should the defendant be found competent), the Court said:

> . . . [I]t is not enough for [the judge] . . . to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but . . . the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational as well as factual understanding of the proceedings against him.'[30]

The determination of a defendant's "sufficient present ability to consult with his lawyer with a degree of rational understanding," was discussed in *Swisher v. United States,*[31] a habeas corpus proceeding brought by a schizophrenic soldier (of sound memory) convicted by a Court-Martial. In determining his capacity to stand trial, the court, quoting an earlier case,[32] adopted among others the following standards:

> . . . [W]hen it is evidentially made to appear in a habeas corpus proceeding by a person under arrest status, confined pursuant to Sections 4244–4246, Title 18, U.S.C.A.: . . . (6) that he will be expected to tell the lawyer the circumstances, to the best of his mental ability (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed . . . and (8) he has memory sufficient to relate those things in his own personal manner . . .''[33]

An earlier view, pre-dating *Dusky,* was expressed in *Lyles v. United States,*[34] an appeal by a sociopathic defendant from a conviction of

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27. *Id.* at 285 (Emphasis supplied).
28. 362 U.S. 402 (1960).
29. 18 U.S.C. § 4244 (1959):
Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such competency of the accused. . . .
30. 362 U.S. at 402.
31. 237 F. Supp. 921 (W.D. Mo. 1965), *aff'd,* 354 F.2d 472 (8th Cir. 1966).
32. Wieter v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961).
33. 237 F. Supp. at 935.
34. 245 F.2d 725 (D.C. Cir. 1957).

robbery and unauthorized use of an automobile. Affirming, the court of appeals said that: " 'To assist in his defense' [per 18 U.S.C. Sec. 4244 (1959)] of course does not refer to legal questions involved but to such phases of a defense as a defendant usually assists in, *such as accounts of facts, names of witnesses, etc.*"[35] In connection with these cases interpreting the federal statute, it should be noted that, as in the early English authorities, reference is made to sound memory as a factor to weigh in assessing the defendant's capacity to stand trial, although in some of the decisions, such as *Swisher,* the element of faulty memory was not actually present.

These references notwithstanding, and aside from the instant Arizona case, no American or English court has ever held loss of memory by itself, even when shown to be temporary, sufficient reason to render the defendant unable to stand trial, even under the "assist in his own defense" standard.

Perhaps the greatest exponents of a "hard line" on amnesia as an incapacitating factor are the military courts, which have faced the problem with relative frequency, yet have never held amnesia to bar trial. Three basic reasons exist in support of this "hard" approach: (1) suspicion that the defendant may be feigning amnesia;[36] (2) a feeling (especially in cases of alleged alcoholic or hysterical amnesia) that the defendant has only himself to blame for his loss of memory;[37] and (3) the judicial apprehension that to hold that amnesia protects the defendant from trial "would be tantamount to a holding that amnesia negated criminal responsibility as an original proposition."[38] In the leading military case, *United States v. Olvera,*[39] the defendant got into a scuffle with another soldier and received several stab wounds and possibly some blows to the head. The accused testified that he then lost his memory temporarily; when it returned, he found himself standing with a knife in his hand and the other soldier lying at his feet, oozing blood. The defendant was convicted of aggravated assault and appealed to the Court of Military Appeals, alleging error in the failure of the court below to consider how his alleged amnesia might affect criminal responsibility. The Appeals Court held that amnesia whether due to head injury, alcoholism, or hysteria in no way negated criminal responsibility; the court then proceeded to dispose of the defendant's subsidiary contention that his amnesia indicated an inability to cooperate in his defense:

> Concededly, such an accused is at some disadvantage — for if innocent, he does not demonstrate that quality by testimony that he 'blacked out' and does not remember. However, he is still quite competent to assume the witness stand, and to assure the court

35. *Id.* at 730 (Emphasis supplied).
36. See United States v. Watson, N.C.M. 376, 18 C.M.R. 391 (1954).
37. See United States v. Watson, N.C.M. 376, 18 C.M.R. 391 (1954) (alcoholic amnesia is "largely self-imposed"); United States v. Lopez-Malave, 4 U.S.C.M.A. 341, 15 C.M.R. 341 (1954) (hysterical amnesia viewed as self-imposed; ". . . precipitated by the desire to forget the horrid details of [defendant's] crime.").
38. United States v. Olvera, 4 U.S.C.M.A. 134, 142, 15 C.M.R. 134, 142 (1954).
39. 4 U.S.C.M.A. 134, 15 C.M.R. 134 (1954).

> that he does not remember — and he is certainly able to analyze rationally the probabilities of his having committed the offense in light of his own knowledge of his character and propensities. If his amnesia be rooted in some fundamental mental disorder existing at the date of the acts charged, he will also be able to raise the possibility that he was not mentally responsible at the time. This we conclude — after indulgence in a weighing process — affords him sufficient protection.[40]

Soon thereafter, the same court decided the case of a defendant suffering from a severe "psychoneurotic disorder" as well as amnesia.[41] In affirming the defendant's conviction of passing bad checks, the court said: "the type of loss of memory which might in and of itself, raise a doubt as to capacity, is a loss of memory as to basic matters of general application, as the difference between truth and falsehood, between the moral and the immoral, not the memory of particular events."[42] Askew of the "hard line" approach, the military courts have indicated that a postponement might be granted where temporary amnesia is shown, but have never had occasion to grant this relief.[43]

Non-military courts have not, in general, been sympathetic to the lot of the amnesic defendant; his disadvantages have been recognized, but seldom have been persuasive.[44] There are, however, indications of a less doctrinaire, more protective approach toward the amnesic defendant, an approach perhaps motivated by fears that to try an amnesic defendant might, in fact, be a violation of due process of law.

Some courts have articulated the principle that the trial of a defendant not mentally present violates due process of law.[45] Thus, it has been held that due process prohibits the trial of an insane defendant,[46] a semi-conscious defendant,[47] or a defendant under the influence of drugs[48] on the ground that defendants thus incapacitated

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40. 4 U.S.C.M.A. at 142, 15 C.M.R. at 142. (Dissenting judge noted the difficulty imposed by the majority on a defendant charged with a crime involving a specific intent, but also noted that genuine amnesia is "reasonable cause" for application for a continuance, and nothing more.)

41. United States v. Watson, N.C.M. 376, 18 C.M.R. 391 (1954).

42. 18 C.M.R. at 401.

43. United States v. Lopez-Malave, 4 U.S.C.M.A. 341, 15 C.M.R. 341 (1954); United States v. Olvera, 4 U.S.C.M.A. 134, 15 C.M.R. 134 (1954). See United States v. Beddingfield, A.C.M. 12692, 22 C.M.R. 840 (1956) (in which an amnesic was held properly brought to trial where it was shown that he had the ability to co-operate rationally in his defense, that there was no competent medical testimony that the amnesia was other than permanent, and that there had been no request for a continuance).

44. See State v. Severns, 184 Kan. 213, 336 P.2d 447 (1959), where the amnesic defendant was held competent to stand trial. However, his alleged amnesia did not arise until after the first, but prior to the second trial. Since the defendant testified extensively at the first trial, the transcript could be introduced to provide the defendant's testimony. State v. Swails, 223 La. 751, 66 So. 2d 796 (1953) (when a defendant pleads insanity, his present amnesia is not a factor which prevents his assisting counsel in that defense).

45. See Moss v. Hunter, 167 F.2d 683 (10th Cir. 1948), *cert. denied*, 334 U.S. 860 (1948); Ashley v. Pescor, 147 F.2d 318 (8th Cir. 1945); United States v. Gundelfinger, 98 F. Supp. 630 (W.D. Pa. 1951).

46. See, *e.g.*, People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957).

47. See, *e.g.*, People v. Berling, 115 Cal. App. 2d 255, 251 P.2d 1017 (1953).

48. See, *e.g.*, Carter v. State, 198 Miss. 523, 21 So. 2d 404 (1945).

are incapable of properly defending themselves.[49] Whether this principle will be extended to embrace an amnesic defendant is unsettled.[50]

The less rigid approach is illustrated by the British case of *R. v. Podola,*[51] and the United States District Court case of *United States v. Sermon*[52] as well as by the present *McClendon* case. In *Podola,* the defendant, indicted for the murder of a police officer, alleged lack of capacity to plead to the indictment or to stand trial due to his loss of memory (allegedly resulting from hysterical amnesia) of all events prior to July 17, 1959 (the alleged murder having taken place on July 13). Noting that this plea was novel,[53] the trial judge left the issue of the genuineness of the amnesia to the jury as a preliminary issue, the burden of proof being on the defendant "by the balance of probabilities." The jury found that the defendant was not suffering genuine loss of memory. He was tried for murder under a plea of "not guilty" and convicted. The case was referred to the Court of Criminal Appeals, which held that an amnesic defendant otherwise normal did not fall within the Criminal Lunatics Act of 1800 and thus could not argue his amnesia in bar of trial. However, in doing so, the court adopted the opinion of the High Court of Justiciary of Scotland in *Russell v. H.M. Advocate.*[54] In that case, the defendant, at her arraignment on charge of embezzlement, raised hysterical amnesia covering the period of the crime in bar of trial. The court rejected this plea. The Appellate Court affirmed, but observed:

> . . . [L]oss of memory may be an important element in leading to conclusion that a panel [defendant] is insane . . . But if it falls short of that, loss of memory in a person otherwise normal and sane plays its full part, if sufficiently proved, in increasing the *onus* [burden of proof] on the Crown, and in raising doubts to which it may be the duty of a jury to give effect in a verdict of acquittal after investigation of the whole case . . .[55]

United States v. Sermon[56] illustrates a similarly thoughtful approach. In that case, the defendant was indicted for income tax fraud. Alleging inability to understand the proceeding against him or properly assist in his own defense, the defendant moved for a mental examination under 18 U.S.C. § 4244 (1959). The examination revealed that the

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49. See Youtsey v. United States, 97 Fed. 937 (6th Cir. 1899) (where "impaired mind and memory" is shown, the trial judge should adopt some method of satisfying himself that the accused is able to rationally defend himself).

50. See Youtsey v. United States, 97 Fed. 937 (6th Cir. 1899).

51. [1959] 3 All E.R. 418, noted, CAMB. L.J. 5 (1960); 76 L.Q. REV. 2 (1960); 76 SCOT. L. REV. 1 (1960).

52. 228 F. Supp. 972 (W.D. Mo. 1964).

53. The claim that a man cannot be tried for a crime if he does not remember what happened is so novel that however you [the jury] answer the question which has been placed before you [Is the defendant suffering from a genuine loss of memory] the name of Guenther Podola [the defendant] is assured of a secure place in the legal history of this country.
[1959] 3 All E.R. 418, 425.

54. 1946 S.C.(J.) 37, (1946) S.L.T. 93.

55. 1946 S.C.(J.) 37, (1946) S.L.T. 93, 98.

56. 228 F. Supp. 972 (W.D. Mo. 1964).

defendant suffered, among other things, from cerebral arteriosclerosis, as a result of which his remote memory was spotty and his recent memory defective. Following this report, the court ordered that proceedings be held *in camera* for the presentation of factual data on which the court could judge the extent of the disability imposed on the defendant by his defective memory. The court adopted the principle that "one cannot properly assist in his own defense unless he can advise his counsel concerning the facts of the case as known to him and unless, if necessary, he can testify on his own behalf in the cause concerning those facts."[57] Determining from medical testimony that there was no objective way of ascertaining what the defendant remembered and what he did not, the court embarked on a study of how much of the facts of the case were indeed known to the defendant and his counsel. The court, finding that the defendant had in fact communicated to his counsel all facts known to him and could testify in his own behalf, held him competent to stand trial, without foreclosing his right to raise both past and present insanity as matters for jury determination. Throughout the opinion there were strong indications that had the deefndant suffered total amnesia, he would have been held incompetent.[58] The importance of the *Sermon* case lies in the approach it illustrates and its implication of a requirement of close pre-trial co-operation between lawyers and the court to assure that in each individual instance justice is done.

In addition, it has been successfully argued that an amnesic defendant is deprived of his constitutional right to the assistance of counsel where there is a reasonable likelihood of recovery.[59] The right to counsel is guaranteed by the due process clause of the fourteenth amendment,[60] and being "fundamental and essential to a fair trial," it is obligatory upon the states.[61] Although the Supreme Court has not yet completely specified elements of the right, considering the high judicial regard currently shown the right to counsel, it is possible that the Court would hold that an amnesic defendant is deprived of assistance of counsel if there is any possibility of his regaining his memory.[62]

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57. *Id.* at 977.

58. *E.g.*, "And certainly no one in the 1960's would dream of putting a defendant suffering from established amnesia to trial for a crime of any sort." *Id.* at 976.

59. In addition to *McClendon,* see Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959). In *Cornell,* the amnesic defendant, arguing that his amnesia deprived him of the right to assistance of counsel, sought mandamus to compel the trial court to permit him to be examined by a hypnotist, who would try to induce memory recall. In granting the mandamus, the California Supreme Court noted that:

> [The right to counsel] includes the right of the accused to consult with his counsel before trial in order that the accused and his attorney may present a proper defense. . . . Without such a privilege, the constitutional right to counsel would be a sham. If the attorney is not given a reasonable opportunity to ascertain the facts surrounding the charged crime so he can prepare a proper defense, the accused's basic right to effective representation would be denied.

52 Cal. 2d 99, 338 P.2d 447, 449 (1959).

60. Powell v. Alabama, 287 U.S. 45 (1932).

61. Gideon v. Wainwright, 372 U.S. 335 (1963).

62. It could also be argued that an amnesic defendant by virtue of his condition is deprived of his sixth amendment right to confront the witnesses against him, a right

The Pennsylvania court in *Cummins v. Price* has taken an unnecessarily doctrinaire approach in categorically stating that an amnesic defendant is required to stand trial under common law and statutory tests of capacity. The Arizona court, on the other hand, perhaps because the defendant asked for more limited relief, has recognized that appropriate relief may be granted to an amnesic criminal defendant without compromising the interest of the state in the orderly operation of the criminal adjudicative process. A mechanical approach to the problem is outmoded in light of improved medical methods of detecting and treating amnesia. The possibility of recovery distinguishes the case of a defendant suffering from temporary amnesia from that of a defendant who was insane at the time of the crime. The mere granting of a continuance until such time as the defendant regains his memory does not result in a negation of his potential criminal responsibility. Furthermore, since insanity, if proven, does negate criminal responsibility, the insane defendant's assistance in the preparation of his defense is far less crucial than that of an amnesic defendant, whose assistance may be decisive in establishing his innocence. Thus, even where the defendant's amnesia is permanent, a narrow approach is unjustified. The courts are vested with a broad discretion in determining capacity to stand trial,[63] a discretion enhanced by a dearth of controlling precedents.[64] Pre-trial conference and discovery devices could be employed on behalf of the defendant to ascertain the extent of the problem posed by his disability and perhaps to mitigate against it.[65] The ill effects of

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made obligatory upon the states in Pointer v. Texas, 380 U.S. 400 (1965). In *Pointer*, Justice Black, speaking for the majority, stated that:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.

Id. at 404. One might well ask how effective a cross-examination could be conducted by an accused who himself is without recollection of the events surrounding his alleged crime.

63. Perkins v. State, 217 Ark. 252, 230 S.W.2d 1 (1950); State v. Henke, 196 Wash. 185, 82 P.2d 544 (1938). See generally *Judicial Hearings to Determine Mental Competency*, 39 F.R.D. 537 (1965).

64. See note 53 *supra;* State v. Severns, 184 Kan. 213, 336 P.2d 447, 453 (1959).

65. See United States v. Wilson, 263 F. Supp. 528, 534 (D.D.C. 1966); United States v. Sermon, *supra* note 56; Comment, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109, 132–36 (1961). Such pre-trial procedures should be conducted in such a manner as to uphold the defendant's privilege against self-incrimination. *Cf.* State v. Muline, 183 A.2d 831, 833 (Del. 1962). A self-incrimination problem could arise in any mental examination of an amnesic defendant. Arguably, statements made in the course of his examination by a defendant whose *sanity* is at issue are not testimonial in character, having significance only as symptomatic of mental illness. The focus of an examination of an amnesic defendant, on the other hand, is of necessity on his knowledge of facts surrounding the alleged crime. There is, therefore, a greater danger in the case of an amnesic defendant that testamentary matter could be elicited from him on the occasion of his mental examination. *Cf.* Schmerber v. California, 384 U.S. 757 (1966) (dictum). On the other side, it could be argued that by pleading amnesia in bar of trial, a defendant waives his privilege, or that the privilege has no application in proceedings to determine *present* capacity to stand trial, a purely collateral issue. See Hunt v. State, 248 Ala. 217, 27 So. 2d 186, 191 (1946) (dictum). In the federal courts, this problem does not arise as to the issue of guilt, due to specific statutory prohibition against admitting any statement made by an accused during a mental examination into evidence against him on the issue of his guilt or innocence. 18 U.S.C. § 4244 (1959).

his disability could be circumscribed by appropriate instructions to the jury. The possibilities are at hand whereby the courts can presently offer ". . . sorely needed protection for law-abiding citizens"[66] and also provide even the defendant who cannot remember with a meaningful day in court.[67]

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66. Cummins v. Price, 421 Pa. 396, 218 A.2d 758, 763 (1966).

67. See generally Comment, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109 (1961); Slough & Wilson, *Mental Capacity to Stand Trial*, 21 U. PITT. L. REV. 593 (1960).