Best Practices in the Evaluation of Competence to Stand Trial

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A Little Bit About Me
A Little Bit About Me
A Little Bit About Today’s Talk

10 Ways to Improve your Competency Evaluations
OR
10 Common Errors in CST Evaluations
OR
Let me share my experience/research with you
1. Keep Evolving Standards Within Sight
Fitness / Competence

• Doctrine from English Common Law
• “Presence” at Trial, Fairness, Accuracy
• Standard set out in *Dusky v. US* (1960)
  – Elaborated in *Drope v. Missouri* (1975)
    • “otherwise assist” affirmed in *US v. Duhon* (2000)
Evolving Standards

• Until the 1990s there was limited focus on decision-making
• Godinez v. Moran (1993)
• Indiana v. Edwards (2008)
Main issue in *Godinez* was whether different standards for standing trial, pleading guilty, or waving counsel exist

- Court determined that the standards for all three were to be the same; constitutional minimum as per *Dusky*

However, the opinion in *Godinez* appeared to include the defendant’s decision making abilities as being encompassed by the *Dusky* standard

Justice Thomas, writing for the majority, opined:

- While the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial…

- Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights
Implications of Godinez

• The concurring opinion suggests that the Dusky standard should not be viewed too narrowly, as a defendant must be competent throughout the proceedings, from arraignment to pleading, trial, conviction and sentencing, and whenever the defendant must make a variety of decisions during the course of the proceedings.

• Felthous (1994) noted that the court “did not forbid legislatures, courts, attorneys and mental health witnesses from addressing de facto those abilities that are embodied in decisions about competency to waive counsel and to make one’s own defense” (p. 110).

• Melton et al. (1997) speculated that Godinez may well increase the level of competency evaluators and judges associate with competency to stand trial, since trial competency includes competency to waive counsel.
Indiana v. Edwards
554 U.S. 164 (2008)

- The Edwards Court considered the issue of whether a state, in the case of a D who meets the Dusky standard of CST, can limit the right to self-representation by requiring that D be represented by counsel at trial
- The Court cited an APA/AAPL brief, which argued that mental illness could impair a defendant’s ability to engage in the expanded role required for self-representation even in cases where the D could proceed to trial with representation
- Edwards makes it clear that the standard for competence may indeed vary in certain limited circumstances
- The Edwards court addressed the seeming inconsistency with Godinez:
  - “Godinez provides no answer here because the defendant’s ability to conduct a defense at trial was expressly not an issue in that case…and because the case’s constitutional holding that a State may permit a gray-area defendant to represent himself does not tell a State whether it may deny such a defendant the right to represent himself at trial” (p. 165, italics in original)
Implications of *Edwards*

- *Edwards* establishes that competence to proceed *pro se* requires a higher level of competence than CST but remains silent on how this should be determined.

- Various *amici* provide some guidance for evaluating competency in the case of a D who wishes to represent him/herself:
  - ABA
  - APA/AAPL

- Highlights and underscores the contextual nature of competence and the need for functional evaluation.

• In 1960 and 1975 the Court’s basic definition of competence centered on whether the accused had
  – a combination of situational awareness ("a rational as well as factual understanding of the proceeds against him") and
  – a basic ability to deal with counsel ("sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding")

• In the 1990s/2000s the Court more fully described its view of the ingredients of the necessary interaction between client and lawyer
  – with "the assistance of counsel, the defendant is also called upon to make myriad smaller decisions [than those discussed in the basic competence definitions] concerning the course of his defense" – *Cooper v. Oklahoma*
Current Standards for Competence

• U.S. Supreme Court cases from the 1990s/2000s are an important part of the current definition of competence
  • This becomes clear upon review of secondary sources (ABA National Benchbook)
  • State courts have acknowledged that controlling case law from the U.S. Supreme Court must guide the review of competence inquiries at the trial level (*People v. Jones*)

• Philipsborn warns that other sources of standards have not kept up (such as state statutes)
  • “These statutory definitions exemplify part of the problem—understanding competence to stand trial requires understanding all currently applicable law and is beyond any one basic local statutory source”
2. Consider Case-Relevant Information
Contextual & Functional

• Case law & legal statute have attempted to elaborate on the specific abilities required for competency
  – Some states have developed articulated standards for CST
  – Competency is an open-textured construct (not a bright line construct); not defined by a fixed set of criteria since it is contextual in nature

“Mere presence of severe disturbance is only a threshold issue—it must be further demonstrated that such severe disturbance in this defendant, facing these charges, in light of existing evidence, anticipating the substantial effort of a particular attorney with a relationship of known characteristics, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome.”

Golding & Roesch (1988)
Context Matters

• Competency cannot really be assessed independent of the context of the case
  – Need to find out as much as possible about what is expected of the defendant for his/her particular case

• Evaluator’s role is to describe for the court the degree of congruence/incongruence between the defendant’s functional abilities and the abilities required of the defendant to proceed with his/her case
“A decision about legal competence is in part a statement about congruency or incongruency between (a) the extent of a person’s functional ability and (b) the degree of performance demand that is made by the specific instance of the context in that case. Thus an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for competence decisions.” (Grisso, 2003, pp. 32-33)
Zapf & Roesch (2009)

- Learn about what is required of the defendant during the legal proceedings
- Assess the defendant’s functional abilities in the context of his/her specific case demands
- Consider the relationship between the defendant’s symptoms and functional abilities
- Specify how the required psycholegal abilities are impaired by the functional deficits
Grisso (2003): Trial Demands

- To evaluate CST within the context of the specific defendant’s case, evaluators must be knowledgeable regarding:
  - complexity and multiplicity of charges
  - particular events associated with the alleged offense
  - range of possible penalties for this alleged offense, and probabilities of their occurrence
  - range and types of evidence available to counsel without defendant’s report
  - simplicity or complexity of the legal defenses available
  - necessity for defendant’s own testimony at trial
  - probable length of trial
  - probable complexity of trial (e.g., types and number of witnesses)
  - potential of trial to arouse emotion
  - sources of social support for defendant during trial process
Philipsborn on *Godinez & Cooper*

- The list of tasks that a defendant might be called upon to make (relying on *dicta* from leading cases, which, he argues, would hold more weight with a judge than secondary sources); arguably all of these matters are either covered or closely related to the decision-making elements described in the most recent competence-related cases (see p. 428)
  - What is the spectrum of defenses available in this particular case?
  - How will the defenses be presented, and which witnesses will be involved?
  - How could the prosecution’s cross-examination, or rebuttal, influence the guilt and penalty phase outcomes?
  - What are the legal, strategic, and tactical implications of proceeding with a mental state expert at the guilt phase?
  - If a particular defense theory is not developed during the guilt phase, will the jurors accept it during the penalty phase—for example, evidence of mental impairment not amounting to a full guilt phase defense?
  - Can a specific defense, such as imperfect defense or mental disorder aggravated by voluntary intoxication, be presented to jurors without testimony from the accused?
  - If so, will calling an expert who has interviewed the client present the prosecutor with a basis for widening the stream of evidence of penalty-related aggravating circumstances beginning in the guilt phase?
Philipsborn (2004): Attorneys

• “Writing out a case plan, which includes descriptions of outcome-influencing variables, rights, and privileges that may be waived or compromised, witnesses that will be necessary, and likely proceedings is a process that helps a capital defender methodically assess what choices and discussions a client must be capable of dealing with...all of this puts the lawyer in a position to identify some of the competence issues, in context of the particular case, and communicate them to the mental health expert(s).”
Philipsborn (2004): Evaluators

• "It is both interesting and somewhat alarming to note that some leading secondary sources omit discussion of how a competence examination is to be undertaken if the expert has incomplete knowledge of the breadth of defenses to the charges, possible penalty phase mitigating and aggravating circumstances, or how these might be presented in the case at issue. This kind of practical knowledge would appear to be necessary."
Philipsborn (2004): The Court

“With the help of the parties, courts should seek to understand whether the methods and instruments used by expert(s) specifically encompass the following: legal procedures; outcome options; legal and strategic case needs; available defenses; pertinent aggravation and mitigation; trial themes; the accused’s participation as a witness and/or as a historian assisting counsel; the accused’s potential to deliver an allocution or plea for mercy, where that is permitted by law; settlement options; available and necessary witnesses; and other personal and legal demands of a capital case in the specific jurisdiction. After all, the trial court’s analysis should be conducted with the ability and necessity to interact with counsel on important case-specific matters.”
Philipsborn (2004)

• Indicates that some court decisions suggest that it is incumbent on defense counsel to seek out the expert to relay this pertinent and relevant information about the case and abilities required of the accused, rather than wait for the expert to seek out defense counsel on these matters.

• *Duhon*: “one of the most evident issues is whether the assessing professional, usually a psychiatrist or psychologist, really knows what would go into the defense of a case”
  – Expert and lawyer need to work together to ensure that the expert has a full understanding of the case and the abilities to be evaluated in the particular defendant
3. Consider Multiple Data Sources
Data Collection

“Data collection should be guided by theories and empirical research findings (within the examiner’s areas of expertise) that provide the empirical relations and theoretical assumptions from which causal explanations and predictions generally are made.”

--Grisso, 2003, p. 39
Data Collection

- Clinical Interview
- Testing
- Third-Party / Collateral Information
Data Collection: Interview

Collateral information reviewed before interview

• Charges & allegations

• Why the issue of competence was raised
  – Including any difficulties with or observations noted by defense counsel

• Abilities required of defendant & info regarding possible outcomes
  – From defense counsel, whenever possible
# Elements of Notification

<table>
<thead>
<tr>
<th>Element</th>
<th>Source of Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose of Evaluation</td>
<td>APA Code, SGFP, AREA, NCME</td>
</tr>
<tr>
<td>Identification of Requesting Entity</td>
<td>APA Code, SGFP</td>
</tr>
<tr>
<td>Nature of Evaluation (Procedures)</td>
<td>APA Code, SGFP, AERA, NCME</td>
</tr>
<tr>
<td>Probable Disposition of the Data</td>
<td>APA Code, SGFP</td>
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<tr>
<td>Parameters of Confidentiality</td>
<td>APA Code, SGFP</td>
</tr>
<tr>
<td>Who has Right to Access/Release Evaluation</td>
<td>APA Code, SGFP</td>
</tr>
<tr>
<td>Whether the D has a Right to Refuse</td>
<td>APA Code, SGFP</td>
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<tr>
<td>Evaluator’s Credentials</td>
<td>SGFP</td>
</tr>
<tr>
<td>Consent for Recording</td>
<td>APA Code</td>
</tr>
<tr>
<td>Cost of Evaluation (if D required to pay)</td>
<td>APA Code, SGFP</td>
</tr>
<tr>
<td>Appropriately Document the Notification or Consent Procedures</td>
<td>APA Code</td>
</tr>
</tbody>
</table>
Data Collection: Interview

- Background and history
  - Context
  - Thoroughness
  - Rapport
- Sample of verbal behavior
- Information that can be corroborated
Observed Interactions with Counsel

- Functional evaluation allows for extrapolation from the evaluation context to the trial context
- Best to directly observe interactions between defendant and attorney
  - When this is not possible, extrapolate from evaluator-defendant interactions

  - Useful content for observed discussions:
    - Legal defenses
    - Possible strategies
    - Defendant’s version of events
Data Collection: Testing

1. Forensic Assessment Instruments (FAIs)
2. Forensically-Relevant Instruments
3. Clinical Assessment Instruments
Data Collection: Testing

• Determining necessary \ relevant psychological constructs
• Select tests on the basis of the information they provide
  – Consider how well D fits with standardization samples
  – Defendant characteristics such as age, ethnicity, gender, presence of disability should be considered in selecting your instrument
  – Consider the limitations of the instrument for this D
• Expert should be familiar with the psychometric properties of any test/instruments they use
  – Reliability, validity, standardization/norming samples
  – Easy target of inquiry for cross-examination
Data Collection: Collateral Info

- Records (Paper)
  - Minimal requirements v. aspirational
- Interviews (People)
  - Third-party information sources
- Evaluating the reliability of collateral information
  - Weighting accordingly
4. Use a Competency Assessment Tool
Forensic Assessment Instruments

• Provide structure
• Improve communication in legal settings
• Facilitate research / improvements in knowledge
• Standardize the assessment process
• Reduction of error and bias
• Meaningful comparisons across time
• Facilitate normative data & comparisons
Evidence-Based Practice


- Integration of clinical interviews w/ standardized measures
  - Embraced by AAPL Guidelines & Best Practices in CST Evaluation
- “Evidence-based practice cannot be achieved without standardization” (p. 453)
- Using reliable & valid measures is the most direct and empirically-defensible method of achieving standardization
  - Systematize evaluation of key points, reduces subjectivity in recording CST-related info, provides normative comparisons, allows for demonstration of IRR for observations and findings
Competence Assessment Instruments

- **Idiographic**
  - IFI-R (Golding, 1993)
  - FIT-R (Roesch, Zapf, & Eaves, 2006)

- **Nomothetic**
  - MacCAT-CA (Poythress et al., 1999)
  - ECST-R (Rogers, Tillbrook, & Sewell, 2004)

- **Special Populations**
  - CAST*MR (Everington & Luckasson, 1992)
## Competency Assessment Instruments

<table>
<thead>
<tr>
<th>Domain/Prong</th>
<th>FIT-R</th>
<th>ECST-R</th>
<th>MacCAT-CA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factual Understanding</td>
<td>Understand Nature/Object of Proceedings</td>
<td>Factual Understanding of Proceedings</td>
<td>Understanding</td>
</tr>
<tr>
<td>Rational Understanding</td>
<td>Understand Possible Consequences</td>
<td>Rational Understanding of Proceedings</td>
<td>Appreciation</td>
</tr>
<tr>
<td>Assist Counsel</td>
<td>Communicate with Counsel</td>
<td>Consult with Counsel</td>
<td>Reasoning</td>
</tr>
<tr>
<td>FIT-R</td>
<td>ECST-R</td>
<td>MacCAT-CA</td>
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<td>-------------------------------------------</td>
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</tr>
<tr>
<td>Arrest process (police, Miranda, jail)</td>
<td>Role of a judge</td>
<td>Role of defense attorney and prosecutor</td>
<td></td>
</tr>
<tr>
<td>Nature and severity of current charges</td>
<td>Role of the prosecutor</td>
<td>Behavioral and mental elements of serious offense</td>
<td></td>
</tr>
<tr>
<td>Role of key participants (judge, jury, prosecutor, defense counsel, witness…)</td>
<td>Role of the defense counsel</td>
<td>Elements of a less serious offense</td>
<td></td>
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<tr>
<td>Legal process (evidence, oath, standard of proof)</td>
<td>Role of the jury</td>
<td>Role of jury</td>
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<tr>
<td>Pleas (guilty, not guilty)</td>
<td>Criminal charges</td>
<td>Responsibilities of the judge at a jury trial</td>
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<tr>
<td>Court procedure (testify (direct, cross), enter plea)</td>
<td>Sentencing as a function of offense severity</td>
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<td>Process of a guilty plea</td>
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<td>Rights waived in pleading guilty</td>
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</tbody>
</table>
## Rational Understanding

<table>
<thead>
<tr>
<th>FIT-R</th>
<th>ECST-R</th>
<th>MacCAT-CA</th>
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</thead>
<tbody>
<tr>
<td>Appreciation of range and nature of possible penalties</td>
<td>Personal awareness</td>
<td>Likelihood of a fair trial</td>
</tr>
<tr>
<td>Appraisal of available legal defenses</td>
<td>Investment in the outcome of the trial</td>
<td>Beliefs about being helped by lawyer</td>
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<tr>
<td>Appraisal of likely outcome</td>
<td>Understanding of the adversarial process</td>
<td>Beliefs about whether to disclose information</td>
</tr>
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<td></td>
<td>Rational participation</td>
<td>Beliefs about likelihood of being found guilty</td>
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<td></td>
<td>Self-defeating motivation</td>
<td>Beliefs about likelihood of being punished if guilty</td>
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<td></td>
<td>Beliefs about whether to accept a plea bargain</td>
</tr>
<tr>
<td>FIT-R</td>
<td>ECST-R</td>
<td>MacCAT-CA</td>
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<td>------------------------------------------------</td>
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</tr>
<tr>
<td>Capacity to communicate facts to lawyer</td>
<td>Expectations about the case and defense counsel</td>
<td>Evidence suggesting self-defense</td>
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<tr>
<td>Capacity to relate to lawyer</td>
<td>Ability to participate in one’s defense</td>
<td>Evidence related to criminal intent</td>
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<tr>
<td>Capacity to plan legal strategy</td>
<td>Ability to communicate coherently</td>
<td>Evidence for provocation</td>
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<tr>
<td>Capacity to engage in own defense</td>
<td>Capacity to make decisions</td>
<td>Motivations for one’s behavior</td>
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<td>Capacity to challenge prosecution witnesses</td>
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<td>Potential impact of alcohol on behavior</td>
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<td>Capacity to testify relevantly</td>
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<td>Capacity to identify info that might inform plea</td>
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<tr>
<td>Capacity to manage courtroom behavior</td>
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<td>Capacity to identity costs/benefits of a legal choice</td>
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<td>Capacity to compare legal options</td>
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</table>
Functional Abilities
Understand

• General information about the arrest process
• General information about court proceedings
• Charges and allegations
• Consequences of conviction
• Roles and functions of key courtroom personnel
• Various pleas and verdicts
• Rights waived in making a guilty plea
Functional Abilities
Assist (Appreciation/Rational Understanding; Reasoning; Decision-making)

• Appraisal of the likelihood of being found guilty
• Appraisal of the consequences of being convicted
  – range and nature of possible penalties and how they will affect the defendant
• Appraisal of the available legal defenses and their likely outcomes
• Appraisal of whether or not to testify
• Ability to make rational decisions regarding his or her specific case
• Relate to his or her lawyer
• Ability to assist in planning legal strategy
• Ability to challenge witnesses, testify relevantly, and manage courtroom behavior
<table>
<thead>
<tr>
<th>Domain</th>
<th>Subdomain</th>
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</thead>
<tbody>
<tr>
<td>Capacity to understand the arrest process</td>
<td>Ability to provide an account of police behavior at the time of arrest</td>
</tr>
<tr>
<td></td>
<td>Comprehension of the <em>Miranda</em> warning</td>
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<td>Confession behavior (influence of mental disorder, suggestibility, and so forth on confession)</td>
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<tr>
<td>Capacity to comprehend and appreciate the charges or allegations</td>
<td>Factual knowledge of the charges (ability to report charge label)</td>
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<td></td>
<td>Understanding of the behaviors to which the charges refer</td>
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<td>Comprehension of the police version of events</td>
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<td>Understanding of the severity of the charges</td>
</tr>
<tr>
<td>Capacity to disclose to counsel pertinent facts, events, and states of mind</td>
<td>Ability to provide a reasonable account of one’s behavior around the time of the alleged offense</td>
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<tr>
<td></td>
<td>Ability to provide information about one’s state of mind around the time of the alleged offense</td>
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<td>Ability to provide an account of the behavior of relevant others around the time of the alleged offense</td>
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<tr>
<td>Capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed in the proceedings</td>
<td>Knowledge of penalties that could be imposed (e.g., knowledge of the relevant sentence label associated with the charge, such as “5 to life”)</td>
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<tr>
<td></td>
<td>Comprehension of the seriousness of the charges and potential sentences</td>
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<tr>
<td>Capacity to appreciate the likely outcome of the proceedings</td>
<td>Capacity to provide a realistic appraisal of the likelihood of being convicted</td>
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<td>Understanding of the finality of the court’s decision and the authority of the court</td>
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<tr>
<td>Basis knowledge of legal strategies and options</td>
<td>Understanding of the meaning of alternative pleas (e.g., guilty, not guilty, NGRI, GBMI, <em>nolo contendre</em>, as applicable)</td>
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<td></td>
<td>Knowledge of the plea bargaining process</td>
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<tr>
<td>Capacity to engage in reasoned choice of legal strategies and options (decision-making)</td>
<td>Capacity to comprehend legal advice</td>
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<td>Capacity to participate in planning a defense strategy</td>
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<td>Ability to deal appropriately with disagreements with counsel</td>
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<td>Plausible appraisal of likely outcome (e.g., likely disposition for one’s own case)</td>
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<td></td>
<td>Comprehension of the implications of a guilty plea or plea bargain (i.e., the rights waived on entering a plea of guilty)</td>
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<tr>
<td></td>
<td>Comprehension of the implications of proceeding <em>pro se</em> (e.g., the rights waived and the ramifications of the waiver)</td>
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<tr>
<td></td>
<td>Capacity to make a reasoned choice about defense options (e.g., trial strategy, guilty plea, plea bargain, proceeding <em>pro se</em>, pleading insanity) without distortion attributable to mental illness (an ability to rationally apply knowledge to one’s own case and make decisions)</td>
</tr>
</tbody>
</table>
| Capacity to understand the adversary nature of the proceedings | Understanding of the roles of courtroom personnel (i.e., judge, jury, prosecutor)  
Understanding of courtroom procedure (the basic sequence of trial events)  
Understanding of legal procedure (types of information that can be used as evidence, what is meant by an oath/pledge, how certain a judge or jury has to be to find one guilty |
| --- | --- |
| Capacity to manifest appropriate courtroom behavior | Appreciation of appropriate courtroom behavior  
Capacity to manage one’s emotions and behavior in the courtroom  
Capacity to track events as they unfold (not attributable to the effects of medication)  
Capacity to challenge witnesses (i.e., recognize distortions in witness testimony) |
| Capacity to participate in trial | Capacity to manage one’s emotional or communication difficulties  
Capacity to track oral questions and respond appropriately |
| Capacity to testify relevantly | Recognition that counsel is an ally  
Appreciation of the attorney-client privilege  
Confidence in and trust in one’s counsel  
Confidence in attorneys in general  
Particular relationship variables that may interfere with the specific attorney-client relationship (i.e., attorney skill in working with the client; problematic socioeconomic or demographic differences between counsel and client) |
| Relationship with counsel | Capacity to track proceedings given sedation level on current medication  
Potentially detrimental effects of medication on the defendant’s courtroom demeanor |

* Adapted mainly from the work of Jennifer Skeem and colleagues (Skeem & Golding, 1998; Skeem, Golding, & Emke-Francis, 2004; Skeem, Golding, Cohn, & Berge, 1998) but with additions made from the Fitness Interview Test – Revised (Roesch, Zapf, & Eaves, 2006).
5. Consider Alternate Hypotheses
Interpretation

1. Determine whether “mental disease or defect” is met (signs, symptoms, diagnosis – mental disorder or cognitive deficit)

2. Determine whether competence-related deficits exist (Understanding, Appreciation, Reasoning, Decision Making, Consulting, Assisting)

3. Determine whether there is a causal connection between any noted deficits (2) and mental disorder/cognitive impairment (1)

4. Specify how these deficits might impact functioning at trial (or for proceeding to next stage)
Step 1: Determine Mental Disorder

- Consult available statutes, guidelines, and case law
- Symptoms are the key to the linkage/causal attribution
- Observed symptomatic behaviors form the basis for inferences re: whether/extent these result in deficits
- Response style must be considered/ ruled out
- Be alert to inconsistencies
Response Style

• Work to gather data and make a determination
• Watch for inconsistencies
  – self-report data & third-party data
  – between different portions of the interview
  – between "content" and "process"
• Response style should guide weight & reliability of data
Gather Data when Red Flags

- ILK
- ECST-R

Other instruments provide data on response style
  - Cognitive (TOMM, VIP)
  - Psychiatric (SIRS, M-FAST)
Report Writing

• Talk about alternate hypotheses in your report!
• Lay out your reasoning and rationale for arriving at your opinion regarding response style
6. Consider Rational Decision-Making
Rational Decision Making

• Crux of competency (of all types)
  – Various criminal competencies
  – Medical treatment / treatment refusal
  – Research participation
  – Informed consent
  – End of life decision making
    • Physician assisted suicide (Oregon)
  – Various capacities for older adults
    • Testamentary, financial, contractual, etc.
Common Abilities

• Various literatures in all the relevant areas show incredible consistency with respect to the abilities implicated in competency
  – Criminal competencies literatures lag behind
  – Typically do not draw from other literatures; lack the breadth of understanding that is possible by doing so

• A broader understanding of these various literatures is key to being able to conceptualize grey-area cases
Keys to Competency/Capacity

• UNDERSTANDING
• APPRECIATION
• REASONING
• COMMUNICATING A CHOICE / DECISION

• Each of these is directly implicated in rational decision making
  – Can be used as a model for all types of competency
Rational Decision-Making Approach

• A robust conception of adjudicative competence that gives meaning to the *Dusky* standard must ask whether a criminal defendant has the capacity to participate meaningfully in the host of decisions potentially required of her
  – Sound assessment of such capacity requires careful attention to both the cognitive and emotional influences on rational decision-making

• Rational decision-making approach provides a model for the conceptualization and assessment of competency (especially in grey-area cases)
Rational Decision-Making Approach

• *Dusky* standard embraces a requirement of “decisional competence”
  – Ability to make, communicate, and implement minimally rational and self-protective choices within the unique context of the criminal case

• Fine-grained analysis of competence will seek to articulate precisely where in the decision-making process the D has gone astray and explain why those defects implicate the ability to represent one’s own interests within a criminal proceeding
Decision-Making Processes

- The components of the decision-making process include:
  - Understanding the relevant information
    - Including accurate perception of the information
  - Assessing the information and forming appropriate beliefs about it with respect to personal involvement
  - Reasoning about the information so as to engage in a logical process of weighing options in light of personally relevant goals
  - Expressing conclusions to others in a coherent and consistent manner
- Cognition or Emotion can impact any of these component processes
Research: Decision Making Abilities

• Rarely addressed in evaluation reports
  – How often are they addressed in the actual evaluation???

• Of seven functional abilities, only the defendant’s understanding of the charge was described in the majority of reports (LaFortune & Nicholson, 1995)
  – Contextually relevant, decisional abilities—such as appreciation of the plea bargaining process—were rarely addressed

• Certain abilities important and relevant to competency to stand trial—such as decision making abilities—were rarely addressed by evaluators in their reports (Skeem, Golding, Cohn, & Berge, 1998)
7. Keep Data & Inferences Separate
Interpretation

"For clinical information to be relevant in addressing legal questions of competence, examiners must present the logic that links these observations to the specific abilities and capacities with which the law is concerned.” -Grisso, 2003
Interpretation

1. Determine whether “mental disease or defect” is met (signs, symptoms, diagnosis – mental disorder or cognitive deficit)

2. Determine whether competence-related deficits exist (Understanding, Appreciation, Reasoning, Decision Making, Consulting, Assisting)

3. Determine whether there is a causal connection between any noted deficits (2) and mental disorder/cognitive impairment (1)

4. Specify how these deficits might impact functioning at trial (or for proceeding to next stage)
Step 1: Determine Mental Disorder

- Consult available statutes, guidelines, and case law
- Symptoms are the key to the linkage/causal attribution
- Observed symptomatic behaviors form the basis for inferences re: whether/extent these result in deficits
- Response style must be considered/ ruled out
- Be alert to inconsistencies
Step 2. Determine Psycholegal Deficits

• Understanding, Appreciation, Reasoning
  – Factual understanding, rational understanding, reasoning
• Factual understanding best viewed as a threshold question
• Also consider decision making, assisting counsel, consulting / communicating
Factual Understanding

• Must demonstrate the ability to factually understand general, legally relevant information
  – Arrest process
  – Key participants
  – Current charges
  – Elements of the offense
  – General consequences of conviction
  – Rights waived in making guilty plea
Appreciation

• Must demonstrate the ability to apply general, legally-relevant information to his own specific case in a rational manner
  – Likelihood of being found guilty
  – Consequences of conviction
  – Appraisal of legal defenses and their likely outcomes
  – Appraisal of whether or not to testify
  – Make rational decisions about the case
Reasoning

• Must be able to consider and weigh relevant information in a rational, reality-based manner undistorted by pathology
  – Distinguish more relevant from less relevant information
  – Weight and evaluate various legal options and consequences
  – Make appropriate comparisons
  – Provide reality-based justifications for a particular decision
Consult / Assist Counsel

• Must have the ability to reason and to communicate coherently to consult with / assist counsel
  – relate to counsel
  – assist in planning legal strategies
  – engage in own defense
  – challenge witnesses
  – testify relevantly
  – manage courtroom behavior
Decision Making

• Incorporated within other competence-related abilities
  – Appreciate, reason, assist counsel
• Should be explicitly addressed in evaluation and report
• Deficits in decision making should be described in terms of their impact on D’s ability to appreciate, reason, and/or assist counsel
Step 3. Determine Whether Casual Connection

- Establish the linkage between noted deficits (Step 2) and mental disorder / cognitive impairment (Step 1)
- Consider alternate explanations for deficits and conduct hypothesis testing
  - Situational (sleep, nutrition); Personal (lack of education, lack of experience); Response style
- Causal attributions for any noted deficits and the logic and inferences of the evaluator in arriving at the causal attribution should be described for the court
Step 4. Specify How Deficits Affect Functioning

• Specify the link between any noted psycholegal deficits (Factual Understanding, Rational Understanding/Appreciation, Reasoning, Decision Making, Assisting) and how this might impact the defendant’s functioning at trial (or next stage of proceedings)
  – Consider list of functional abilities by domain in Appendix D
8. Delineate All Linkages
Key Elements in CST Evaluation

• Mental illness or defect (threshold)
• Functional deficits
• Casual connection between functional deficits and mental illness or defect
• Establish linkage between functional deficits and functioning at trial/proceedings
  – Describe for the court the congruence/incongruence between the defendant’s functional abilities and the abilities required of the defendant at trial
Causal Connection

• Causal connection between symptoms and functional deficits must be established
  – co-occurrence of deficits and MI is not enough
  – may be other causes for deficits

• The cause of any deficits will often dictate appropriate prescriptive remediation

• While most evaluators agree that this is a necessary component of the written report, few actually provide information regarding the causal connection
Casual Connection: Describe the Linkages

- Mental disorder -> psycholegal deficits
- Psycholegal deficits -> performance/participation at trial

- 90% of respondents agreed that detailing the link between MI and deficits was essential or recommended (Borum & Grisso, 1996)
- 27% of reports provided an explanation regarding how the defendant’s mental illness influenced his or her abilities/deficits (Robbins, Waters, & Herbert, 1997)
- 10% of reports provided an explanation regarding how the defendant’s psychopathology compromised his or her abilities (Skeem, Golding, Cohn, & Berge, 1998)
Congruence of Required and Functional Abilities

• The congruence between functional abilities and required abilities is rarely addressed in competency evaluation reports.

• 12% of reports delineated the congruence between the defendant’s abilities and his/her case context (Skeem, Golding, Cohn, & Berge, 1998).

• 0% of reports delineated the congruence between the defendant’s abilities and his/her case context (Robbins, Waters, & Herbert, 1997).

• This is always important but especially when an opinion on the “ultimate issue” is not given.
Linkages & Congruence

• Evaluators need to describe how a defendant’s deficits will impact his/her abilities at trial
  – describe linkage between causal factor & psycholegal deficits
  – describe linkage between psycholegal deficits & functional abilities

• The degree of congruence/incongruence between functional abilities and required abilities should be clearly described
  – This is where evaluators may need to go beyond articulated standards
  – Context matters / context will dictate required abilities

• Conditional statements are appropriate
9. Substantiate your Conclusions
Forensic Assessment

- Statutory definition or standard for competence
- Description of competence-related abilities / deficits
  - Broken out into sections that mirror the standard/statute
- Cause of deficits
- Impact of symptoms on performance/participation
- Prescriptive remediation
- Conclusions or opinions
- Restorability
Substantiating Conclusions

• All opinions and conclusions need to be substantiated
  – Data, source of data, inferences about the data need to be clearly described for the court
  – Delineate the logic and rationale behind any conclusion
• The evaluator’s role is *not* to make a determination regarding competency
  – Legal issue; “ultimate issue” issue
• “The examiner’s task is to describe as clearly and accurately as possible that which the defendant knows, understands, believes, or can do” (Grisso, 2003, p. 38).
• Delineate everything and leave it to the court to make the decision
  – Even when an ultimate opinion is provided
Bases for Opinion

- Substantiate any opinions / conclusions reached
- Multiple sources of converging data
- Attribute appropriate weight for each piece of data
- Distinguishing between fact, inference, and opinion
- Take legal decision maker through your logic and reasoning in arriving at conclusions/opinions
## Skeem’s Scheme
**Skeem & Golding (1998)**

<table>
<thead>
<tr>
<th>Type</th>
<th>Description</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>Evaluator simply describes competency domain as being impaired but does not provide any info regarding the relationship of this impairment to D’s symptoms</td>
<td>“the defendant is unable to provide information to assist in his defense”</td>
</tr>
<tr>
<td>Implied</td>
<td>Evaluator presents quotes from the D or examples that merely imply a link between the CST impairment and psychopathology</td>
<td>“when asked to describe his version of events, the D said he did not know what happened”</td>
</tr>
<tr>
<td>Asserted</td>
<td>Evaluator attributes the CST impairment to psychopathology without specifically describing the relationship</td>
<td>“the accused has problems with memory that would preclude him from providing information to assist in his defense”</td>
</tr>
<tr>
<td>Substantiated</td>
<td>Evaluator specifies how the CST impairment is caused by psychopathology</td>
<td>“As noted, the accused has problems with memory and could not relate what he and others were doing at the time of the alleged crime. He may have difficulty providing information to his attorney to assist in his defense”</td>
</tr>
</tbody>
</table>
10. Provide Prescriptive Remediation
Reports to Court

• Courts rely *heavily* on evaluators’ reports
• Research indicates a high rate of agreement between legal decisions and evaluator opinions
  – > 90% agreement (Reich & Tookey, 1986)
  – 95% agreement (Hart & Hare, 1992)
  – 99.6% agreement (Cox & Zapf, 2004)

• Anecdotal evidence
  – “Just tell me whether he’s competent or not”
Common Report Deficiencies

- Lack of substantiation of conclusions
- Rarely address the causal connection between MI (symptoms) and deficits
- Almost never address the degree of congruence between functional abilities and abilities required to proceed
- Rarely address decision-making abilities
- Prescriptive remediation
  - Even when statutorily required (Zapf, Hubbard, Cooper, Wheeles, & Ronan, 2004)
“A decision about legal competence is in part a statement about congruency or incongruency between (a) the extent of a person's functional ability and (b) the degree of performance demand that is made by the specific instance of the context in that case. Thus, an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for the legal competence decisions.” –Grisso, 2003
Consider Interaction

• Person x Situation interaction

• 2 ways to remedy deficits
  – Change the person (incompetent; restore capacity)
  – Change the situation (change demands/characteristics of case)
Prescriptive Remediation

• Be aware of the jurisdictional requirements for reports
• Specific functional deficits, treatment history, and previous response to treatment must be considered in restorability opinions
• Remediation strategies or interventions should be outlined
• Prescriptive remediation for reducing incongruence
  – Provide information on how best to manage functional deficits
  – Remediation can mean a change in person or situation
Prescriptive Remediation

- Literature on learning provides useful information
- Visuals and contextual cues
  - Hand signs, images, stories (relevant to own case)
- Impulsivity
  - “Think about the question a few minutes before answering”
- Perseveration
  - “Disregard the previous question and focus only on most recent”
- Answering prior to fully understanding
  - “First, repeat the question back to examiner”
Prescriptive Remediation

• Use simple language
• Speak slowly, clearly, and calmly
• Use concrete terms and ideas
• Avoid questions that give part of the answer (leading)
• Repeat questions from a slightly different perspective
• Proceed slowly and give praise and encouragement
• Avoid frustrating questions about time, complex sequences, or reasons for behavior
Prescriptive Remediation

• Do not show frustration
• Highlight important information to improve memory/retention
• Repeat important information
• Cut down on distractions
• Give direct, explicit feedback when D does not communicate effectively or responds inappropriately to questions (no, that’s not right…)
• Be careful not to nod or give other nonverbal cues
• Take short breaks; multiple, shorter sessions better than lengthy
Report Writing

- Educational function of reports
- Conditional statements in reports
- Prescriptive remediation
- Specifically outline the deficits that are noted in interview (so these can be used to develop treatment plan and to guide re-assessment after restoration)
- Use clear language about the best ways to communicate most optimally with the defendant
Thank you!
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