which [is] actually related to. . .competence at the time of [the] proceeding. . .” does not suffice to trigger a competence hearing (101 P.3d at 489, interior quotation marks omitted).

The court gave short shrift to Ramos’ objection to the trial court’s mention of his demeanor in denying a competence hearing. When “substantial evidence” arises suggesting incompetence, a psychiatric evaluation and a hearing are mandatory. However, when, as in this case, there is no such substantial evidence, a competence hearing is discretionary and considering a defendant’s in-court demeanor is not an abuse of that discretion.

Finally, the court dismissed the argument that testimony as to Ramos’ paranoid personality disorder met California’s case law standard of a “changed circumstance” or “new evidence casting a serious doubt” on Ramos’ competence. After all, the same psychiatrist explicitly conceded that Ramos’ personality disorder “did not render him mentally incompetent to understand the proceedings or assist the defense in any way” (101 P.3d at 491).

Other arguments raised by Ramos regarding alleged errors in the admission of evidence, jury selection, alleged juror misconduct, and, rather wishfully, the illegality of the death penalty under “international law” were brushed aside.

Discussion

In *Dusky v. United States*, 362 U.S. 402 (1960), the United States Supreme Court defined competence to stand trial: a defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. . .and. . .a rational as well as factual understanding of the proceedings against him.” The Court later ruled in *Godinez v. Moran*, 509 U.S. 389 (1993), that *Dusky* applies also to a defendant’s competence to plead guilty. While the burden of proving incompetence generally rests on the defense, the case of *Cooper v. Oklahoma*, 517 U.S. 348 (1996), bars any such burden higher than preponderance of the evidence. California has by case law adopted the *Dusky* test, *People v. Welch*, 976 P.2d 754 (Cal. 1999), and has statutorily enacted the *Cooper* standard (Cal. Pen. Code section 1369(f)).

Neither Ramos’ record of violence nor his putative suicidality implicated the *Dusky* standard. The defense never introduced evidence to suggest psychosis or impaired cognitive abilities. Ramos was within his rights to plead guilty, even if actuated by a desire to be executed. Still, given that California has sentenced more than 750 individuals to death since 1977 but has executed only 12 (see www.deathpenaltyinfo.org and www.corr.ca.gov), it is far from certain that Ramos’ expressed desire will be fulfilled.

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Competence to Stand Trial Does Not Conclusively Equate to Competence to Waive Trial Counsel

In *Brooks v. McCaughtry*, 380 F.3d 1009 (7th Cir. 2004), the Seventh Circuit Court of Appeals addressed the claim that a state court’s finding of competence to stand trial compels acquiescence in the defendant’s motion to proceed to trial without an attorney. Deftly navigating through inconvenient *dicta* in *Godinez v. Moran*, 509 U.S. 389 (1993), the court rejected such automatic linkage.

Facts of the Case

Eddie Brooks received a sentence of life plus 109 years for the murder of a police officer. After exhausting his state court remedies, Brooks argued on federal *habeas* that a trial attorney had been forced on him in violation of his right to waive counsel under *Faretta v. California*, 422 U.S. 806 (1975).

The trial judge had found Brooks competent to stand trial. Brooks argued that the same test governs competence to waive counsel, as *Godinez* seems to say (“. . .we reject the notion that competence to. . .waive the right to counsel must be measured by a standard. . .different from. . .the *Dusky* standard”; 509 U.S. at 399), and therefore that the trial judge had erred in denying Brooks’ motion to represent himself before the jury. The U.S. district court rejected this argument, denying Brooks’ writ.

Ruling and Reasoning

Judge Posner, in a characteristically elegant opinion for the Seventh Circuit Court of Appeals, affirmed, holding that a defendant’s competence to stand trial does not vitiate the court’s duty to evaluate whether the waiver of particular constitutional

rights, in this case the right to trial counsel, is "knowing and voluntary."

In the court's view, the issue was not, as Brooks posed it, whether distinct tests of competence could be imposed: (1) the familiar *Dusky v. United States*, 362 U.S. 402 (1960), test for competence to stand trial, versus (2) a different and higher test for competence to represent oneself at trial. Rather, the issue was that, whatever the defendant's level of competence (or thinking ability), the waiver of a constitutional right, such as counsel, at any such stage requires a threshold finding that it is "knowing and voluntary." This, in turn, depends on whether the defendant exhibits a requisite fund of knowledge as to what he is waiving, a different matter from thinking ability, and context specific. More knowledge is required for a "waiver of the right to the assistance of counsel *at trial*, the stage of a criminal prosecution most difficult for a layperson to navigate. . ." (380 F.3d at 1012, citation omitted; emphasis in original).

Pointing to Brooks' counterproductive antics in court, including "punch[ing his] lawyer in the face," (380 F.3d at 1011) the court found ample support that Brooks' knowledge base fell short of the constitutional threshold for a waiver. A defendant, after all, cannot have it both ways. Had the court allowed him to proceed *pro se*, Brooks' behavioral disorganization and truncated understanding of law and procedures would have supported an appeal of the inevitable conviction on the ground that he did not know the implications of proceeding without a lawyer. Heads, Brooks wins; tails, the state loses.

Alternatively, the court reasoned, as a matter of federalism, states are always free to adopt greater protections than the minimums mandated by the federal Constitution. As such, even if this were viewed as consisting of two distinct tests of competence (the *Dusky* test to stand trial, and a higher one to waive trial counsel), rather than an issue of "knowing" waiver, all Wisconsin did was to give Brooks greater protection as to a fair trial.

Discussion

A number of state courts, not as nimble as the Seventh Circuit, have followed *Godinez* more concretely, holding that "competent to stand trial" now means competent for all purposes and specifically for a waiver of trial counsel. No federal circuit court has done so yet. When one does, conflicting with this case and exposing the ambiguity of *Godinez*, a Supreme Court revisit to the issue seems likely.

This case highlights the perils of *dicta*. Under the precise ruling in *Godinez*, Brooks would have had no *habeas* argument. In *Godinez*, the defendant's waiver of counsel was accepted, and he elected to plead guilty, in both respects the opposite of this case. There was no need for Justice Thomas to issue a blanket statement purporting to cover all situations, including this procedurally opposite one, with a single procrustean competence test. (Justice Thomas would learn this lesson again in *Kansas v. Crane*, 534 U.S. 407 [2002], wherein the dissenters from *Kansas v. Hendricks*, 521 U.S. 346 [1997], were able to undercut *Hendricks* by pouncing on Justice Thomas's unnecessary flourish in *Hendricks* that sexually violent predators are totally undeterrable.) Often a well-intended overreach for rhetorical forcefulness and ready administrability sacrifices coherence and precedential stability.

Judge Posner wryly concluded his opinion:

> We may be wrong, but if so Brooks must still lose. . . . [A] state court's decision can be struck down only if it is contrary to "clearly established " federal law as declared by the Supreme Court. *Godinez* did not *clearly* establish. . .the rule for which Brooks contends. . . [380 F.3d at 1013, emphasis in original].

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Commitment Pursuant to Insanity Acquittal

"Clear and Convincing" Burden of Proof on an Insanity Acquittee at a Commitment Hearing Is Constitutional

In *United States v. Weed*, 389 F.3d 1060 (10th Cir. 2004), an insanity acquittee argued, first, that the federal statutory commitment scheme violates (1) due process by placing the burden of proof on the acquittee, where the underlying crime involves bodily injury or "serious damage to. . .property," to establish by "clear and convincing evidence" either