Competency Evaluation

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A Little About Me
Useful Books
Helpful Articles/Resources
www.concept-ce.com/mspd

• Pirelli, Gottdiener, & Zapf (2011) Meta-Analytic Review
• AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial (2007)
• Specialty Guidelines for Forensic Psychology
Outline of Topics

• Legal Standard for Competence + Case Law
• Forensic Mental Health Concepts / Psycholegal Abilities
• The Evaluation Process & Counsel’s Role
• Evaluation Reports (Dos & Don’ts)
• Restoration
Legal Standard + Case Law
Legal Context & Standard

• Missouri Standard - Section 552.020

“No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.”
It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has *sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding* -- and whether he has a *rational as well as factual understanding of the proceedings against him* (p. 402)
Relevant Case Law - Standards

• *Dusky v. United States* (1960)
  – Constitutional Minimum

• *Wieter v. Settle* (1961)
  – Delineated 8 functional abilities

• *Wilson v. United States* (1968)
  – Functional and contextual nature of the inquiry
Relevant Case Law - Standards

- *Drope v. Missouri* (1975)
  - “assist in preparing his defense”
  - No higher standard for waiving counsel or pleading guilty; affirms that decision making is part of the competency standard
  - Higher standard for proceeding *pro se*

- In 1960 and 1975 the Court’s basic definition of competence centered on whether the accused had
  - a combination of situational awareness, and
  - a basic ability to deal with counsel

- 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
A Final Note Regarding Standards

• Controlling case law must guide the review of competence inquiries at the trial level (People v. Jones)

• “Understanding competence to stand trial requires understanding all currently applicable law and is beyond any one basic local statutory source” (Philipsborn)
  – State statutes have not kept up
Forensic Mental Health Concepts
### Steps in Opinion Formation

<table>
<thead>
<tr>
<th>Step</th>
<th>Task</th>
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<tbody>
<tr>
<td>1</td>
<td>Determine whether “mental disease or defect” is met (signs, symptoms, diagnosis)</td>
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<tr>
<td>2</td>
<td>Evaluate relevant psycholegal abilities and deficits (Understanding, Appreciation, Reasoning, Decision Making, Consulting/Assisting)</td>
</tr>
<tr>
<td>3</td>
<td>Determine whether there is a causal connection between any noted deficits and mental disorder/cognitive impairment</td>
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<tr>
<td>4</td>
<td>Specify how these deficits might impact functioning (functional deficits) at trial (or for proceeding to next stage)</td>
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</table>
Prerequisites for Incompetence

- Mental Illness
- Mental Disease or Defect
- Cognitive Impairment

Spoiler Alert: This all comes down to symptoms
Psychiatric Diagnosis & Symptoms

• Formal thought disorder / Disorganized thinking
  – Loose associations, tangentiality, incoherence, word salad
  – May interfere with ability to give coherent, relevant instructions to attorney; capacity to provide testimony; understand evidence or what witnesses are saying

EVALUATOR IS TO CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Concentration deficits
  – May result from severe anxiety, depression, (hypo)mania, organic brain dysfunction, severe ADHD
  – May interfere with ability to follow court process or instruct counsel as case unfolds; consult with counsel; engage in decision making

EVALUATOR IS TO CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Rate of thinking
  – Profound slowing or increase rate of thinking (e.g., flight of ideas)
  – May interfere with ability to focus attention or make decisions

EVALUATOR IS TO CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Delusions or hallucinations
  – False ideas or hallucinatory experiences may interfere with ability to think clearly and logically *in areas relevant to CST*
  – May impact ability to participate in trial strategy; make rational decisions; provide relevant and rational information to attorney

EVALUATOR IS TO CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Memory deficits
  – Recall court’s decision in *Wilson* (amnesia not a *de facto* basis for incompetence)
  – Memory deficits must affect the ability to consult with and assist lawyer or the ability to testify on one’s own behalf

EVALUATOR IS TO CONSIDER CONTEXT
Psychiatric Diagnosis & Symptoms

• Intellectual/Developmental disability
  – Also not a *de facto* basis for incompetence
  – Intellectual disability must be related to an inability to function in the legal context
  – May interfere with ability to understand the charges and/or legal procedures; decision making ability; ability to participate meaningfully in defense; insight into defenses

EVALUATOR IS TO CONSIDER CONTEXT
Competence-Relevant Abilities

• Understanding
• Appreciation
• Reasoning
• Consulting/Assisting
• Decision-making
Understanding (Factual Understanding)

• Legal proceedings, strategies, and plea options
• Roles of key participants within the legal process
  – Defense counsel, prosecutor, judge, jury, etc.)
• Current charges
• Elements of an offense
• Consequences of conviction
• Rights waived in making a guilty plea
Appreciation (Rational Understanding)

• Likelihood of being found guilty
• Consequences of being convicted
  – Range & nature of possible penalties and how they affect D)
• Appraisal of available legal defense and their likely outcomes
• Appraisal of whether or not to testify
• Make rational case-specific decisions
Reasoning

• Distinguish more relevant from less relevant information
• Seek out relevant information
• Weigh and evaluate various legal options and their consequences
• Make comparisons
• Provide reality-based justification for making particular case-specific decisions or conclusions
Assisting/Consulting

• Consult with counsel
• Relate to lawyer
• Plan legal strategy
• Engage in own defense
• Challenge witnesses
• Testify relevantly
• Manage courtroom behavior
Decision Making

• Consider alternatives
• Weigh options
• Make crucial legal decisions
  • whether to accept the plea agreement or proceed to trial, which plea to enter and which steps to take, e.g., testifying or calling witnesses at trial
• Myriad smaller decisions throughout the course of the proceeding
Areas of CST Inquiry

• Capacity to understand the arrest process
• Capacity to understand/appreciate the charges or allegations
• Capacity to disclose to counsel pertinent facts, events, and states of mind
• Capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed in the proceedings
• Capacity to appreciate the likely outcome of the proceedings
• Basic knowledge of legal strategies and options
• Capacity to engage in reasoned choice of legal strategies and options (decision making)
Areas of CST Inquiry

- Capacity to understand the adversary nature of the proceedings
- Capacity to manifest appropriate courtroom behavior
- Capacity to participate in trial
- Capacity to testify relevantly
- Relationship with counsel
- Medication effects on CST
- Any other case-specific area of relevance

See Appendix A (Best Practices Book; Domains & Areas of inquiry)
<table>
<thead>
<tr>
<th>Domain</th>
<th>Subdomain</th>
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<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>
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<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>Understanding of the behaviors to which the charges refer</td>
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<td></td>
<td>Comprehension of the police version of events</td>
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<td></td>
<td>Understanding of the severity of the charges</td>
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<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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<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 contendere</em>, as applicable)</td>
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<tr>
<td></td>
<td>Knowledge of the plea bargaining process</td>
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<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>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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<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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<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</td>
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<td>(an ability to rationally apply knowledge to one’s own case and make decisions)</td>
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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

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<td>Appreciation of appropriate courtroom behavior</td>
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<td>Capacity to manage one’s emotions and behavior in the courtroom</td>
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<tr>
<td>Capacity to track events as they unfold (not attributable to the effects of medication)</td>
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<td>Capacity to challenge witnesses (i.e., recognize distortions in witness testimony)</td>
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<th>Capacity to manifest appropriate courtroom behavior</th>
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<tr>
<td>Capacity to manage one’s emotional or communication difficulties</td>
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<td>Capacity to track oral questions and respond appropriately</td>
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<th>Capacity to participate in trial</th>
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<td>Recognition that counsel is an ally</td>
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<tr>
<td>Appreciation of the attorney-client privilege</td>
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<td>Confidence in and trust in one’s counsel</td>
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<td>Confidence in attorneys in general</td>
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<tr>
<td>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)</td>
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<td>Capacity to track proceedings given sedation level on current medication</td>
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<td>Potentially detrimental effects of medication on the defendant’s courtroom demeanor</td>
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* 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).
The Evaluation Process
Competency Evaluation

• Data sources:
  – Interview
  – Testing
  – Collateral information (records, collateral i/v)

• Nature: Functional / Contextual

• Purpose: Assess Congruence v. Incongruence and provide prescriptive remediation
“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.” (p. 32-33)
Contextual & Functional Nature

• 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

• 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

• Competency cannot truly 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
Defense Counsel’s Role

• Crucial to get info from defense counsel about required abilities, expected outcomes, and case-specific details

• Expect evaluators to ask detailed information about:
  – Abilities required of D for the specific case
  – Possible penalties, pleas, defense strategy, likely outcome
  – Anything relevant for guiding competence-related inquiries

• Expect evaluators to ask about interactions with D and to request the opportunity to observe
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)

- 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
### Attorney CST Questionnaire

**Telephone**

**FAX**

**Email**

**Agency & Address**

Who brought your client’s competency to the attention of the court?

- [ ] Myself
- [ ] Processing Attorney
- [ ] Client’s own motion
- [ ] Probation officer
- [ ] Detention staff
- [ ] Assessing officers
- [ ] Client’s family
- [ ] Others

What factors, if any, contributed to the perception need for a competency evaluation?

Check all that apply. Describe factors checked.

- [ ] History of mental illness
- [ ] History of psychiatric medication
- [ ] History of psychiatric hospitalization
- [ ] History of counseling therapy
- [ ] History of substance abuse
- [ ] Difficulty communicating with client
- [ ] Client’s unusual behavior
- [ ] Other

One aspect of competency is the client’s understanding of the charges and the associated possible dispositions. To assist in evaluating this, please:

- [ ] The charges against your client:
- [ ] The nature of the dispositions that your client might face, given these charges and your client’s past record:

<table>
<thead>
<tr>
<th>1.</th>
<th>It is likely to have to make a decision about a plea agreement</th>
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<tbody>
<tr>
<td>2.</td>
<td>Evidence against client is unclear and the defense largely depends on the client’s ability to provide information</td>
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<tr>
<td>3.</td>
<td>Case will involve many adverse witnesses</td>
</tr>
<tr>
<td>4.</td>
<td>Client will need to testify in the case</td>
</tr>
<tr>
<td>5.</td>
<td>The pre-adjudication process will be lengthy</td>
</tr>
<tr>
<td>6.</td>
<td>The adjudication hearing will be lengthy</td>
</tr>
</tbody>
</table>

Likelihood:

- [ ] Unlikely
- [ ] Don’t know
- [ ] Likely
- [ ] Definite
Functional Evaluation

• Evaluate the ability of the D to perform specific tasks at trial by engaging in those tasks during the interview
  – Discuss the specific nature of D’s case
  – Engage the D in discussions that allow the assessment of rational decision making abilities

• Observe interactions between defense counsel and D
  – Ask defense counsel to discuss possible case strategies, pleas, consequences, outcomes, etc.
Testing in CST Evaluations

- Forensic Assessment Instruments
  - Standardize the assessment process
  - Reduce error and bias
  - Promote meaningful comparisons across time
  - Allow for comparisons between examiners
  - Help to improve communication in legal settings
- Evaluators are being encouraged to use CAIs and should be questioned about their rationale for choosing not to do so
Collateral Contacts / Records

• Collateral information should be obtained to determine the veracity of D’s self-report
  – Records
  – Interviews with collateral informants
Guideline 9.02: Use of Multiple Sources of Information

• Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (AERA, APA, & NCME, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.
Evaluation Reports
Evaluation Reports

• Purpose: document relevant information regarding assessment & procedures; communicate conclusions and opinions as well as the bases for these

• Nature: thorough yet concise; scope limited to the legal issue at hand; clear, relevant, informative, defensible
Report Contents

- Identifying Information
- Source of referral, reason for referral, statement of the charges
- Relevant legal standards and criteria
- Notification/Informed consent/Statement of non-confidentiality
- Data Sources/Sources of Information
- Background Information
- Psychological Test Results, if any
- Mental Status at Interview
- Clinical Assessment/Conclusions/Diagnoses
- Forensic Assessment/Formulation and basis for opinion regarding competency
- Opinion on restorability or other statutorily required information
- Summary and Recommendations
Inappropriate Report Content

• Defendant’s version of the circumstances surrounding the offense
• Other legal issues
Guideline 11.02: Differentiating Observations, Inferences, and Conclusions

• In their communications, forensic practitioners strive to distinguish observations, inferences, and conclusions. Forensic practitioners are encouraged to explain the relationship between their expert opinions and the legal issues and facts of the case at hand.
Guideline 11.03: Disclosing Sources of Information and Bases of Opinions

• Forensic practitioners are encouraged to disclose all sources of information obtained in the course of their professional services, and to identify the source of each piece of information that was considered and relied upon in formulating a particular conclusion, opinion, or other professional product.
Guideline 11.04: Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

• Forensic practitioners are encouraged to limit discussion of background information that does not bear directly upon the legal purpose of the examination or consultation. Forensic practitioners avoid offering information that is irrelevant and that does not provide a substantial basis of support for their opinions, except when required by law (EPPCC Standard 4.04).
Bases for Conclusions

• Delineate rationale or logic used in arriving at ultimate opinion
• Describe linkage between threshold condition and noted deficits in psycholegal abilities (should be using language of the statute)
• Describe the ways in which these deficits could play out at trial/next phase for this D
Prescriptive Remediation

• Include ways to improve the Ds understanding of and participation in the proceedings

• Competency involves a person x situation interaction
  – Change the person
  – Change the situation
5 Common Deficiencies that Set the Best Apart from the Rest

• Demonstrate an understanding of evolving standards (consider decision making as key)
• Expert sought out pertinent and relevant information about proceedings from defense
• Focus on rational decision making
• Delineate all linkages: substantiate conclusions
• Communicate prescriptive remediation strategies
Competency Restoration
Competency Restoration

- 75-90% of incompetent individuals are restored within 6 months – 1 year
- Medication is the single most common form of treatment for restoration
- Responsiveness to psychotropic medications likely has a large impact on restoration
- Clinical factors predictive of poor treatment outcome – earlier illness onset, number of psychotic episodes, and increased duration of untreated psychosis – are also likely related to poor restoration success
Reduced Success of Restoration

- Mossman (2007): 2 types of Ds that had well below average probabilities of being restored
  - (a) chronically psychotic defendants with histories of lengthy inpatient hospitalizations, and
  - (b) defendants whose incompetence stemmed from an irremediable cognitive disorders such as mental retardation

- Prior state inpatient hospitalization and increased age have also demonstrated a relation to decreased restoration success
Competency Restoration

• Vast majority of incompetent defendants are restored
  – Most will be restored within 6 months; almost all within 1 yr; diminishing returns after 2 yrs, almost nothing after 3yr
  – Approximately 80-90% of D’s are ultimately restored

• Successful restoration associated with:
  – Younger age, mood disorder or non-psychotic disorders, more serious criminal charges

• Unsuccessful restoration associated with:
  – Older, > hospitalizations or findings of incompetence, diagnosis of MR or MR+Psychiatric illness, less serious charges
THANK YOU!

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212.866.0608
Challenging the State’s Mental Health Expert

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- Philipsborn (2004) *Psychology, Public Policy, & Law*
Competency Evaluation

• Data sources:
  – Interview
  – Testing
  – Collateral information (records, collateral i/v)

• Nature: Functional / Contextual

• Purpose: Assess Congruence v. Incongruence and provide prescriptive remediation
Preparing for the Interview

• Minimum requirements:
  – The charges; Police/arrest report(s)
  – Reason(s) for referral
  – Background information from defense counsel on case specific details and considerations

• Evaluator should look to defense counsel for this info

• Defense counsel can assist ex parte expert in obtaining additional collateral information/records (CO: should know about relevant records that should be reviewed)
Obligations of the Expert

- Response style
  - Denial, minimization, exaggeration
  - Malingering (Psychiatric symptoms, cognitive deficits)

- Cultural considerations
  - Cultural context & degree of acculturation, language
  - Cultural perceptions of mental illness

- Incriminating evidence
  - D’s account should not be included in written report
Functional Evaluation

• Observe interactions between defense counsel and D
  – Ask defense counsel to discuss possible case strategies, pleas, consequences, outcomes, etc.

• Evaluate the ability of the D to perform specific tasks at trial by engaging in those tasks during the interview
  – Discuss the specific nature of D’s case
  – Engage the D in discussions that allow the assessment of rational decision making abilities
Information about D’s Case

• If the State’s expert did not ask you about what will be required of the D at trial or the next phase of the proceedings....how did they obtain this information?

• Need to assess (in)congruency between current abilities and those required at trial...evaluators need to know what to evaluate
Trial Demands

Grisso (2003):
• complexity and multiplicity of the charges
• events associated with the alleged offense
• range of possible penalties for the alleged offense & their probabilities
• range and types of evidence available to counsel without the defendant's report
• simplicity or complexity of the legal defenses available
• necessity of the defendant to testify on their own behalf at trial
• probable length of trial
• probable complexity the trial (number & types of witnesses)
• potential of the trial to arouse emotion in the defendant
• sources of social support
Philipsborn (2004)

• “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)

• “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.”
Biggest Issue in MO (IMO)

• Evaluators have not kept up with current prevailing Supreme Court case law and do not consider the full panoply of psycholegal abilities

• Focus is primarily on factual understanding to the neglect of rational understanding (appreciation) and decision-making/assisting
Testing

• Forensic Assessment Instruments
  – Specific to the focus of legal inquiry
  – Lots of these for CST
  – Nomothetic v. Idiographic

• Forensically Relevant Instruments
  – Evaluate characteristics relevant to the legal inquiry
  – Malingering

• Psychological Testing
  – Specific to a psychological issue or construct (WAIS, MMPI)
  – Neurocognitive or language-specific evaluation instruments
Testing: 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
Testing in CST Evaluations

- Evaluators are being encouraged to use CAIs and should be questioned about their rationale for choosing not to do so
  - What questions did you use to evaluate the different domains of competence?
  - Where is the record of what you asked and what the D replied?
  - Why did you choose not to standardize your evaluation?
  - What questions did you ask to evaluate.....[see domains and areas of inquiry handout]
Testing: Psychological

• Select tests on the basis of the information they provide
  – Consider how well D fits with standardization samples
  – 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
Testing

• You can request the evaluator’s raw test data
  – Old Ethics code required release to another MH
  – New Ethics code recognizes the need for transparency in forensic contexts
  – Have an expert look at the test data for errors or deviations from standard administration as well as errors in interpretation
Keys for Preparing Cross-Examination

• Request raw test data
  – Can be released to you or your expert
• Request copies of evaluation notes
  – Consulting expert can assist in interpretation
• Obtain copies of test manuals
  – Consulting expert can obtain any protected manuals
• Examine the literature on scoring, norms, and psychometric properties for any tests / instruments used
  – Consulting expert can assist with obtaining & interpreting**
Testing & MR/ID

- Testing becomes problematic with individuals who have MR/ID
- Formal testing for ID & functional abilities should occur if the issue is germane to context
- Test data should be interpreted accordingly & and special deviations or procedures should be documented in the evaluation report
Intellectual / Developmental Disability

• Under-identified in the CJ system
• Present with a “cloak of competence”
  – Compliant & cooperative with authority figures
  – Acquiescent & pretend to understand
  – Pick up on non-verbal cues & respond accordingly
• Recommended techniques
  – Open-ended questions w/ developmentally appropriate language
  – Provide simple & straightforward info / teach & test
  – Detailed probing and inquiry
  – Use confrontational questioning to determine ability for cross-exam
Evaluation Report

• Purpose is to document the evaluation and the procedures as well as the data considered
• Evaluator should delineate his/her reasoning process in arriving at their opinion(s)
• High standard for record keeping in forensic evaluation; length of time for I/Vs, dates, records reviewed, collateral I/Vs, detailed notes
Evaluation Report

• This is the primary way in which you will learn about the evaluation – how it was conducted, what was reviewed, what data were considered relevant & important, how these data sources were weighted, how the evaluator arrived at opinion(s)

• Report should delineate the entire process
Report Contents

• Identifying Information
• Source of referral, reason for referral, statement of the charges
• Relevant legal standards and criteria
• Notification/Informed consent/Statement of non-confidentiality
• Data Sources/Sources of Information
• Background Information
• Psychological Test Results, if any
• Mental Status at Interview
• Clinical Assessment/Conclusions/Diagnoses
• Forensic Assessment/Formulation and basis for opinion regarding competency
• Opinion on restorability or other statutorily required information
• Summary and Recommendations
# Elements of Notification

<table>
<thead>
<tr>
<th>Element</th>
<th>Source of Authority</th>
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<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>
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<tr>
<td>Who has Right to Access/Release Evaluation</td>
<td>APA Code, SGFP</td>
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<tr>
<td>Whether the D has a Right to Refuse</td>
<td>APA Code, SGFP</td>
</tr>
<tr>
<td>Evaluator’s Credentials</td>
<td>SGFP</td>
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<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><strong>Appropriately Document the Notification or Consent Procedures</strong></td>
<td>APA Code</td>
</tr>
</tbody>
</table>
Information Sources

• This is a good place to start when trying to determine why evaluators came to different conclusions
  – What data sources were used; what was missing?
  – Data should be attributed to its source in report

• If information was requested but not received, this should be in the report [so if info was requested of you but not received, that should be indicated in the report]
Steps in Opinion Formation

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

2. Evaluate relevant functional abilities and deficits (Understanding, Appreciation, Reasoning, Decision Making, Consulting, Assisting)

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

4. Specify how these deficits might impact functioning at trial (or for proceeding to next stage)
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
1. Threshold Issue

- Mental disease or defect = threshold issue
- Diagnosis ≠ incompetence
  - Incompetent D’s 8 x more likely to have psychotic disorder
  - Symptoms more important that diagnosis
  - Incompetence associated with
    - Formal thought disorder (disorganized speech, incoherence, word salad)
    - Concentration deficits
    - Rate of thinking (abrupt, rapid changes or profound slowing of speech / thought)
    - Delusions (strongly held irrational beliefs that are not based in reality)
    - Hallucinations (sensory perceptions in the absence of a stimulus)
    - Intellectual or Developmental Disability (MR)
2. Psycholegal Abilities

• Understanding
  – Factual understanding of general, legally relevant information

• Appreciation
  – Rational application of factually understood information to own case

• Reasoning
  – Use appropriate reasoning processes (weigh, compare, evaluate) in a rational manner (focus on process, not outcome)

• Consulting & Assisting
  – Engage with counsel in a rational manner; communicate coherently

• Decision Making
  – Consider specific, contextually-relevant aspects of the case
3. Demonstrate Causal Connection

Mental Disorder / Cognitive Impairment

Deficits in Psycholegal Abilities
Research Findings

• 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 competency evaluation reports reviewed provided an explanation regarding how the defendant’s psychopathology compromised his or her abilities (Skeem, Golding, Cohn, & Berge, 1998)
4. Functional Deficits at Trial

Mental Disorder / Cognitive Impairment

Deficits in Psycholegal Abilities

Functional Deficits/Impairments at Trial
Research Findings

• The link 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)
Bases for Opinion in Report

- 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
Forensic Assessment Section

- 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
10 Common Errors / Shortcomings

• Opinions without sufficient explanations (53%)
• Forensic purpose unclear (53%)
• Organization problems (36%)
• Irrelevant data or opinions (31%)
• Failure to consider alternative hypotheses (30%)
• Inadequate data (28%)
• Data and interpretation mixed (26%)
• Over-reliance on single source of data (22%)
• Language problems (19%)
• Improper test uses (15%)

Grisso, 2010
5 Common Deficiencies that Set the Best Apart from the Rest

- Demonstrate an understanding of evolving standards
- Expert should seek out pertinent and relevant information about proceedings from defense
- Focus on rational decision making
- Delineate all linkages: substantiate conclusions
- Communicate prescriptive remediation strategies
Preparing your Expert for Testimony

• Report serves as the basis so ensure it is complete
  – Ask questions about anything you don’t understand
• Ask your expert what the weaknesses are
  – There are always pieces of outlier information—ask about these
• Ask your expert to compare data sources with opposing expert’s report
  – Were different sources used? Implications?
Preparation - What to Ask your Expert

• How was response style evaluated?
• What are the relevant cultural considerations, if any?
• What alternative hypotheses did you consider?
• How does D compare to the standardization/norming samples for any test/instruments used?
• What are the limitations of your evaluation/report?
• What are D’s competence-related abilities and deficits?
• What is the basis for any noted deficits?
Using your Expert to Prepare Cross

• Did the opposing expert ask about specific abilities required of defendant?
• Were the same data sources used by both sides?
• What are the limitations of the opposing expert’s evaluation?
• What are the limitations of the test/instruments used?
• What are the strengths of the opposing expert’s opinion?
• Did the opposing expert consider anything that you did not?
THANK YOU!

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