Competence, in the context of criminal justice proceedings, refers to a defendant’s capacity to meaningfully participate and make decisions during the criminal justice process. Competence is relevant at any stage of the process, from a defendant’s first words to arresting officers, through that defendant’s decision about pleas, until—in the gravest of cases—the moment of execution. Because questions about competence can be raised at any point in criminal justice proceedings, this chapter describes criminal competencies, and many scholars use broad terms such as adjudicative competence (see Bonnie, 1992) or competence to proceed, to cover the span from arrest to verdict to sentencing. Nevertheless, this chapter focuses primarily on the defendant’s capacities that comprise his or her competence to stand trial because this is, by far, the most commonly adjudicated competence (Melton, Petrila, Poythress, & Slobogin, 2007), and far more scholarly research literature addresses this particular competence. Authorities estimate that at least 60,000 defendants—approximately 5% of all felony defendants—are evaluated for trial competence each year in the United States, making trial competence assessments the most common form of criminal forensic mental health assessment (Bonnie & Grisso, 2000; Poythress, Bonnie, Monahan, Otto, & Hoge, 2002). Most practicing clinical forensic psychologists evaluate trial competence on a routine basis. Indeed, evaluating, adjudicating, and restoring competence consumes most of the financial resources that jurisdictions devote to forensic mental health services (Golding, 1992).

This chapter also addresses defendants’ capacity to waive their Miranda rights, that is, defendants’ capacity to knowingly, intelligently, and voluntarily waive their Fifth Amendment rights to silence and counsel during custodial interrogation. Miranda waivers have received increasing scholarly attention in recent years (e.g., A. M. Goldstein & Goldstein, 2010; N. E. S. Goldstein, Goldstein, Zelle, & Oberlander Condie, 2012) and appear to be the competence next most often examined after competence to stand trial. Finally, we give only brief attention to another criminal competence—competence for execution (CFE)—which is in proportion to its less frequent attention in legal proceedings and clinical practice.

**IMPORTANCE OF THE PROBLEM**

A core principle in modern criminal law is that every defendant has the right to a fair trial. But, for a trial to be truly fair, the defendant must be able to comprehend the trial process and be able to attempt some form of defense. Defendants must understand the charges against them; they must be able to meaningfully understand the proceedings to determine their guilt; and they must be able to help defend themselves during those proceedings, whether by arguing innocence or pursuing a favorable sentence. In short, defendants must have a basic level of competence in order for the justice system to have fair and dignified proceedings.

The principle that a defendant must be competent in order to face adjudication has deep roots in
English common law (see William Blackstone’s *Commentaries on the Laws of England*, 1769/1979, and *King v. Frith*, 1790). Some accounts suggest that the principle arose even earlier, in an era when defendants were not guaranteed a right to defense counsel but were expected to present their own defense (Grisso, 2003; Zapf & Roesch, 2009). When a defendant refused to enter a plea, the court was then left to determine whether he or she was “mute by malice” or “mute by visitation of God” (e.g., deaf, mute, or suffering psychiatric illness). Defendants determined to be the former were usually tortured, with heavy stones placed on their chests until they pled. But, the latter were spared this process, reflecting even then a recognition that some defendants may not have the capacity to face the weight of legal proceedings against them (Melton et al., 2007).

U.S. law was built on English common law, so U.S. courts quickly acknowledged the problem of incompetent defendants as American jurisprudence developed. For example, a trial court found the man who attempted to assassinate President Andrew Jackson not fit to stand trial (*United States v. Lawrence*, 1835), and a court of appeals concluded that subjecting “an insane person” to trial violated due process (*Youtsey v. United States*, 1899).

The U.S. Supreme Court established the formal standard for competence to stand trial in *Dusky v. United States* (1960), when it held that

> It is not enough for the district judge to find “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)

This brief opinion is typically viewed as the Court interpreting the constitutional right to due process to require that defendants have a minimal level of competence. Subsequently, all state statutes and case law have modeled their discussion of competence on this Dusky language. Three decades after Dusky, the Supreme Court concluded that the same standard for trial competence should apply to waiving counsel and pleading guilty (*Godinez v. Moran*, 1993).1

The principle of competence per se is hardly controversial, and authorities have detailed strong rationales for prohibiting the prosecution of incompetent defendants. For example, *Bonnie* (1992) emphasized dignity, reliability, and autonomy:

- **Dignity**: Proceeding with trial and punishment against a defendant who lacks a rudimentary understanding of the nature and purpose of proceedings, or a moral understanding of wrongdoing and punishment, offends the “moral dignity” (Bonnie, 1992, p. 295) of the justice process.
- **Reliability**: Proceeding with trial against a defendant who cannot recognize or communicate relevant information to counsel increases the chance of an erroneous verdict. This is not only unfair to the defendant but also undermines society’s interest in reliable, or accurate, court decisions.
- **Autonomy**: Our justice system prioritizes defendant self-determination by requiring that the defendant, not counsel, make those certain key decisions—such as how to plead—that affect the defendant more than anyone else. But proceeding with trial against a defendant who lacks decisional competence undermines this core value of defendant autonomy.

Other authorities have offered similar rationales for a competence doctrine (e.g., Group for the Advancement of Psychiatry, 1974; Melton et al., 2007).

Thus, the values and rationale underlying a competence requirement are well established. But, these values and rationale direct attention to the problem of incompetence because *some portion of criminal defendants are impaired in ways that may render them incompetent to participate in their*...

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1Although the *Godinez* decision has been understood as holding that the same competence standard applies to any actions that a defendant may take (i.e., waiving counsel and pleading guilty), a more recent case has modified this understanding. In *Indiana v. Edwards* (2008), the U.S. Supreme Court considered the unusual case of a mentally ill defendant who not only waived counsel but represented himself at trial (rather than simply pleading guilty, as in *Godinez*). The Court decided that the state could indeed limit this defendant’s right to represent himself, even though he met the Dusky standard for trial competence, because self-representation in trial requires greater capacities. Thus, the recent Edwards decision suggests that the standard for competence may indeed vary in at least some circumstances.
Criminal Competencies

Questions of competence arise as early as pre-arrest interactions with police officers during custodial interrogation. At this time, a suspect has certain rights, so his or her capacities to comprehend his or her circumstances and make decisions become legally relevant. 

Miranda warnings were intended to provide useful information to suspects who might be unversed in their rights (Miranda v. Arizona, 1966), but research suggests that the vast majority of suspects waive their rights and provide statements to police (e.g., Kassin et al., 2007). Rogers and colleagues demonstrated the widespread misconceptions that defendants, and even the general population, hold about Miranda warnings (e.g., Rogers, 2011; Rogers, Rogstad, et al., 2010). Moreover, evidence that vulnerable groups, such as individuals with intellectual deficits and/or mental illness, are disproportionately represented in the criminal justice system raises concerns about suspects waiving their rights even though they may lack the capacity to do so.

After suspects proceed beyond the police interview and formally become criminal defendants, concerns about their competence become more acute. Defense attorneys have reported concerns about defendants' trial competence in up to 15% of their cases (Hoge, Bonnie, Poythress, & Monahan, 1992; Poythress et al., 2002). However, for strategic reasons (e.g., to avoid delays or hospitalization), attorneys sometimes decline to pursue a formal competence evaluation even when they doubt a client's competence. In other instances, attorneys may simply fail to recognize the deficits (such as well-disguised symptoms of intellectual disability) that may render a defendant incompetent.

Similar competence concerns arise in juvenile court. After youth in delinquency hearings became entitled to many of the same rights and procedures as adult defendants (Kent v. United States, 1966; In re Gault, 1967), states began to recognize that youths' due process rights required that they be competent in order to be adjudicated in juvenile court. In practice, attorneys raised the issue more often after the juvenile justice reforms of the 1990s, which left
youths facing more serious sanctions in juvenile court.

Whether in juvenile court or criminal court, the issue of competence can be raised at any point before or during trial (Drope v. Missouri, 1975). Indeed, it must be raised by court personnel (i.e., defense counsel, prosecutor, or judge) when they have a legitimate doubt about a defendant’s competence (Pate v. Robinson, 1966). Thus, each particular stage of a defendant’s proceedings—such as the decision to enter a plea, to stand trial, or to proceed pro se—may prompt questions about the defendant’s competence, even if such questions did not arise at earlier stages of the proceedings. Even at the last stage of the most severe sentence, the court may ask for an evaluation of the last competency (Brodsky, Zapf, & Boccaccini, 2001; Zapf, Boccaccini, & Brodsky, 2003)—competence for execution (CFE).

**RELEVANT PSYCHOLOGICAL THEORY AND PRINCIPLES**

At the most obvious level, psychological theory is relevant to the criminal competencies because incompetence is always attributable to psychological problems, broadly defined. Nearly every jurisdiction requires that a finding of incompetence must be based on a mental disorder (“a mental disease or defect,” in many statutes). Mere ignorance of the law or inexperience with the justice system is never a basis for incompetence.

**Incompetence Must Be Based on Mental Disorder**

Though not explicitly mentioned in the brief Dusky decision, almost all jurisdictions hold, whether through statute or case law, that mental disorder is a necessary condition for any kind of incompetence. But, mental disorder alone is never a sufficient condition for a finding of incompetence (e.g., Feguer v. United States, 1962; Swisher v. United States, 1965; United States v. Adams, 1969; Wieter v. Settle, 1961). Rather, the symptoms of a mental disorder must interfere with a defendant’s relevant, practical abilities in a way that leaves that defendant unable to meaningfully participate in the adjudicative process.

What psychological conditions tend to be most relevant to competence determinations? There is no diagnosis—and no particular symptom pattern—that ensures a finding of incompetence. Indeed, studies suggest that most of the defendants in any particular diagnostic group are found competent (e.g., Pirelli, Gottidiener, & Zapf, 2011; Warren et al., 2006). But, studies also suggest that the two general conditions most often underlying incompetence findings are psychosis and cognitive impairments.

**Psychosis.** Psychosis itself is neither a specific mental disorder nor a formal diagnosis. Rather, the term refers to particular symptoms that may be associated with several different disorders or other conditions, such as substance intoxication or certain medical conditions. Psychosis refers broadly to a severe impairment in an individual’s ability to distinguish reality from that which is not real. More specifically, it typically denotes a group of severe symptoms including hallucinations (false sensory experiences such as seeing sights or hearing sounds that do not exist in reality), delusions (fixed, false beliefs that persist despite clear evidence to the contrary), and/or grossly disorganized behavior. There are countless ways that psychosis might interfere with adjudicative competence; in severe cases, a psychotic defendant may be too paranoid, disorganized, or agitated to cooperate with counsel or understand proceedings at even a minimal level. But, less severe cases could also preclude adjudicative competence; for example, if a defendant’s psychosis is limited to a delusional belief that his attorney is part of an international conspiracy against him, this narrow delusion may preclude the defendant from working productively with his attorney.

Despite the disruptive nature of psychotic symptoms, a diagnosis of a psychotic disorder does not guarantee a finding of incompetence. In a recent meta-analysis, defendants who had been diagnosed with psychotic disorders (e.g., schizophrenia) were approximately eight times more likely to be found incompetent compared to defendants without such a diagnosis. Nevertheless, the majority of defendants who had been diagnosed with a psychotic disorder were still found competent (Pirelli et al., 2011).
Cognitive impairment. The term cognitive impairment, like psychosis, refers to a variety of deficits that may result from a variety of mental disorders or medical conditions. Perhaps most common among incompetent defendants are cognitive impairments due to intellectual disability (formerly called mental retardation) or developmental disabilities that leave the defendant with well below–average intellectual skills. Of course, low intelligence alone does not render a defendant incompetent, and clinicians performing competence evaluations find that most of the defendants they diagnose with intellectual disability are, nonetheless, competent to stand trial (Cochrane, Grisso, & Frederick, 2001; Warren et al., 2006). But, depending on the circumstances, severe intellectual impairments could preclude a defendant from understanding proceedings at even a rudimentary level or making basic legal decisions in an autonomous manner.

Of course, psychosis and cognitive impairments are not the only psychological deficits or conditions that could lead to incompetence. But, they are the conditions that most often correspond with incompetence (Pirelli et al., 2011). The reason that no particular condition or set of symptoms always renders a defendant incompetent is because competence always depends on the exact functional deficits that these symptoms cause as related to the exact functional demands of the particular legal context.

Competence Is Functional and Contextual

Competence is a legal construct that has no single, easily identifiable psychological correlate. In fact, any legal competence is an “open-textured” (Golding, 2008; Meehl, 1970) construct in the sense that competence may vary across contexts, is subject to a variety of operational definitions, and can probably never be adequately captured by one fixed set of facts (Grisso, 2003). Even examining a single, specific legal competence, such as competence to stand trial, underscores the open-textured nature of the concept.

Recall that the brief Dusky decision (1960) conveyed only that the defendant must have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational and factual understanding of proceedings against him or her. Despite the brevity of the Court’s opinion, its wording carries implications that are crucial to defining and assessing a defendant’s trial competence (see Kruh & Grisso, 2009; Zapf & Roesch, 2009). First, sufficient ability implies that the defendant need not have a sophisticated, perfect, or wholly unimpaired ability to work with defense counsel, merely an adequate one. In the same way, the defendant needs only a reasonable degree of rational understanding. This “suggests that the test [of competence] as applied to a particular case is a flexible one” (Melton et al., 2007, p. 128). The term reasonable implies that it be adequate for the situation at hand.

This emphasis on sufficient, reasonable abilities underscores what may be the most important principle underlying the assessment of trial competence or any other legal competence: Competence is both functional and contextual. Grisso (2003) clearly described the functional and contextual nature of legal competencies when he explained:

Legal competence constructs focus on person–context interactions. A legal competence question does not merely ask the degree of functional ability or deficit that a person manifests. It asks further, “Does this person’s level of ability meet the demands of the specific situation with which the person will be . . . faced?” Defined more formally, a decision about legal competence is in part a statement about the 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’s ability and situational demand, not an absolute level of ability, is of special significance for legal competence decisions. . . . The individual’s level of ability will be important to consider, yet the fact finder can assess its significance only when it is weighed against the demands
of the individual’s specific situation. (pp. 32–33)

This emphasis on function and context underlies any discussion of competence. Recall that the forensic evaluation of competence involves the intersection of two fields. Although the field of psychology typically takes a nomothetic (group-based) approach, the legal field typically takes an idiographic (individualized) approach. Competence is not framed as an absolute standard in which an individual is compared against the general population because the legal field reviews on a case-by-case basis in order to allow for individualized application of general rules to each particular defendant’s case. Practically speaking, this principle means that any question about competence will require individualized consideration of the defendant and the defendant’s unique case. Also practically speaking, this means that no assessment instrument or checklist, however well designed, can by itself answer the question of competence for all defendants in all contexts. It is crucial to remember this foundational principle—that competence is open textured and context dependent—before considering the specific abilities that are relevant in most evaluations of competence.

Competence Requires Certain Basic Abilities

An evaluation of any legal competence is an evaluation of whether the defendant’s threshold condition (a mental disorder) has caused functional impairments that interfere with the basic skills or abilities that are essential to a particular legal task in the context of the defendant’s unique case. What are those basic skills or abilities? Scholars have identified several broad abilities that are particularly relevant to most legal competencies. Such abilities may be thought of as psycholegal variables and are theory based by nature. That is, these abilities are derived through theoretical consideration of legal standards and practices in order to identify what is apparently required of defendants and then translate those requirements into measurable psychological variables. Perhaps most broadly, Appelbaum and Grisso (1988) identified four abilities that tend to comprise any legal competence. The abilities do not necessarily make up a single definition of competence and, depending on the context, a competence standard might require just one of the abilities, all four abilities, or a combination of some of the abilities. But, these four aspects are basic components of most legal competencies.

- **Understanding relevant information**: This concept refers to being able to comprehend information that is relevant to decision making. It is the ability that is most often explicitly identified because of the basic need to understand information before one can genuinely decide to accept or reject that information.
- **Appreciating the situation and its consequences**: This concept builds on the first and speaks to the need for a person to grasp what information means in his or her own case.
- **Manipulating information rationally**: This concept refers to the ability to use logical thinking (reasoning) to weigh the risks and benefits of options when making a decision.
- **Communicating choices**: This concept refers to the basic ability to convey a choice as evidence of one’s ability to make decisions. It often is not formally assessed because it is generally accepted as a self-evident indication of whether someone can make decisions independently.

These four basic abilities were originally derived through theoretical consideration of patients’ competence to make medical treatment decisions (Appelbaum & Grisso, 1988), but they are also relevant to understanding any legal competence. Subsequently, several scholars (e.g., Bonnie, 1992; Cruise & Rogers, 1998; Grisso, 2003; Rogers, Tillbrook, & Sewell, 2004) worked to apply the broad abilities that are necessary for legal competence generally to the more specific context of competence to stand trial (see Kruh & Grisso, 2009; Zapf & Roesch, 2009, for reviews). Despite some differences in organization and emphasis, almost all of their analyses have in common the following five capacities:

- **Understanding**: Defendants must have a factual understanding of the legal proceedings, including the adversarial arrangements and procedures in court as well as the roles of key court personnel.
(i.e., judge, defense attorney, prosecuting attorney). Understanding also involves the case at hand because defendants must know the charges and the range of possible penalties they are facing as well as the plea options and basic rights to which they are entitled. Understanding is a foundational ability in that a defendant’s understanding of his or her legal situation is a prerequisite for appreciating, reasoning, and making rational decisions about that legal situation.

- **Appreciating**: A defendant must not only be able to understand certain information on a factual level, but he or she must also be able to rationally abstract that information to apply it to his or her case and grasp the important implications. Whereas understanding involves only recognizing or identifying certain facts, appreciation involves the defendant’s beliefs underlying those facts. Are the defendant’s beliefs grossly distorted or unrealistic due to psychopathology? Or are the defendant’s beliefs accurate enough that he or she can proceed through adjudication in a rational manner that conforms to the reality of the situation? Is the defendant’s appreciation of his or her situation grossly concrete and simplistic due to cognitive limitations? Or can the defendant reasonably appraise the evidence against him or her and anticipate the likely outcomes of legal proceedings? Appreciation involves a reality-based, logical grasp of the relevant facts.

- **Reasoning**: A defendant must not only appreciate the legally relevant information, but he or she must also be able to perform a closely related task of manipulating and weighing that information to make reasonable — though not necessarily impeccable — decisions (Zapf & Roesch, 2009). Can the defendant use a logical process to identify and evaluate the information that is most relevant to the case and then use a logical process to weigh that information and choose a reasonable course of action? Reasoning need not be sophisticated, but it should be rational and logical. Competent reasoning is self-interested, as the client considers the relevant information and approaches decisions with his or her best interests in mind.

- **Assisting**: With adequate understanding, appreciation, and reasoning, a defendant should be capable and motivated enough to assist counsel in mounting a vigorous defense (or be able to make a reasonable decision not to pursue a defense). Assisting counsel will entail communicating with counsel to provide information that is relevant to the case and opinions regarding legal strategy. In cases that proceed to trial, assisting includes behaving appropriately in the courtroom; following courtroom proceedings as they occur; providing counsel with relevant input as the trial develops; and, if the defendant chooses to testify, doing so appropriately.

- **Decision Making**: Finally, competent defendants must be able to make decisions. That is, they must consider alternatives and make crucial legal decisions such as whether to accept a plea agreement or proceed to trial, which plea to enter, and which steps to take (e.g., testifying, calling witnesses) at trial. Although rational decision making will certainly require careful consideration of guidance from counsel, certain key decisions are reserved solely for the defendant. Thus, the ability to make decisions in a rational, reality-based manner is usually considered a core capacity for competence to stand trial.

Of the five core abilities listed here, decision making is the least clearly addressed in the Dusky standard, so it has tended to receive less focus than the other abilities. Nonetheless, Bonnie (1992) proposed that adjudicative competence involved (a) a foundational competence necessary to assist counsel and (b) a somewhat more demanding decisional competence. He argued for an additional, more context-specific, decisional competence because defendants who have only basic abilities (e.g., understanding one’s charges, appreciating one’s situation, skills needed to assist) may not be competent to make some of the specific decisions necessary for certain steps of adjudication.

The U.S. Supreme Court’s ruling in Godinez v. Moran (1993) addressed decision making directly; however, its final holding effectively undermined decision making as a requisite for adjudicative competence. The Godinez decision discussed at length the ways in which defendants make decisions during
the adjudicative process. In doing so, it appeared to make clear that a defendant’s decision-making skills are indeed a part of the Dusky standard. Nonetheless, the Court ruled that the standard for a defendant to perform any number of tasks during adjudication (i.e., to plead guilty, to stand trial, to waive counsel and proceed pro se) should be considered the same as the general standard for competence to stand trial. So, there is little chance for legal proceedings to address competence in the way Bonnie (1992) proposed. However, because of the Court’s dicta recognizing decision making, authorities tend to include it as a component of other key abilities. For example, Grisso (2003) described decision making as an implied aspect of a defendant’s rational understanding.

**Distinction for Miranda Waiver**

Technically, the idea of competence to waive the Miranda rights is inaccurate because case law has not developed in the same fashion as for adjudicative competence. That is, a court ruling on a Miranda waiver challenge is concerned with whether the waiver was valid or invalid, and not with whether the defendant was competent or incompetent. The term competence has often been used in reference to Miranda waivers; however, because of the difference in focus, it is more accurate to discuss a defendant’s capacity to waive his or her Miranda rights. The Dusky standard does not apply to Miranda waiver questions because they are not questions of competence to stand trial. Rather, the constitutional rights waiver standard of knowing, intelligent, and voluntary applies in such cases (Miranda v. Arizona, 1966). Voluntariness, in the police interview context, has been defined through case law as freedom from coercion, particularly police coercion (e.g., Brown v. Mississippi, 1936; Spano v. New York, 1959). The knowing and intelligent components of the standard have been equated by scholars to understanding and appreciation in the Appelbaum and Grisso (1988) model of necessary abilities for legal decision making (A.M. Goldstein & Goldstein, 2010).

**RESEARCH REVIEW**

A review of the research on the three primary types of criminal competencies is presented in this section. We begin with the research on an individual’s capacity to waive Miranda, then present the research on competency to stand trial, and end with a brief review of the research regarding CFE.

**Research Addressing Capacity to Waive Miranda**

Research on understanding and appreciating Miranda rights (or Miranda rights comprehension) addresses the prevalence of waivers, the correlates and predictors of Miranda rights comprehension, and the legal standard for rights waivers. There are differences between adjudicative competence research and Miranda rights research due to the particular nature of Miranda rights comprehension as a capacity that is concerned with waiving limited pretrial rights. (See A. M. Goldstein & Goldstein, 2010, and N. E. S. Goldstein, Goldstein, et al., 2012, for more detailed overviews.)

**Frequency of Miranda waivers and Miranda waiver challenges.** Relatively little research has been conducted examining the occurrence of Miranda waivers and waiver challenges. Although it is unclear how (in)frequently attorneys may challenge the admissibility of inculpatory statements by challenging the validity of a Miranda waiver, the rate is likely low given the low referral rates that have been found for adjudicative competence. Research shows high rates of Miranda rights waivers by suspects, however, and that most suspects offer inculpatory statements to police (see Volume 2, Chapter 9, this handbook for more details about confessions). Approximately 80% of adult suspects waive their Miranda rights (Cassell & Hayman, 1996; Kassin et al., 2007; Leo, 1996), and juveniles waive their rights at even higher rates (Ferguson & Douglas, 1970; Grisso & Pomicter, 1977; Viljoen, Klaver, & Roesch, 2005). Early studies showed that more than 90% of juveniles waived their Miranda rights (Ferguson & Douglas, 1970; Grisso & Pomicter,

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3Writing for the majority, Justice Thomas explained that “all criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undoubtedly 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” (Godinez v. Moran, 1993, p. 398).
1977), and that only approximately 7% of juveniles refused to talk with police, whereas the rest provided statements varying in their amount of admission or denial (Grisso & Pomicter, 1977). A more recent study found that only approximately 13% of juveniles questioned about an offense reported that they asserted the right to silence, whereas 55% reported confessing and 31% reported talking to police but denying involvement (Viljoen et al., 2005). Similarly, only 10% of juveniles requested a lawyer, and less than 1% had a lawyer present during interrogation (Viljoen et al., 2005).

High rates of Miranda rights waivers are also likely for other vulnerable populations. Rogers and Shuman (2005) calculated a conservative estimate of suspects with mental retardation in custodial interrogation settings, determining that more than 400,000 such suspects waive their Miranda rights each year. A conservative estimate of suspects with mental illness in custodial interrogation settings is even higher, suggesting that approximately 695,000 such suspects waive their Miranda rights each year (Rogers, Harrison, Hazelwood, & Sewell, 2007).

Despite high rates of waivers, research suggests that Miranda waivers are not challenged very often. Direct studies of Miranda challenges are not available, but related research addressing the impact of motions to suppress inculpatory statements is informative. Such research has shown that cases are rarely lost on the basis of suppression motions (Cassell, 1996), that Miranda-based suppression motions are successful less than 1% of the time (Cassell, 1996), that only one case out of 10,500 was won by the defense on the basis of an excluded confession (Nardulli, 1983, 1987), and thatappeals based on Miranda challenges rarely result in overturned convictions (Davies, 1982; Guy & Huckabee, 1988). Although such studies focused on the impact of Miranda-related motions in defeating convictions, they suggest the limited use of Miranda motions overall. In addition, they appear congruent with findings by Leo (2001a, 2001b), who reviewed several studies and determined that the provision of Miranda rights has not burdened police during interrogation and has had limited impact on individuals’ waiver and confession rates.

**Totality of circumstances factors.** When considering the validity of a suspect’s Miranda rights waiver, judges are guided by a general legal standard called the **totality of circumstances** approach. Under the totality of circumstances approach, the validity of a Miranda waiver cannot be predicated on a single factor but must be based on a consideration of several relevant factors in a case. As with competence to stand trial, the capacity to waive Miranda rights is a functional and contextual matter because the analysis is based on an individual’s abilities and characteristics in the particular circumstances of his or her case. Totality of circumstances factors are typically categorized as suspect related (e.g., defendant age and intelligence) or situation related (e.g., length and setting of interrogation). Awareness of the totality of circumstances approach is helpful for organizing research, and the following sections review research on several of the most often considered factors.4

**Suspect-related factors.** Across many decades and several studies, age and intelligence have consistently been identified as primary correlates of Miranda rights comprehension. The foundational research in the area, conducted by Grisso in the 1970s and 1980s, determined that juveniles ages 12 or younger generally demonstrated inadequate understanding of Miranda and that juveniles ages 13 to 15 demonstrated variable understanding. Older adolescents demonstrated variable comprehension as well and, ultimately, age was shown to be a better predictor of comprehension when it was combined with IQ (Grisso, 1981). More recent research has supported the varied difficulty in comprehending Miranda rights demonstrated by juveniles (e.g., Abramovitch, Peterson-Badali, & Rohan, 1995; Colwell et al., 2005; N. E. S. Goldstein, Zelle, & Grisso, 2012; Otto & Goldstein, 2005; Viljoen & Roesch, 2005; see also Chapter 12, this volume on juvenile offenders).

Comprehension of Miranda rights appears to plateau around ages 14 to 16, and adults demonstrate

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4Research has largely focused on examining correlates and predictors of the two "cognitive" requirements for Miranda waiver (knowing and intelligent) because Supreme Court case law has limited causes for finding a waiver involuntary to police activities that are unduly coercive. Accordingly, the following subsections review research that is mostly concerned with examining the understanding and appreciation of Miranda warnings.
generally better comprehension that is more consistent across ages (Everington & Fulero, 1999; Grisso, 1981). Overall, it appears that “differences among adults in understanding of *Miranda* warnings are related primarily to differences among them in general intellectual functioning” (Grisso, 1981, p. 101).

Given the clear trends in *Miranda* comprehension by age, research has begun to examine how known cognitive, psychosocial, and neurological developmental trends may underlie age-related *Miranda* comprehension deficits. For example, abstract and logical thinking abilities develop during adolescence (Baird & Fugelsang, 2004), as does sustained attention (McKay, Halperin, Schwartz, & Sharma, 1994) and reasoning (Klaczynski, 2001). One *Miranda*-specific study found that improvements in cognitive functioning played a role in age-related differences in *Miranda* comprehension (Viljoen & Roesch, 2005). Similarly, research has demonstrated that psychosocial maturity is related to legal decision making by adolescents—for example, younger adolescents are less able to recognize long-term consequences and are more likely to comply with authority figures (Grisko et al., 2003)—and is also related to *Miranda* comprehension (Colwell et al., 2005; Grisso et al., 2003).

The second primary suspect-related totality of circumstances factor considered by judges is intelligence, and research has consistently associated IQ with *Miranda* understanding and appreciation abilities (Colwell et al., 2005; N. E. S. Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003; N. E. S. Goldstein, Zelle, & Grisso, 2012; Grisso, 1981; Otto & Goldstein, 2005; Viljoen & Roesch, 2005). In particular, verbal intelligence is strongly associated with *Miranda* comprehension (Colwell et al., 2005; N. E. S. Goldstein, Zelle, & Grisso, 2012; Viljoen & Roesch, 2005). As noted earlier, IQ appears to interact with age when examining juveniles, especially those with lower IQs (Colwell et al., 2005; Grisso, 1981; Viljoen & Roesch, 2005). In contrast, intelligence alone appears to be the foremost predictor of *Miranda* comprehension in adults (Grisso, 1981). Intellectual impairment rising to the level of mental retardation is particularly salient because individuals with such deficits have consistently been shown to have inadequate comprehension of *Miranda* warnings (e.g., Clare & Gudjonsson, 1991; Cloud, Shepherd, Barkoff, & Shur, 2002; Everington & Fulero, 1999; Fulero & Everington, 1995; O’Connell, Rigg, Romaine, Zelle, Wolbransky, Zelechoski, & Goldstein, 2005). Past research has also examined the relationship between a defendant’s history of special education and *Miranda* comprehension, but it appears to be an inconsistent predictor of comprehension (e.g., N. E. S. Goldstein et al., 2003; Riggs, Romaine, Zelle, Wolbransky, Zelechoski, & Goldstein, 2008), probably because individuals can be placed in special education for a wide variety of reasons, each of which may or may not be related to *Miranda* comprehension.

More specific skills such as academic abilities, as opposed to a broad categorization like special education history, have shown promise in recent research. Reading and listening skills are relevant to *Miranda* because the warnings may be delivered orally, in written format, or both, and the vocabulary and syntax of the *Miranda* warnings in many jurisdictions is above reading levels that may be expected of suspects with cognitive deficits (Fulero & Everington, 1995). One study found that academic achievement was a strong predictor of *Miranda* comprehension, even when controlling for the primary predictors of age and IQ (Zelle et al., 2008). In particular, juveniles with reading abilities that are at or below the fourth-grade level performed significantly worse on measures of *Miranda* comprehension than their peers with higher reading abilities. Rogers, Rogstad, et al. (2010), however, found only modest correlations between scores on a measure of *Miranda* rights misconceptions and those on measures of reading and listening comprehension. Nevertheless, it is clear that *Miranda* warnings vary widely in their reading comprehension level, as one study of 560 *Miranda* warnings included warnings ranging from Grade 2.8 to postgraduate level (Rogers, Harrison, Shuman, Sewell, & Hazelwood, 2007). Even more recently, research has extended to examine the *listenable* of *Miranda* warnings (Eastwood & Snook, 2012) because most warnings (67%) are delivered orally (Kassin et al., 2007), and attempts to reduce reading complexity have not yielded substantial improvements in *Miranda* comprehension (e.g., Eastwood, Snook, & Chaulk, 2010). Initial results
suggest that helpful listenability alterations to *Miranda* warnings include explanatory components, instructions about the waiver process, and the listing of information into discrete rights (Eastwood & Snook, 2012).

The presence of mental illness, especially psychotic symptoms, also appears to be relevant to *Miranda* comprehension. In particular, adults with psychotic symptoms demonstrated poorer *Miranda* comprehension than adults without psychotic symptoms (Cooper & Zapf, 2008; Olley, 1998) and, even more specifically, individuals with schizophrenia performed more poorly than those with other psychotic disorders (Viljoen, Roesch, & Zapf, 2002). More generally, adult psychiatric inpatients demonstrated similar *Miranda* misunderstandings as juveniles and individuals with intellectual impairment (Cooper & Zapf, 2008).

The presence of other psychiatric symptoms, such as depressive symptoms and anxiety, has not demonstrated a significant relationship with *Miranda* comprehension (e.g., Olubadewo, 2008; Viljoen & Roesch, 2005). Symptoms of attention-deficit/hyperactivity disorder, in contrast, were associated with a greater likelihood of juveniles waiving the right to counsel (Viljoen et al., 2005) and poorer *Miranda* comprehension in adults (Viljoen & Roesch, 2005). Only one study examined the direct relationship between general substance use and *Miranda* comprehension, finding that self-reported drug and alcohol use was related to *Miranda* comprehension deficits in juveniles (Olubadewo, 2008). Generally, intoxication is associated with relevant considerations such as reduced inhibition, attention, and reasoning (e.g., Fromme, Katz, & D’Amico, 1997), and is likely to affect *Miranda* comprehension in many cases because many youth (Ferguson & Douglas, 1970; Viljoen et al., 2005) and adults (Sigurdsson & Gudjonsson, 1994) have reported being under the influence of drugs or alcohol during interrogation.

Finally, personality characteristics have not been investigated in the context of *Miranda* comprehension, with the exception of factors such as suggestibility and compliance. Although suggestibility has traditionally been presumed to be associated with behaviors during interrogation, more recent research has implied that suggestibility may not be a key factor in the context of *Miranda* comprehension and decision making (Rogers, Harrison, Rogstad, LaFortune, & Hazelwood, 2010). A stronger relationship may exist between compliance and *Miranda* capacities, as adult defendants who scored higher on a measure of compliance tended to perform more poorly on measures of *Miranda* comprehension and reasoning (Rogers, Rogstad, et al., 2010). This research raises interesting challenges to the intuitive links between increased suggestibility, voluntariness, and vulnerable suspects in interrogation settings. It may be that suggestibility is less relevant to the initial consideration of waiving *Miranda* rights than it is to later interactions between suspects and police that may lead to inculpatory statements. (Suggestibility and false confessions are discussed in more detail in Volume 2, Chapter 9, this handbook.) Rather, the related construct of compliance, or the tendency toward obedience that may lead to decisions to cooperate with authority figures (i.e., waive one’s rights and talk with police), may be the more relevant consideration. Further research is needed in this area (Rogers, Rogstad, et al., 2010).

Courts have long cited experience with the criminal justice system as a consideration when making *Miranda* waiver validity assessments, yet research generally has not supported criminal justice experience as a significant predictor of *Miranda* comprehension (Cooper & Zapf, 2008; N. E. S. Goldstein et al., 2003; Grisso, 1981; Rogers, Rogstad, et al., 2010; Viljoen & Roesch, 2005). Interestingly, one study showed that the history of contact with attorneys is associated with better *Miranda* comprehension for juveniles, including younger juveniles and those with low IQ scores (Viljoen & Roesch, 2005). It is widely assumed that suspects (and the general population) know the *Miranda* rights because of repeated exposure via popular media (Nguyen, 2000; Rogers, 2008, 2011; Rogers, Rogstad, et al., 2010). Research has shown this presumption to be false, however, as defendants and college students alike have demonstrated several misconceptions about the *Miranda* rights (Rogers, 2011; Rogers, Rogstad, et al., 2010).

Finally, background characteristics such as race and socioeconomic status (SES) have been
investigated as moderators of *Miranda* comprehension with mixed results. It is highly likely, however, that a complex relationship exists between race/ethnicity and *Miranda* comprehension due to shared correlates such as SES and level and quality of an individual’s education. Moreover, when controlling for the two primary predictors of age and IQ, there appears to be no relationship between racial/ethnic identity and *Miranda* comprehension (Everington & Fulero, 1999; N. E. S. Goldstein et al., 2003).

Regarding other social variables, one study found that low-SES juveniles were less likely than high-SES juveniles to assert their rights to silence and counsel (Viljoen et al., 2005), and another study found that they demonstrated poor *Miranda* comprehension (Everington & Fulero, 1999; N. E. S. Goldstein et al., 2003). In the case of juveniles, a jurisdiction may require that a parent or other “interested adult” be present during interrogation as a mechanism to protect the juveniles’ rights. Whether required or not, the presence of an interested adult has not been well supported by research, which demonstrated that parents provided little advice to children (Grisso & Pomicter, 1977), and when they did offer advice, the majority (60%) advised waiving the rights to silence and counsel (Grisso & Ring, 1979). More recently, Viljoen et al. (2005) demonstrated that parental presence remains of mixed value: Of juveniles who knew their parents’ opinion, more than half (56%) stated that their parents wanted them to “tell the truth,” whereas 11% stated that their parents wanted them to deny the offense. None of the juveniles surveyed reported that their parents had advised them to remain silent.

**Waiver decision making.** Whether a suspect sufficiently comprehends the *Miranda* rights is separate from the suspect’s decision to either invoke or waive his or her rights. As Kassin et al. (2010) noted, there is likely to be a range among suspects who do comprehend the rights as to how well they are able to decide about waiving or invoking their rights. Therefore, research has examined what factors may be associated with *Miranda* waiver decision making, especially among adolescents. Generally, suspects who are less able to consider long-term consequences are more likely to make a waiver decision based on the immediate negative consequences (Kassin et al., 2010). Research suggests a tie between *Miranda* comprehension and decision making, as would be expected. For example, one vignette-based study found that 90% of adolescents who could understand a waiver form indicated that they would
Criminal Competencies

not sign the waiver, whereas 65% of adolescents who could not understand the form said that they would sign the waiver (Abramovitch, Higgins-Biss, & Biss, 1993). Similar results were obtained in a more recent study by Viljoen et al. (2005), who found that adolescents with poor legal abilities (i.e., poor understanding and appreciation of the rights) were more likely to waive their right to counsel, and that poor legal ability was a better predictor of rights waiver than broader cognitive abilities.

Other potential influences on Miranda decision making include suggestibility and psychotic symptoms. Although intuitively appealing, the relationship between suggestibility and Miranda comprehension and decision making is not all that strong. One recent study determined that suggestibility was not significantly related to Miranda reasoning (Rogers, Harrison, et al., 2010), instead suggesting that the related concept of compliance (i.e., intentional obedience to authority) was significantly related to Miranda reasoning. Specifically, participants who were high in compliance were less able to consider the long-term benefits of invoking the rights (Rogers, Harrison, et al., 2010). These results join the mixed findings from previous studies that have shown differing patterns of relationship between suggestibility and comprehension (McLachlan, Roesch, & Douglas, 2011), appearing to imply that suggestibility is not as relevant a factor for decision making (Rogers, Harrison, et al., 2010).

Finally, research has supported a limited, yet important, role of psychotic symptoms in Miranda decision making. Although some results have indicated that psychotic symptoms among defendants in the general population “play a minimal overall role in assessing impaired Miranda reasoning” (Rogers, Blackwood, Fiduccia, Drogin, & Sewell, 2011, as cited in Rogers, 2011, p. 734), there is evidence that active psychotic symptoms have a notable impact on Miranda reasoning among hospitalized defendants (Rogers, Harrison, Hazelwood, & Sewell, 2007). Overall, less research has examined factors relevant to Miranda waiver decision making than Miranda rights comprehension, and additional study is needed in this area because of the consequential nature of deciding to waive one’s rights and talk with police.

Assessment methods. Given the relationship between factors like IQ and Miranda comprehension noted earlier, the assessment of an individual’s capacity to waive his or her Miranda rights may involve general instruments that are designed to measure relevant capacities, such as intelligence and language comprehension. In addition, specialized forensic assessment instruments that were designed specifically to assess Miranda-related capacities are available.

The first of these tools is Grisso’s Instruments for Assessing Understanding and Appreciation of Miranda Rights, which is a standardized set of four measures that were initially designed for research purposes in the 1970s and were widely adopted for clinical use since then (Grisso, 1998). The instruments were recently revised to broaden their applicability and provide updated normative data. The Miranda Rights Comprehension Instruments (MRCI; N. E. S. Goldstein, Zelle, & Grisso, 2012) include revised versions of the original four measures: the Comprehension of Miranda Rights—II (an assessment of Miranda understanding that asks examinees to paraphrase each warning), the Comprehension of Miranda Rights—Recognition—II (an assessment of Miranda understanding that uses preconstructed sentences that examinees must identify as having the same or different meaning as each warning), the Function of Rights in Interrogation (an assessment of Miranda appreciation of three relevant domains: the nature of interrogation, the right to silence, and the right to counsel), and the Comprehension of Miranda Vocabulary—II (an assessment of understanding of vocabulary that is common to many Miranda warnings). The MRCI include normative data from two samples of 21st-century juvenile and nonjuvenile youth, and an overview of their development and psychometrics can be found in N. E. S. Goldstein et al., (2011). Updated normative data for adults will be available in 2014.

A second set of measures was recently published as the Standardized Assessment of Miranda Abilities (SAMA; Rogers, Sewell, Drogin, & Fiduccia, 2012). The SAMA are the result of a program of development studies with adult defendants, and details of
their development can be found in Rogers et al. (2009) and Rogers, Harrison, Hazelwood, and Sewell (2007). Like the MRCI, the SAMA contain independent measures that each aim to assess related elements of an individual’s Miranda capacities. The Miranda Quiz uses true or false questions to assess whether examinees hold certain common misconceptions, and the Miranda Vocabulary Scale is a vocabulary measure of relevant terms. The Miranda Comprehension Template allows an evaluator to assess an examinee’s understanding of the Miranda warning given in his or her jurisdiction by having the examinee paraphrase the warning. The Miranda Acquiescence Questionnaire assesses the examinee’s level of acquiescence, and the Miranda Reasoning Measure assesses the examinee’s thinking and reasoning around his or her Miranda waiver decision.

Remediation. Efforts to improve an individual’s legal knowledge as compared to efforts to develop measures of legal abilities are relatively young, and examination of Miranda-related learning is even less studied than the restoration/remediation of adjudicative competence. To date, there appears to be only one program that was developed specifically to address the remediation of understanding and appreciation of Miranda rights (Kalbeitzer, 2008; Strachan, 2008), which focused on adolescents. Ultimately, Miranda-specific instruction improved individuals’ understanding and appreciation in the short term, whereas cognitive maturation appeared to account for improvements in the long term, and psychosocial capacities and legal judgment did not appear to be affected by instruction or maturation (Kalbeitzer, 2008; Strachan, 2008).

Research Addressing Adjudicative Competence

By all accounts, evaluations of an individual’s adjudicative competence are the most common type of forensic mental health evaluation (Melton et al., 2007). Widely cited estimates suggest that 4%–8% of all felony defendants are referred for competence evaluation, and attorneys may have concerns about competence in as many as 15% of all cases (Hoge et al., 1992; LaFortune & Nicholson, 1995; Poythress et al., 2002). But, these estimates are based on small surveys from a few jurisdictions, so the actual rates of referral probably vary more. Indeed, there are no available wide-scale data on the rates of, and reasons for, competence referrals. Some early data suggest that attorneys may have requested many competence evaluations erroneously (simply due to misunderstanding the relevant legal concepts; Roesch & Golding, 1980; Rosenberg & McGarry, 1972) or strategically (e.g., to delay trial; Melton et al., 2007), although these incorrect referrals are probably less common currently. The available data do suggest a sliding scale approach to competence referral, wherein attorneys are more likely to request evaluations when defendants face more serious charges (Berman & Osborne, 1987; Hoge et al., 1992). This finding certainly appears congruent with most legal and clinical guidance, which suggests that forensic evaluators should expect a defendant to demonstrate greater capacities when he or she is facing more serious charges or proceedings (e.g., American Bar Association [ABA], 1989).

Rates and correlates of incompetence. Of those defendants who are referred for formal evaluation, clinicians find approximately one in five incompetent to stand trial (IST). In a large meta-analysis of 68 studies that were published between 1967 and 2008, the base rate of IST was 27.5% (Pirelli et al., 2011). Of course, IST rates vary greatly across samples and jurisdictions, ranging from 7% to 70% in the meta-analysis. Large, jurisdiction-wide studies tend to reveal IST rates around 20%. For example, in the largest single study of competence evaluations—reviewing 8,000 cases over a 12-year period—clinicians opined that 19% of the Virginia defendants they evaluated were IST (Warren et al., 2006). Similarly, clinicians found 19% of Alabama defendants IST (Cooper & Zapf, 2003) and 18% of federal defendants IST (Cochrane et al., 2001). Clinicians found slightly higher rates of IST

5 Far more research has examined competence “findings” at the stage when clinicians offer an opinion on competence than at the later stage when a judge renders a formal decision about competence. In other words, researchers more often examine clinicians’ opinions than judges’ rulings. But, because the court so often follows clinician opinions about competence (e.g., Hart & Hare, 1992; Zapf et al., 2004), the rates of incompetence are probably similar whether clinician opinion or judicial disposition is measured.
among Hawaii defendants (25% in Gowensmith, Murrie, & Boccaccini, 2012) and much higher rates among a small sample of Utah defendants (53% in Skeem, Golding, Cohn, & Berge, 1998), but most statewide samples appear to reveal IST rates around the 18%–25% range.

What factors influence a clinician’s opinion about a defendant’s competence to stand trial? Psychosis, not surprisingly, appears to be the characteristic that is most strongly associated with incompetence. In a comprehensive meta-analysis (Pirelli et al., 2011), defendants who were diagnosed with a psychotic disorder were approximately eight times more likely to be found IST than those without a psychotic diagnosis (see Nicholson & Kugler, 1991, for similar, but earlier findings). The presence of a psychotic disorder was also the strongest predictor of IST in most large, single-site studies (e.g., Cochrane et al., 2001; Cooper & Zapf, 2003; Warren et al., 2006). But, these findings do not indicate that evaluators simply equate psychosis with incompetence. In most studies, even the majority of defendants who were diagnosed with a psychotic disorder were opined competent to stand trial (CST).

Cognitive disorders (a broad category including mental retardation, brain damage, and other conditions that impair cognition) tend to be the second condition most strongly associated with IST (e.g., Cochrane et al., 2001; Warren et al., 2006). Again, despite this apparent relationship, most defendants with mental retardation or other forms of cognitive disorder are still opined CST. For example, 70% of Virginia defendants who were diagnosed with mental retardation or learning disorders were still opined competent (Warren et al., 2006). Indeed, not all studies have found an association between mental retardation and IST (Nicholson & Kugler, 1991).

Of course, research depends largely on the data that are easy to obtain and code, so many studies examine broad diagnostic categories, and fewer studies examine the more precise symptoms and behaviors that relate to incompetence. However, these more focused studies are crucial because incompetence is attributable to specific psychological symptoms interfering with specific legal capacities, not simply a clinical diagnosis. Indeed, specific symptoms, rather than diagnoses, are better predictors of an individual’s IST. In their detailed study, Rosenfeld and Wall (1998) found that incompetent defendants were significantly higher on clinicians’ ratings of thought disorder, delusional beliefs, paranoia, disorientation, and hallucinations, but not necessarily depressive symptoms or estimated intellectual functioning. The MacArthur study of adjudicative competence revealed that “conceptual disorganization” (as measured by the scale of this name on the Brief Psychiatric Rating Scale [Overall & Gorham, 1962]) was the symptom that was most clearly associated with impaired competence across all diagnostic groups (Hoge, Poythress, et al., 1997). Likewise, Viljoen, Zapf, and Roesch (2004) found that conceptual disorganization was associated with impairments on another measure of trial competence.

These detailed studies are helpful in shedding light on the types of symptoms that are most commonly associated with findings of incompetence. However, because competence is such an individualized question regarding the match between a particular defendant and a particular legal context, it remains unlikely—and undesirable—that clinicians will ever rely on a research-generated list of symptoms to perfectly predict an individual’s incompetence.

Nevertheless, psychiatric variables appear to be the strongest correlates of incompetence (Pirelli et al., 2011)—a finding that is hardly surprising but is certainly reassuring. Only severe psychiatric symptoms (those typically associated with psychosis or profound cognitive disorders) would be sufficient to interfere with the simple capacities that a defendant must demonstrate for trial competence. But, research often reveals that social and demographic factors correspond with findings of incompetence, presumably due to their covariation with serious mental illness. For example, compared to defendants who were evaluated and found competent, defendants found IST “were slightly older (35 years old vs. 31.8), predominantly non-White (52.3 vs. 43.1%), had a higher unemployment rate (70.8 vs. 58.2%) and a greater percentage were unmarried (84 vs. 77.3%)” (Pirelli et al., 2011, p. 15), according to the largest meta-analysis. Of these common
demographic factors, unemployment tends to be the one that is most strongly associated with findings of incompetence (Cooper & Zapf, 2003; Pirelli et al., 2011). Of course, any demographic differences between those defendants found IST versus CST are more striking when we consider that even the broader population of defendants who are referred for evaluation tend to be “marginalized individuals with extensive criminal and mental health histories” (Zapf & Roesch, 2009, p. 50).

**Validity, reliability and quality of competence evaluations.** Can clinicians reach valid, or accurate, conclusions about a defendant’s trial competence? This simple research question has been remarkably difficult to answer. As Zapf and Roesch (2006, 2009) emphasized, there is no gold standard or clear criterion by which to gauge the accuracy of a competence opinion. Judicial opinions cannot serve as the criterion because they are not independent of clinician opinion; indeed, they tend to closely follow the clinicians’ opinions (e.g., Zapf, Hubbard, Cooper, Wheeles, & Ronan, 2004). Another criterion might involve opinions from a blue ribbon panel of experts (Golding, Roesch, & Schreiber, 1984), but this is more a test of reliability (described below) than validity. The ideal validity study might arrange a provisional trial in which researchers document a defendant’s competence-relevant abilities and behavior and a judge renders an independent decision about his or her competence (Zapf & Roesch, 2006, 2009). But, this ideal study has never been conducted, probably due to the tremendous practical challenges.

One recent attempt to study validity used mathematical models to infer validity from reliability (Mossman, 2008; Mossman et al., 2010). Mossman et al. (2010) arranged for experienced forensic evaluators to review written competence reports and offer competence opinions on a graded scale (rather than dichotomous competent/incompetent opinions). Using sophisticated techniques to analyze these ratings, the authors concluded that “experts' intrinsic ability to discriminate between competent and incompetent defendants is high (but not perfect)” (Mossman et al., 2010, pp. 411–412).

Relative to validity research, more research has addressed reliability, which is certainly a prerequisite for validity. Authorities have suggested that evaluations of trial competence may be the most reliable types of forensic evaluations (Melton et al., 2007; Zapf & Roesch, 2009). That is, it seems reasonable to expect different evaluators to reach the same conclusions about the same defendant. After all, competence evaluations involve a narrow focus on a defendant’s present abilities for a circumscribed task (i.e., understanding and participating in proceedings), as opposed to the more complex retrospective inferences necessary for evaluations of legal sanity (see Chapter 4, this volume for a discussion of criminal responsibility). Consistent with this expectation, some studies have reported excellent reliability in evaluations of trial competence. In a study by Rogers and Johansson-Love (2009), when trained raters scored structured competence measures (usually based on the same interview), rates of agreement ranged from good to excellent, albeit with stronger agreement for overall competent/incompetent status than for individual scales of the instruments (e.g., Golding et al., 1984; Roesch & Golding, 1980). These instrument-focused reliability studies are important, but they probably reveal more about the instruments than about the evaluators or the competence construct itself.

Fewer reliability studies have examined clinicians in practice, but the first two such studies revealed excellent agreement among clinicians who offered opinions about whether or not a particular defendant was CST (R. L. Goldstein & Stone, 1977; Poythress & Stock, 1980). However, clinicians in these early studies appear to have worked and trained together in the same setting. Even scholars who are optimistic about the reliability of competence evaluations acknowledge that reliability may be weaker among independent clinicians from different institutions or “evaluation centers” (Melton et al., 2007, p. 144). Evidence of weaker reliability emerged in a national survey of 273 board-certified forensic psychologists and psychiatrists who responded to two brief vignettes describing defendants who had been referred for competence evaluations (G. Morris, Haroun,
Naimark, 2004a, 2004b); clinicians offered an overall competence opinion for each of the two vignettes in light of three different competence standards. Overall, rater agreement was remarkably poor; the participants were evenly divided (49.2% vs. 50.8%) regarding the defendant’s competence in one vignette. Researchers lamented the results and concluded that “the defendant’s fate depends only upon who performed the evaluation” (G. Morris et al., 2004b, p. 216). But, because several aspects of the study methodology seemed particularly conducive to eliciting poor rater agreement (e.g., brief vignettes with limited detail describing ambiguous cases), these results should not be used to characterize wide-scale practice.

In a study that better reflects wide-scale practice, Skeem et al. (1998) reviewed 100 competence reports—two evaluations for each of 50 defendants—from a sample of 18 Utah clinicians. Evaluators demonstrated fair agreement (82%) regarding whether a defendant was competent or incompetent but poorer agreement (approximately 25% on average) regarding whether a defendant was impaired on specific psycholegal skills necessary for trial competence. Indeed, evaluator agreement fell below 10% regarding almost half of these skills (Skeem et al., 1998).

In the largest available study of field reliability or agreement among forensic evaluators in routine practice, researchers reviewed 216 cases from Hawaii (Gowensmith et al., 2012). Hawaii is uniquely suited for reliability studies because the state requires three separate evaluations from independent clinicians for each felony defendant who is referred for CST evaluation. In 71% of the initial CST evaluations, all of the evaluators agreed about a defendant’s competence or incompetence. Agreement was somewhat lower (61%) in reevaluations of defendants who were originally found incompetent and were sent for restoration services. Overall, the results reflected moderate agreement among independent evaluators. Reliability was significantly better than chance but clearly weaker than the reliability reported in small studies in which cooperating clinicians conducted the same interviews or used the same instruments. The disagreement among the trios of Hawaii evaluators (29% in Gowensmith et al., 2012) and the pairs of Utah evaluators (18% in Skeem et al., 1998) seems to suggest that approximately 20%–30% of CST cases in the field result in divergent opinions among independent evaluators. So, overall, a fair view of the research suggests that the reliability of competence evaluations is not as poor as “flipping coins in the courtroom” (G. Morris et al., 2004b, p. 216), but reliability remains less than perfect.

Some unreliability is certainly due to difficult cases. Although the legal determination regarding competence is dichotomous (i.e., competent or not competent), it seems reasonable to think of the capacities underlying trial competence as dimensional; in other words, some defendants are more competent and others are less competent. If these capacities are dimensional, we might not be surprised to find some disagreement among reasonable clinicians regarding cases that fall toward the midpoint of this continuum (Murrie, Boccaccini, Zapf, Warren, & Henderson, 2008). But, clinicians themselves may also differ in terms of where they draw the threshold for competence versus incompetence. If this were the case, we might expect different clinicians to differ in the rates at which they find incompetence among the same population of defendants. Therefore, in order to examine whether individual clinicians vary in terms of how often they find defendants IST, researchers studied 60 practicing clinicians who conducted a combined total of more than 7,000 evaluations. The rates of IST findings varied considerably—from 0% to 62%—across evaluators, suggesting that individual evaluators may differ in terms of how they define, conceptualize, and opine competence (Murrie et al., 2008).

Although researchers can rarely observe actual evaluator practices in an attempt to understand the reasons for differences or unreliability, they can study one end product of evaluator practice—the written report of a competence evaluation. Several studies across different locations have examined the quality of forensic evaluation reports and have found that “the practice of forensic psychological assessment falls far short of its promise” (Nicholson & Norwood, 2000, p. 40). For example, after reviewing 100 CST reports from Utah, Skeem and colleagues (Skeem & Golding, 1998; Skeem et al.,
Murrie and Zelle (1998) reported that evaluators often provided reasonable clinical information but failed to detail the reasoning underlying their psycholegal opinions. Many of the evaluators also failed to explicitly address many of the specific capacities related to trial competence.

**Disposition of competence cases.** Of course, questions about competence are ultimately legal decisions, not clinical decisions. After evaluators form opinions, the courts must render formal decisions about the defendants’ adjudicative competence. But, in the vast majority of cases, research suggests that the courts agree with the forensic evaluator. In the Hawaii study that examined multiple evaluations, judges followed the *majority opinion* among evaluators in most cases (93% of initial competence evaluations and 77% of reevaluations that followed restoration efforts; Gowensmith et al., 2012). When judges did decide against the majority opinion, they more often did so by finding the defendant incompetent than competent, reflecting a conservative approach. Of course, judges do not typically consider multiple opinions in routine cases. More often, they receive only one opinion and tend to follow—or at least agree with—that single opinion. One study reported a 99.6% agreement rate between forensic evaluator opinions and Alabama court dispositions (Zapf et al., 2004), and other studies reported at least 90% agreement (e.g., Cruise & Rogers, 1998; Hart & Hare, 1992).

“Restoration” to competence. For the minority of defendants who are found IST (usually approximately 20% of the defendants referred for evaluation), the courts typically order remediation efforts to “restore” competence (as described in the later Practice and Policy Issues section). Fortunately, most defendants make significant progress toward competence. Indeed, most defendants who are originally found incompetent attain competence within 6 months, and the vast majority does so within 1 year (e.g., D. Morris & DeYoung, 2012; D. Morris & Parker, 2008; Nicholson & McNulty, 1992). Overall, at least 80%–90% of IST defendants with mental illness are eventually restored (or trained) to competence (Pinals, 2005; Samuel & Michaels, 2011).

Generally, a few factors appear to be associated with competence restoration. For example, younger age, diagnoses of mood disorder or nonpsychotic disorders, and more serious criminal charges are associated with successful competence restoration. Those defendants least likely to be restored to competence tend to be older, have more prior hospitalizations or incompetence findings, carry diagnoses of mental retardation or comorbid mental retardation and serious psychiatric illness, and face less serious charges (e.g., Colwell & Ganesini, 2011; D. Morris & Parker, 2008; Mossman, 2007; Zapf & Roesch, 2011). Similar to most research on competence evaluation, most research on competence restoration tends to rely on diagnoses and/or demographic factors that are easily coded from case files. When conducting archival research, this is probably a practical necessity, but studying broad diagnostic categories and the dichotomous competent versus incompetent status is only indirectly relevant to the more nuanced assessments that clinicians must make about a defendant’s trial competence. More precise research on the defendant’s specific symptoms and specific *functional capacities* that are amenable to restoration would be more helpful for clinicians in the field (Zapf & Roesch, 2011).

A few early studies described specific programming for competence restoration (Brown, 1992; Davis, 1985; Pendleton, 1980), and a few studies have more formally studied specific programming among small samples of defendants. For example, Siegel and Elwork (1990) compared a group of defendants who received an experimental intervention (court-related education via videotape, courtroom models, and verbal instruction) to a control group who received standard group treatment addressing psychiatric issues and found that many more of the defendants in the competence-specific experimental intervention were restored to competence.

Bertman et al. (2003) also used a control group comparison to study competence restoration programming. The control condition involved the hospital’s default 4-times-per-week educational group addressing legal rights. The experimental groups involved two different strategies for competence
restoration: supplemental legal-rights education and supplemental “deficit-focused” individual education addressing deficits specific to trial competence. Both experimental interventions led to better performance and faster improvement on posttests that involved competence assessment instruments. However, the experimental intervention groups were similarly effective (i.e., neither was clearly superior to the other), leaving it unclear whether it was the nature of the interventions or simply the additional patient contacts that were responsible for the improvement. Practically speaking, the authors concluded that the group supplemental legal-rights education appeared more feasible than the individualized deficit-focused intervention.

Of course, much of the success in interventions for defendants who are incompetent due to psychosis is probably due to concurrent treatment by psychiatric medication. Concurrent medication for defendants who are incompetent due to mental retardation is probably less common and less effective. So, restoration programs for defendants with mental retardation have appeared less successful than those for defendants with psychosis. In one of the better studies of mentally retarded defendants in a competence restoration program, only 18% were restored to competence (Anderson & Hewitt, 2002). Nevertheless, one of the most rigorous and well-developed restoration programs in the literature addressed mentally retarded defendants (Wall, Krupp, & Guilmette, 2003). Wall and Christopher (2012) reported that Rhode Island’s restoration program using the “Slater method”—a comprehensive approach that involved extensive education to the defendant and guidance to attorneys—resulted in a 61% rate of restoration to competence compared to 17% with traditional treatment alone.

**Research Addressing Competence for Execution**

Because CFE evaluations are so rare, there has been remarkably little empirical research on this type of criminal competence. The vast majority of scholarship on these evaluations have debated the ethics of performing them at all (e.g., Appelbaum, 1986; Bonnie, 1990; Brodsky, 1990; Brodsky, Zapf, & Boccaccini, 2001, 2005; Ewing, 1987; Radelet & Barnard, 1986) or proposed procedures for performing them appropriately (e.g., Brodsky, Zapf, & Boccaccini, 2001, 2005; Cunningham & Goldstein, 2003; Heilbrun & McClaren, 1988; Small & Otto, 1991). The very limited empirical literature tends to be descriptive. For example, Young and colleagues (Young, Boccaccini, Conroy, & Lawson, 2007; Young, Boccaccini, Lawson, & Conroy, 2008) described the practices and perspectives of 16 Texas clinicians who performed CFE evaluations. A few other studies simply surveyed clinician attitudes regarding CFE (Deitchman, Kennedy, & Beckham, 1991; Leong, Silva, Weinstock, & Ganzini, 2000; Pirelli & Zapf, 2008). Currently, the field lacks even basic research on the frequency and outcomes of these evaluations, although anecdotal evidence suggests that they are quite rare.

**PRACTICE AND POLICY ISSUES**

This section discusses practice and policy issues regarding criminal competencies. We begin by discussing general practices regarding the evaluation of criminal competencies and then discuss issues relevant to each of the three primary types of criminal competencies that are discussed throughout this chapter.

**General Practices Regarding the Evaluation of Criminal Competencies**

As with any forensic evaluation, practice for evaluating criminal competencies is guided by general field standards that consider the unique requirements produced by the intersection of law and psychology. Several sources provide clinical guidance for evaluating criminal competencies and preparing evaluation reports (e.g., Golding, 2008; Kruh & Grisso, 2009; Mossman et al., 2007; National Judicial College [NJC], 2011; Zapf & Roesch, 2009). In addition, authorities in forensic psychology and psychiatry have prepared ethical/practice guidelines that

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6 For incompetent defendants with mental retardation, restoration is probably a misnomer because they may have never had the trial-related skills that clinicians are attempting to “restore.” More appropriate terms might be competence training or competence attainment (e.g., Schouten, 2003; Wall et al., 2003).
address considerations specific to forensic work (e.g., American Psychological Association [APA], 2013; Mossman et al., 2007). Although there is some minor variability among this guidance, the series of steps described in the following sections is common across most sources and is generally consistent with best practices (see Chapter 1, this volume for additional guidance concerning forensic assessment). 7

Evaluator qualifications. The appointed evaluator should be a licensed psychologist or psychiatrist with ample training in forensic evaluation, particularly criminal competence evaluations (e.g., ABA Criminal Justice Mental Health Standard [hereinafter ABA Standard] 7-3.10; 1989). Evaluating criminal competence requires training and experience beyond that typical of general clinical practice. Generally, this involves a doctoral degree in psychology or a medical specialization in psychiatry, followed by specialized training—whether a formal fellowship or extensive continuing education—in forensic evaluation, including evaluations of adjudicative competence. Several states specifically identify training and continuing education requirements that evaluators must meet in order to be eligible to perform court-ordered evaluations of criminal competence (e.g., Raising Question of Competency, 1982; United States v. Miller, 2005). But, even absent specific state requirements, psychologists who agree to evaluate an individual’s competence have an ethical duty to demonstrate competence specific to the evaluations and the case at hand (APA, 2013).

The clinician who evaluates a defendant’s competence should not be the same clinician who provides treatment services to the defendant (e.g., APA, 2013; NJC, 2011). This ethical guideline is typically easy to follow in systems that rely on private, outpatient forensic evaluations. It may be more challenging to follow in hospital systems that provide inpatient evaluations. Yet, even inpatient settings can arrange services so that one clinician performs only the evaluation role, and other clinicians provide only treatment roles, for any given defendant.

Evaluation preparation. As with any forensic evaluation, an evaluation of criminal competence requires that the evaluator prepare by clarifying the referral question and gathering the case facts. For example, the question of trial competence is well defined (i.e., all state statutes closely follow the Dusky criteria), but clarifying the referral question is crucial because attorneys may use the term competency generically, sometimes confusing competence to stand trial with capacity to waive Miranda, or even with mental state at the time of the offense.

It is also crucial to inquire about the factors that prompted the referral; these may be historical factors such as a history of psychiatric hospitalization or special education, or more recent factors such as problems communicating with defense counsel. This data gathering usually requires a conversation with the referral source (often defense counsel, but sometimes the court or prosecutor). Some evaluators also rely on a standard referral form that queries basic case information and the reason for referral (see Kruh & Grisso, 2009; Melton et al., 2007; Zapf & Roesch, 2009, for examples).

Even when defense counsel is not the referral source, a conversation with defense counsel is usually necessary to (a) ensure that counsel is aware of the pending evaluation, (b) gather information about the defendant’s interaction with counsel up to this point (after all, adjudicative competence requires the ability to assist counsel, and an attorney may have educated his or her client about Miranda since the interrogation), and (c) gather information about the tasks likely facing the defendant during the proceedings (again, adjudicative competence is contextual, requiring the functional abilities necessary for a specific case). Of course, regardless of whether the requested evaluation, all conversations with the defense counsel should remain neutral, and evaluators should be cautious about any attempts to sway the course or outcome of the evaluation. Defense counsel is a crucial source of information but not a collaborator in the evaluation.

7This series of steps serves as a descriptive summary of the typical evaluation process; it is not intended to serve as stand-alone guidance, nor is it sufficient instruction for performing a criminal competence evaluation. Clinicians who anticipate performing Miranda comprehension or adjudicative competence evaluations should study more comprehensive guides (e.g., A. M. Goldstein & Goldstein, 2010; Kruh & Grisso, 2009; Zapf & Roesch, 2009) and engage in more formal instruction.
Preparation for evaluation also requires proper authorization. For court-ordered evaluations, authorization is simply the formal court order. For ex parte evaluations (i.e., those arranged by defense counsel, without initial court involvement), authorization involves the written request (a form of consent) from counsel and eventually involves informed consent by the defendant.

Finally, as with other forms of forensic evaluation, preparation for evaluations of criminal competencies involves gathering records. At a minimum, evaluators should gather arrest reports, indictments, and other details of the pending charges. These are crucial in order to gauge whether the defendant accurately understands the charges; they can also help illuminate how accurately the defendant can relay the circumstances surrounding those charges. Often, it is important to gather historical records that might detail the defendant’s psychiatric illness (e.g., records from prior psychiatric hospitalizations) or intellectual disability (e.g., records from special education services or disability evaluations).

**Evaluation process.** After a careful review of the records, conversation with defense counsel, and other preparation, the evaluator can proceed to interview the defendant. As with other forensic evaluations, an interview must begin with a clear notification to the defendant, describing the purpose of the evaluation, reasons for evaluation, who requested the evaluation and who will receive evaluation reports, and limits on confidentiality (see Zapf & Roesch, 2009, for a sample notification). For court-ordered evaluations, formal consent by the defendant is not necessary because the court has ordered the evaluation performed regardless of defendant preferences (furthermore, defendants whose criminal competencies are in question may not be competent to provide genuine informed consent). Nevertheless, the evaluator has a duty to help the defendant understand the evaluation purpose and context to the extent possible. For ex parte evaluations, formal consent by the defendant is necessary (if the defendant appears unable to provide meaningful consent, consent from defense counsel may be sufficient).

Background information and history are usually a necessary part of any interview in a forensic evaluation, although the depth and breadth of the background discussion will vary depending on the defendant and the case context. For any defendant, it is necessary to review a general social history, including information about adaptive behaviors and day-to-day functioning. This process is useful in providing content (e.g., defendant’s history of relationships and real-world functioning) as well as process (e.g., samples of how well the defendant can communicate relevant information and converse collaboratively). Generally, the discussion of a defendant’s background—in the interview and in the eventual report—should be proportional to its potential relevance to the referral question. For example, a defendant who might be incompetent due to intellectual limitations will warrant detailed attention to his or her educational background, whereas a defendant who might be incompetent due to psychiatric illness will warrant much more attention to his or her mental health history.

Clinical status, including current mental status, is a second focus of any interview in a forensic evaluation. This portion of the interview may appear similar to interviews in other clinical contexts, in that the evaluator attempts to thoroughly assess the individual’s current mental status and identify any active psychiatric symptoms. The evaluator will gather enough information about the defendant’s historical and current symptoms to assign a diagnosis, if warranted (particularly after comparing interview content to collateral sources of information). But again, even in this portion of the interview, the attention given to symptoms should be proportional to their relevance to the criminal competence at issue. For example, certain disorders or diagnoses rarely bear on adjudicative competence (e.g., most personality disorders, paraphilias, etc.) and therefore usually warrant much less attention. Other conditions (e.g., psychosis, intellectual disability, certain developmental disorders) are quite likely to bear on adjudicative competence and require meticulous exploration of the condition’s course and symptoms. But in contrast to traditional clinical interviews, in which the goal is primarily to assign the appropriate diagnosis, the goal of a clinical interview in a criminal competence evaluation is to identify specific symptoms that may interfere with the defendant's
criminal competence and to understand the scenarios under which they are mostly likely to interfere.

Psychological testing. Psychological testing is not a required component of a criminal competence evaluation, but appropriate assessment instruments can enhance an evaluation. Appropriate testing may include one or both of the following strategies:

- **General psychological testing** is occasionally appropriate when such testing can help illuminate or clarify the deficits underlying an individual's incompetence. Perhaps the most common example involves a defendant who is apparently incompetent due to intellectual disability, prompting an evaluator to administer intelligence or neuropsychological testing in order to better describe and quantify the specific intellectual deficits underlying the defendant's inability to perform certain competence-related tasks. Another example might involve a defendant who is incompetent due to a combination of symptoms related to mood and thought disorder, prompting the evaluator to administer psychological testing that might help clarify the diagnosis that best summarizes these symptoms. Note that in both examples, the general psychological testing performed an illustrative or clarifying function but was not the basis of the actual opinion about competence. Finally, another instance of applying general psychological testing (or a forensically relevant instrument) might occur when an evaluator is concerned that a defendant's apparent deficits are actually feigned deficits. The evaluator might administer a broad psychological test that has validity scales, or even an instrument specifically designed to measure malingering, to help determine whether a defendant's reported symptoms are exaggerated or feigned.

- **Forensic assessment instruments**, in contrast, are probably used more often in evaluations of adjudicative competence (see Chapter 2, this volume for additional discussion of forensic assessment instruments). These instruments were developed to guide evaluators through an evaluation of *Miranda* comprehension or trial competence in a structured, standardized manner, ensuring that they address the relevant conceptual information and thereby enhance reliability across evaluators and evaluations.

The evaluation report. In the vast majority of cases, the evaluation report is the crucial end product of the evaluation. Although some ex parte evaluations will not end in a report, nearly all court-ordered evaluations do, and most of these do not require expert testimony. Thus, in most cases, the report may be the only evidence of the evaluation that the court or attorneys receive. Therefore, the goal of the report is to carefully document the assessment procedures, the data obtained, the evaluator's analysis of that data, and the resulting conclusions. Although the report culminates in the evaluator's opinion regarding the defendant's competence, the report should so clearly detail the underlying procedures, information, and analysis that readers can reach their own well-informed conclusion.

Specific Practices Regarding *Miranda*

Challenges to *Miranda* waivers are relatively rare, due at least in part to the limited scope of *Miranda*'s application to the criminal justice process. Typical practices regarding *Miranda* that may be followed in a jurisdiction include the following.

- First, the relevance of *Miranda* must be determined. *Miranda* is relevant only to individuals who are taken into custody and questioned regarding a crime. Whether a situation rises to the level of custodial interrogation requiring application of *Miranda* is assessed by courts via the objective reasonable person standard (*Yarbrough v. Alvarado*, 2004), which examines the circumstances of the situation to determine if a reasonable person would have felt free to end the questioning and leave (*Thompson v. Keohane*, 1995). In circumstances that do not meet this standard (e.g., police ask questions of a potential suspect at the person's home), *Miranda* is not required and thus no *Miranda* waiver exists to be challenged.

- Variation in procedures exists across jurisdictions; however, suspects are generally assumed to be capable of waiving their *Miranda* rights.
In the majority of cases where *Miranda* is at issue, a *Miranda* waiver challenge will be raised pretrial by the defense in order to request the suppression of inculpatory statements made by the defendant. A pretrial hearing may be held that could include testimony to establish the circumstances of the interrogation and the defendant’s apparent comprehension of the *Miranda* warnings.

- The prosecution has the burden of proof to establish that the knowing, intelligent, and voluntary standard was met, although the burden varies across jurisdictions, with some states requiring preponderance of the evidence (e.g., *Colorado v. Al-Yousif*, 2002; *Maine v. Coombs*, 1998; *United States v. Miller*, 2005) and others requiring beyond a reasonable doubt (*Massachusetts v. Jackson*, 2000).

- The judge then enters a ruling on the validity of the waiver. If the waiver is deemed valid, then inculpatory statements are admissible at trial; if the waiver is deemed invalid, then statements made by the defendant are suppressed. In many jurisdictions, if a defendant’s waiver is found valid, the defense may still challenge the trustworthiness of any statements that are subsequently admitted during trial (A. M. Goldstein & Goldstein, 2010).

Evaluating practices: Recommended *Miranda* evaluation process. The current section provides only a brief overview of the relevant practice recommendations, supplementing those covered in the General Practices section above, for evaluating an individual’s capacity to waive his or her *Miranda* rights. These recommendations are derived from DeClue (2005, 2010); Frumkin (2000, 2010); A. M. Goldstein and Goldstein (2010); N. E. S. Goldstein, Zelle, and Grisso (2012); Grisso (1981, 1998); and Oberlander and Goldstein (2001). Readers preparing to conduct a *Miranda* evaluation should look to those sources for more detailed coverage.

- An evaluation includes not only measurement of the specific legal capacity at issue, but also broader psychological considerations that are relevant to the issue (e.g., intellectual functioning), as well as the larger context of the individual (e.g., relevant historical data). Thus, evaluation of an individual’s capacity to waive his or her *Miranda* rights entails record review and a general clinical interview in order to gather relevant data regarding areas such as the defendant’s development, social history, academic and work history, medical and mental health history, and criminal history.

- A record that is particularly important in *Miranda* waiver cases, if available, is a copy of the *Miranda* warning that is given in the defendant’s jurisdiction. Information about the delivery method, reading level, and language is important to understanding whether a particular defendant may or may not have comprehended the warnings. Similarly, if an audio or video recording of the interrogation is available, it should be reviewed to assess how the warnings were actually delivered and the defendant’s apparent comprehension.

- The clinical interview may also yield information about potential collateral sources of information and the defendant’s view of the interrogation circumstances. Under best practice standards, collateral sources are particularly important in conducting forensic evaluations because information obtained from defendants must be corroborated (A. M. Goldstein, 2003, 2007; Grisso, 2003; Heilbrun, Warren, & Picarello, 2003; Melton et al., 2007).

Evaluating practices: Relevant instruments for *Miranda* evaluations. The relevant records and instruments used in the evaluation of *Miranda* rights comprehension can vary because of the wide variety of potentially relevant factors under the totality of circumstances standard.

- In some cases, an assessment of an individual’s broader abilities, such as his or her intellectual functioning or reading comprehension, may be relevant; however, in many cases, administration of an intellectual battery is unnecessary. Therefore, there is no one fixed assessment battery for *Miranda* evaluations; instead, evaluators must carefully select...
appropriate instruments and assessment approaches based on hypotheses developed from initial record reviews and the referral circumstances. Ultimately, evaluators should pick relevant, reliable, and valid instruments because any conclusions about the defendant should be based on reliable data that demonstrate consistency across the various sources of information (A. M. Goldstein & Goldstein, 2010; Heilbrun, Grisso, & Goldstein, 2009).

The two sets of instruments that were developed specifically to assess *Miranda* comprehension, the MRCI and the SAMA, were described in the Research section. The use of such instruments is strongly recommended for *Miranda* waiver evaluations because of the specific nature of the material and the fact that such instruments allow for standardized assessment and comparison to normative data for this narrow psycholegal question. Surveys of practitioners have shown that the majority recommends using instruments that are designed to measure *Miranda* comprehension in addition to other relevant measures, such as intelligence tests (Lally, 2003; Ryba, Brodsky, & Shlosberg, 2007). In addition to these tools, clinicians performing *Miranda* evaluations should consider several chapters, models, and protocols that detail the relevant steps from referral through expert testimony (e.g., DeClue, 2010; Frumkin, 2010; A. M. Goldstein & Goldstein, 2010, chapters 4–7).

**Specific Practices Regarding Adjudicative Competence**

Authorities have provided guidelines, or best practices, for courts that are handling questions of adjudicative competence (ABA, 1989; NJC, 2011). Of course, not every court follows these practices in every case, but a common flow of events, consistent with good practices, would involve the following sequence.

- First, when defense counsel (or, less commonly, the court or the prosecution) raises a question about an individual’s competence, the court holds a hearing to determine whether there is a reasonable basis to refer the defendant for formal evaluation. Authorities recommend that the court conduct a colloquy with the defendant and confirm that apparent incompetence is not due solely to nonmental-health factors such as brief intoxication or cultural differences (NJC, 2011). But, because the court has a duty to order an evaluation when there is any reasonable basis for concerns about the defendant’s competence (*Drope v. Missouri*, 1975; *Pate v. Robinson*, 1966), the bar for ordering an evaluation is relatively low.
- Next, if the court finds reason to believe that an individual’s competence may be at issue, the court appoints an independent evaluator (e.g., ABA Standard 7-4.4(a), 1989). Ideally, use of an independent evaluator reduces the likelihood that opposing sides will order their own, competing evaluations. Yet, even authorities who recommend “neutral” evaluators also recommend that each party have the option of retaining a second evaluation if they are not satisfied with the court-appointed evaluation (NJC, 2011). When appointing an evaluator, the court should also establish a deadline to receive the evaluation report, typically within 1 month of ordering the evaluation (e.g., ABA Standard 7-4.4(c)). Generally, resolving the competence question quickly is fairest to the defendant and most congruent with the goals of the justice system (*Drope v. Missouri*, 1975; *Jackson v. Indiana*, 1972).
- Generally, the court should order the competence evaluation to be performed in the least restrictive setting possible, considering the defendant’s safety risk and treatment needs (Miller, 2003; NJC, 2011). Although historically, most evaluations tended to take place in psychiatric hospitals, this tends to be the option that is most expensive, time consuming, and disruptive to the defendant (Melton et al., 2007; Melton, Weithorn, & Slobogin, 1985). Community-based evaluations (whether based in jail or outpatient clinics) can be just as accurate while better stewarding scarce resources and better protecting defendants’ rights and interests (Melton et al., 1985).
- Upon completion of the evaluation, the evaluator should submit the evaluation report to defense
counsel and the court (NJC, 2011; see also ABA Standards 7-3.7 to 7-3.8, 1989). Some state statutes require that the report also be sent to the prosecution. Of these, some (e.g., Raising Question of Competency, 1982; United States v. Miller, 2005) explicitly prohibit the evaluator from including information about the defendant’s account of the offense in the report. In states without similar prohibitions, the NJC (2011) recommends that the judge review the competence report in camera to ensure that the report does not include defendant statements about the offense or trial strategy before providing the report to the prosecution.

- A formal hearing on the defendant’s competence should follow receipt of the report if the defense requests such a hearing or if the conclusions of the report are otherwise contested (NJC, 2011). Any hearing required should be scheduled shortly after receipt of the report, because opinions in the report become less relevant over time; competence is a dynamic issue that changes with time and circumstances (ABA Standards 7-4.7 to 7-4.8, 1989). The defendant should be present at that hearing (unless significant safety concerns preclude this; ABA Standard 4.8, 1989), and the court should conduct an independent colloquy with the defendant in order to inform the court’s opinion on competence. It may also be necessary for the evaluator(s) to testify regarding his or her competence findings (ABA Standards 7-3.9 and 7-3.11, 1989). The burden of proving incompetence rests on the party asserting incompetence (Medina v. California, 1992), which is usually the defense, and they must prove incompetence by a preponderance of the evidence (Cooper v. Oklahoma, 1996).

**Practices regarding competence restoration.** If, after the procedures detailed above, the court finds the defendant CST, then the adjudication process simply proceeds. If, however, the court find the defendant IST, the court orders some form of restoration services.

- Best practice dictates that courts refer a defendant for competence restoration services in the least restrictive setting, considering safety and treatment needs (ABA Standards 7-4.9 to 7-4.10, 1989; NJC, 2011). For defendants who do not have a severe psychiatric illness that requires inpatient treatment, the appropriate location for restoration is often the jail or the community. States increasingly allow, and even encourage, outpatient restoration, whether in community clinics or jails (Frost & Gowensmith, 2010), because doing so tends to save scarce resources and better protect defendants’ rights and interests (Kapoor, 2011; Miller, 2003). Practically, however, even states that allow or recommend outpatient restoration may fail to provide it consistently, particularly outside urban jurisdictions. So in many situations, inpatient restoration, albeit more lengthy and expensive, remains the default.

- Authorities recommend that initial court orders commit a defendant to restoration treatment for no more than 3–4 months (e.g., NJC, 2011). Certainly, defendants should not be ordered into restoration treatment for a period longer than the sentence they would have served if they were convicted of their charges (see, generally, Jackson v. Indiana, 1972). Regardless of length, though, restoration treatment providers should keep the court notified of the defendant’s progress toward restoration (ABA Standard 7-4.11, 1989). As detailed earlier, research suggests that most defendants can be restored to competence within 3–6 months (Pinals, 2005).

- Treatment providers should determine the best regimen for restoring an individual’s competence. Because most defendants who have been deemed IST, suffer psychiatric illness, the primary treatment modality is usually psychiatric medication. However, as detailed in the research review presented earlier, psychoeducational groups are often provided as an adjunct to medication, or even as the primary form of intervention for defendants who have only intellectual disabilities. Regardless of modality, it is important that treatment providers ensure continuity of treatment (particularly medication) across settings so that “restored” defendants do not decompensate and become incompetent again before returning to court due to changes in medication or monitoring (NJC, 2011).
In many instances, defendants voluntarily take the medication that is recommended as part of their restoration treatment plan. In some instances when defendants refuse medication, however, involuntary medication is permissible in order to restore competence. In short, the U.S. Supreme Court has held that involuntary medication is appropriate only if the treatment is (a) medically appropriate, (b) unlikely to have side effects that may undermine the fairness of legal proceedings, and (c) necessary to further important government interests. Furthermore, involuntary medication is permissible only if restoration is not feasible via less intrusive alternatives (Sell v. United States, 2003).

Evaluator practices: Recommended adjudicative competence evaluation process. Beyond the general practices relevant for criminal competence evaluations (described earlier), particular areas of focus for adjudicative competence include the following.

- **Competence-specific interview content** is the crux of the interview in a competence evaluation. During this portion of the interview, the evaluator asks the defendant about criminal proceedings, generally, and the defendant's case, specifically. For example, evaluators often begin by asking the defendant about the typical process for court proceedings (e.g., plea, trial, sentencing) and the roles of key courtroom personnel (i.e., judge, prosecutor, defense counsel, jury). This discussion should extend beyond basic facts and definitions to gauge important conceptual issues, such as the adversarial nature of the proceedings and the defendant's basic legal rights. A defendant need not know this material perfectly from the start, but in order to be considered CST, the defendant should demonstrate the capacity to learn and retain this material when instructed.

- Beyond asking about the generalities of legal proceedings, evaluators should ask about the defendant’s particular case, including the specific charges, potential penalties, and viable plea options. The evaluator should also explore the defendant’s opinions and expectations regarding his or her defense counsel and trial outcome. Consistent with the Dusky standard, the evaluator seeks to gauge not only whether the defendant’s understanding is factually correct, but also whether it is rational and reasonable or is impaired by the symptoms identified in the clinical interview. The evaluator also inquires about the circumstances of the offense—not to assess the defendant’s guilt or mental state at the time of the alleged offense (indeed, it is inappropriate to address these issues in competence reports or testimony), but solely to determine whether the defendant is capable of providing relevant information to defense counsel.

- An important but sometimes overlooked aspect of the competence interview involves exploring the defendant’s expectations, reasoning, and judgment about the pending case. The evaluator must gather enough information to determine whether the defendant’s decision making in the case at hand is generally rational or whether it is impaired by a mental disorder.

- Reports of adjudicative competence evaluations should be tightly focused and carefully written. Generally, some background information is necessary to provide a context for understanding the defendant’s functioning, but reports should not detail the types of personal information that are irrelevant to the legal question. Furthermore, evaluators should not reveal in competence reports the defendant’s version of the alleged offense, the defendant’s legal strategy, or the content of the defendant’s communication with counsel. Evaluators must be able to address a defendant’s capacities related to competence (e.g., whether he can describe a coherent version of events surrounding his alleged offense, whether he can communicate constructively with counsel, etc.) without disclosing substantive details that would compromise the defendant’s

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8 In some cases, it is helpful to go further and actually observe the defendant interact with counsel as they prepare for the case. Perhaps for logistical reasons, this rarely occurs in routine practice, except in some of the most serious cases (e.g., capital sentencing). But, obviously, one aspect of competence is the ability to work constructively with defense counsel. Although this can often be inferred from a defendant’s interaction with an evaluator during the interview, there is no substitute for actually observing defendant/counsel interactions, particularly in complicated or ambiguous cases.
confidentiality or other legal rights. Although a few state statutes specifically direct evaluators to exclude such sensitive information from reports (e.g., Raising Question of Competency, 1982; United States v. Miller, 2005), many do not, making it particularly important that evaluators are attuned to their ethical duty to avoid compromising a defendant’s rights.9

Finally, adjudicative competence reports often conclude with additional recommendations. For example, many jurisdictions require that when an evaluator opines that a defendant is IST, the evaluator offer guidance for restoration services (e.g., inpatient vs. outpatient). Even when an evaluator finds a defendant CST, the evaluator may offer suggestions to counsel or the court for working constructively with the defendant in order to maximize his or her understanding or participation.

Evaluator practices: Relevant adjudicative competence instruments or guides. Over the past few decades, authorities have developed a variety of instruments or guides to assist in trial competence evaluations. No instrument is sufficient to replace a full evaluation, but a well-developed instrument may supplement an evaluation, and a well-developed guide may be useful for organizing an evaluation. Furthermore, instruments provide more structure to the examination and ensure that certain content is addressed, which may improve reliability across evaluators. Although the following list does not address every competence instrument developed—and it cannot replace a thorough literature review—it briefly summarizes the most commonly used competence assessment instruments in roughly chronological order (from the oldest to the most recently developed).

The Competency Screening Test (Lipsitt, Lelos, & McGarry, 1971) is a 22-item sentence-completion test in which defendants answer questions based on case scenarios. The Competency Screening Test was developed as a screening measure to efficiently distinguish between defendants who are clearly competent versus those who require further comprehensive evaluation with the Competency to Stand Trial Assessment Instrument (Laboratory of Community Psychiatry, 1973; McGarry & Curran, 1973). Although a reasonable instrument at the time it was developed, the Competency Screening Test is subject to some criticism (see Melton et al., 2007; Zapf & Roesch, 2009) and is not frequently used today.

The Competence to Stand Trial Assessment Instrument was developed as a semistructured interview to help evaluators assess 13 functions that the authors considered relevant for trial competence, based on a review of the legal literature. Each function is scored on a 5-point scale, quantifying the degree of impairment. However, the instrument does not include detailed rules for administration or overall scoring (i.e., translating item scores into an overall score of judgment about competence), nor are scores linked to any normative sample. Historically, the instrument has been fairly popular. It has probably been used more as a general guide to structure interviews than as a formal test, though even this has been a valuable contribution in earlier eras where other guidance on forensic evaluation was less readily available.

The Interdisciplinary Fitness Interview (IFI; Golding et al., 1984) was designed as an interview to assess both legal and clinical issues. Ideally, it is conducted jointly by both a clinician and an attorney. Addressing three broad areas (i.e., legal issues, psychopathological issues, and overall evaluation), the IFI attempts to facilitate an evaluation that is specific to the defendant’s individual case (based on attorney input), consistent with the functional and contextual nature of competence.

The Interdisciplinary Fitness Interview—Revised (IFI–R; Golding, 1993) is a more recent version of the IFI and reflects an additional decade of case law and professional literature addressing trial competence. The measure addresses 31

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9Although this issue arises most often in written reports of competence evaluations, it is just as applicable to expert testimony about adjudicative competence and documentation produced during competence restoration services.
psycholegal abilities across 11 broad domains. As with the earlier version, the IFI–R may be a helpful guide to facilitate a thorough interview, with the strength of including attorney input. However, there has been little formal empirical research addressing the instrument.

- The Fitness Interview Test (FIT; Roesch, Webster, & Eaves, 1984) and Fitness Interview Test—Revised (FIT–R; Roesch, Zapf, & Eaves, 2006; Roesch, Zapf, Eaves, & Webster, 1998) are also interview guides. They were developed in the Canadian justice system, though the FIT–R has been revised to be relevant in the United States as well. Using a semistructured interview format, the examiner scores the defendant using a 3-point rating scale across 16 brief sections that comprise three broad domains: (a) factual knowledge of criminal procedure, (b) understanding the possible consequences of proceedings and appreciating personal involvement in these proceedings, and (c) communicating with counsel and participating in one’s defense. Generally, the instrument has been well researched, demonstrating good psychometric properties (Viljoen et al., 2002) and strong potential as a screening instrument to identify defendants who warrant a more comprehensive evaluation (Zapf, Roesch, & Viljoen, 2001).

- The MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT–CA; Hoge, Bonnie, Poythress, & Monahan, 1999; Poythress et al., 1999) was derived from a broader research instrument, the MacArthur Structured Assessment of the Competencies of Criminal Defendants (Hoge, Bonnie, Poythress, Monahan, & Eisenberg, 1997), which was used during the extensive work by the MacArthur Foundation’s Research Network on Mental Health and the Law. Unlike most other measures, the MacCAT–CA is based on a vignette about a fictional crime, which the evaluator reads to the defendant. The defendant then responds to 22 questions addressing his or her understanding, reasoning, and appreciation of the crime. Both understanding and reasoning are assessed with respect to the case vignette, whereas appreciation is assessed by inquiring about the defendant’s own charges and situation. Scores can be compared to normative data from three groups of defendants, including jail inmates, jail inmates receiving mental health services, and incompetent defendants in a psychiatric hospital. Overall, the instrument is psychometrically strong and is well supported by research (e.g., Otto et al., 1998). But, like most instruments, the authors stress that it is a tool to be used in conjunction with other evaluation procedures, not a replacement for a comprehensive evaluation of adjudicative competence.

- The Evaluation of Competency to Stand Trial—Revised (ECST–R; Rogers et al., 2004) was designed to assess a defendant’s competence, closely tracking the Dusky criteria, but also the defendant’s response style, particularly the possibility of feigned incompetence. Eighteen items comprise four different content scales: Factual Understanding of Courtroom Proceedings, Rational Understanding of Courtroom Proceedings, Consulting With Counsel, and Overall Rational Ability. An additional 28 items comprise five Atypical Presentation (response style) scales. The instrument is interview based but includes structured and semistructured components.

Specific Practices Regarding Competence for Execution

Questions about CFE can be raised by any party (i.e., the state, defense, or court), though in practice, it is almost always the defense who raises the issue. When courts consider CFE, they attempt to address the substantive standards provided in the key U.S. Supreme Court decisions that addressed CFE (i.e., Ford v. Wainwright, 1986; Panetti v. Quarterman, 2007).

In the Ford decision, the Court concluded that the Eighth Amendment’s prohibition of cruel and unusual punishment should prohibit the execution of incompetent offenders, primarily because such executions would offend humanity and would fail to serve the traditional goals of punishment (i.e., deterrence and retribution). Although the Court’s plurality decision offered very little guidance as to when an offender would be considered incompetent, an
influential concurring opinion from Justice Powell provided more guidance. Powell suggested that the Eighth Amendment should prohibit the “execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it” (Ford v. Wainwright, 1986, p. 422). Thus, his proposed standard required that the offender have a factual understanding of the capital proceedings and that the test for competency should be whether the offender understands the nature, pendency, and purpose of the looming execution. After Ford, most of the courts that addressed the CFE issue adopted similar rationale and criteria for excluding incompetent offenders from capital punishment (see e.g., DeMatteo, Murrie, Anumba, & Keesler, 2011; Otto, 2009; Reisner, Slobogin, & Rai, 2004). Practically, courts considered only whether an offender had a factual awareness of his or her impending execution and the reasons for it.

More than two decades later, in Panetti v. Quarterman (2007), the Supreme Court more specifically addressed whether the Eighth Amendment permits the execution of an offender who has a factual awareness, but apparently lacks a rational understanding, of the reasons for execution. Panetti’s attorneys conceded that he had a sufficient factual awareness of the reasons for his execution (he was facing execution for murdering two people), but they argued that he lacked an adequate rational understanding (due to significant mental illness, Panetti held a delusional belief that he was also being executed as a form of religious persecution). By a narrow vote, the Supreme Court concluded that the factual understanding standard articulated by Justice Powell in Ford was not sufficient. Rather, a prisoner must have a factual understanding of the offense, the impending execution, and the state’s reason for the execution, and also a rational understanding of the connection between the offense and the impending execution. Explaining its decision, the Court emphasized that an offender’s mental illness could undermine the retributive and deterrent purposes of the death penalty (see DeMatteo et al., 2011).

By holding that CFE require both a factual and rational understanding of the reasons for the impending execution, the Panetti decision provided more specific guidance than Ford. However, the Supreme Court again declined to offer a detailed, explicit standard for courts to use when determining whether an offender is competent for execution. Writing for the majority, Justice Kennedy stated that the factual record was not sufficient to permit the Court to define a specific standard for CFE. The Court also recognized that defining “rational understanding” could be difficult. Thus, states and courts will likely continue to engage in some degree of interpretation when implementing the Panetti decision.

Recommended evaluation process. Despite the rarity of CFE evaluations, they share many similarities with evaluations of other criminal competencies. After all, they are essentially a question of whether an inmate has the functional capacities necessary for a specific task (i.e., facing execution with adequate understanding and appreciation), so many of the initial considerations that apply to any evaluation of a criminal competency (described earlier) apply to CFE evaluations. The considerations specific to CFE evaluations generally involve a focus on the defendant’s understanding of his or her impending death.

As with any evaluation, CFE evaluations should begin with a broad review of relevant records (e.g., Heilbrun et al., 2009; Heilbrun & McLaren, 1988; Small & Otto, 1991). But, the most relevant records are likely those that address the inmate’s psychological functioning on death row, in the period following his or her death sentence and approaching his or her impending execution. Thus, crucial collaterals include the inmate’s legal counsel (i.e., original defense counsel, but also any habeas counsel), prison staff who have routine contact with the inmate, prison mental health staff, and any family who have contact with the inmate. These, and similar collateral sources, are usually in the best position to describe the defendant’s current statements or reactions to the pending execution. As always, obtaining information from multiple sources can help the evaluator to assess the inmate’s response style (e.g., truthful responding vs. exaggeration/minimization of deficits) in the subsequent clinical interview.
The clinical interview is likely the most important component of a CFE evaluation. Although the evaluator will be well informed about the defendant’s psychiatric history after reviewing historical records, CFE is a question of present abilities, so focusing on the inmate’s current psychological functioning is essential. Conducting the evaluation over the course of more than one meeting may help an evaluator better gauge the nuances and stability of an inmate’s symptoms (Heilbrun & McClaren, 1988). Again, the focus of the clinical interview in a CFE evaluation is on assessing the degree to which the offender understands his or her pending execution and the reasons for the execution. Specifically, the inmate must have both a factual and a rational understanding of the issue.

Otto (2009) recently provided guidance to help evaluators explore four broad categories of symptoms that may impede an inmate’s rational and factual understanding of his or her impending execution. First, Otto noted that impaired thought content, such as grandiose delusions, paranoid delusions, and religious delusions, might hamper an inmate’s understanding and appreciation of his or her death sentence. Second, impaired thought process or form can hamper the capacities necessary for competence. For example, disordered thinking, including tangential thinking or circumstantial thinking, could affect an offender’s understanding or appreciation of the death sentence. The psychotic symptoms that cause impaired thought content or impaired thought process are not uncommon among death row inmates (e.g., Cunningham & Vigen, 2002). Although psychotic symptoms do not necessarily render a defendant incompetent for execution, evaluators should certainly screen for them carefully and explore them in depth if they are present. Third, cognitive impairment, including deficits in memory, attention/concentration, orientation, executive functioning, and intellectual functioning, could lead to a finding of incompetence for execution. Finally, Otto noted that severe mood disorders might affect an offender’s ability to understand or appreciate the death sentence. Thus, evaluators should carefully explore these four broad categories of symptoms and examine their relation to the inmate’s perceptions of his pending execution in detail.

Evaluator practices: Relevant CFE instruments or guides. Despite the rarity of CFE evaluations, a few checklists and measures have been developed to assist evaluators in conducting them. Presumably, instruments developed for use in CFE evaluations may help evaluators to assess the relevant criteria in a more structured and easy-to-replicate manner. However, one important limitation of all existing measures is that they were developed prior to the Supreme Court’s ruling in Panetti. Thus, they fit imperfectly, or at least incompletely, with our current understanding of the CFE standard in that they tend to focus more on factual understanding and give less focus to rational understanding.

Ebert (2001) offered a checklist of 12 items, with eight focused on functional legal abilities and four more clinical in nature that could be rated on a 6-point Likert-type scale. However, Ebert did not provide information for determining how the level of incapacity is determined or how the item ratings can be combined for making an overall determination of CFE (Zapf, 2008). Moreover, Ebert did not provide sample questions for all items or data about the measure’s psychometric properties.

Zapf et al. (2003) developed the Interview Checklist for Evaluations of Competency for Execution, not so much as a formal measure, but rather “to serve as an aide memoire to assist professionals” (p. 115) with the clinical interview in CFE evaluations. They developed the checklist after reviewing the literature on criminal competencies, reviewing relevant case law, and consulting with professionals who conduct CFE evaluations. The checklist is divided into four sections that assess an offender’s (a) understanding of the reasons for punishment, (b) understanding of the punishment, (c) appreciation and reasoning, and (d) ability to assist the attorney. Although developed before the Panetti decision, the guide directs evaluators to assess the offender’s appreciation and reasoning beyond a superficial factual understanding.

The most recently developed CFE guide is the Competency for Execution Research Rating Scales (CERRS; Ackerson, Brodsky, & Zapf, 2005). Ackerson and colleagues developed the CERRS after surveying 113 judges with authority to give death penalty sentences about issues they considered
important when determining CFE. The CERRS has four sections: understanding and appreciating punishment, understanding and appreciating death, capacity to work with counsel, and relevant clinical information. Each item is scored on a 5-point Likert-type scale (from severe incapacity to no incapacity) following item descriptions in the instrument manual.

Policy
For each of the criminal competencies we have discussed in this chapter, certain broad policy issues—such as standards for each competency as defined by the U.S. Supreme Court and typical procedures for litigating each competence—have already been addressed. Thus, this section addresses only a few recent policy developments, and a few areas in which policy is unsettled, creating ongoing challenges to the criminal justice system.

Recent policy regarding Miranda. The protections afforded by Miranda v. Arizona (1966) were soon extended to juveniles in Kent v. United States (1966) and In re Gault (1967), which established the application of the Fifth and Fourteenth Amendment-based protections to delinquency proceedings. In Fare v. Michael C. (1979), the Court made it clear that the Miranda requirements applied to the custodial interrogation of juveniles. In J. D. B. v. North Carolina (2011), the Court highlighted the critical importance of adolescent age when considering whether a custodial interrogation occurred under the reasonable person standard.

The attention to such differences in adolescents has led to ancillary case law and legislation that is meant to protect this group. For example, in Gallegos v. Colorado (1962), the Supreme Court held that the impact of adolescent immaturity during interrogation might be assuaged by having a lawyer, adult relative, or friend present. State court holdings since then have applied and further refined this idea, leading to the interested adult standard that calls for the presence of a relevant, presumably helpful adult (e.g., Massachusetts v. Guyton, 1989; Massachusetts v. MacNeill, 1987).

The availability, and even required presence, of an interested adult appears to be helpful policy, but as noted in the research section earlier, there is little evidence to support the presumed beneficial impact of an interested adult. Research suggests that parent-adolescent consultations often do not provide the protection assumed because the adult either does not offer advice, miscommunicates with the adolescent, or advises a youth to cooperate with police and “tell the truth” (Grisso & Ring, 1979; Viljoen et al., 2005).

Several studies have demonstrated the wide variability in reading level of jurisdictions’ Miranda warnings (e.g., Kahn, Zapf, & Cooper, 2006; Rogers, Harrison, Shuman, et al., 2007; Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008), with some warnings requiring as low as a 2.8 grade reading ability and others requiring as high as a postgraduate-level reading ability. Rogers and colleagues (Rogers, Harrison, Shuman, et al., 2007; Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008) analyzed 122 juvenile-specific warnings. Although such versions were presumably created to simplify the warnings and make them more understandable, findings suggested that juvenile warnings were on average 60 words longer than standard warnings, still required reading abilities higher than many juveniles likely have, and contained vocabulary very much like that in standard warnings intended for adult suspects (Rogers, Hazelwood, Sewell, Shuman, & Blackwood, 2008).

Varying waiver standard across states. In Miranda v. Arizona (1966), the Supreme Court clearly stated that it did not intend to prescribe a specific phrasing to be afforded to suspects, leading to wide variability across jurisdictions. Similarly, the Court indicated that the knowing, intelligent, and voluntary standard would apply to Miranda waivers, but it did not further define the standard in the custodial interrogation context. In particular, the cognitive knowing and intelligent components were left open to interpretation, whereas the Court’s precedent concerning coerced confessions in the decades preceding Miranda outlined the general definition of voluntary. Later Supreme Court cases suggested a distinction between knowing and intelligent (e.g., Brady v. United States, 1970; Fare v. Michael C., 1979), and in Moran v. Burbine (1986), the Court noted that a suspect must be aware of both the
nature and consequences of a Miranda waiver. The standard remains largely open to interpretation, however, leading to variation among states as to what is required for a valid Miranda waiver. Many states require that a suspect meet two requirements: (a) understanding of the basic factual elements of the rights, and (b) appreciation of the consequences of a waiver (e.g., Arkansas v. Bell, 1997; In re Patrick W., 1978; Pennsylvania v. Def Jesus, 2001; Tennessee v. Stephenson, 1994). Other states, however, have case law explicitly requiring only a basic understanding of the Miranda rights (e.g., Illinois v. Bernasco, 1990; Michigan v. Daoud, 2000). Yet other states appear to use an intermediate approach that requires understanding of some consequences (e.g., Colorado v. Al-Yousef, 2002; New Hampshire v. Bushey, 1982). A recent survey of state court judges suggested that the majority of judges distinguish between knowing and intelligent (Zelle, 2012). It appears that, while recognizing the need to maintain flexibility in legal standards so they can be applied on a case-by-case basis, there is reason to develop a “floor” threshold for what the knowing and intelligent standard requires.

Without such a clarification, the variation across states likely leads to inconsistent and unfair application across defendants—especially given the great weight that inculpatory statements carry in criminal cases. Further research and policy discussion in this area are needed.

Recent Supreme Court changes to Miranda doctrine. The Supreme Court has revisited Miranda to clarify several areas of its application, especially in recent years. Some cases have resulted in protecting and extending Miranda, but many have circumvented Miranda’s application and made it more difficult to invoke. An understanding of the changes to Miranda doctrine is important for both practice and research, as psychological constructs and policy questions are relevant to the evolution of police, court, and clinical practices. Several of the more prominent cases are reviewed very briefly here.

In Colorado v. Connelly (1986), the Court made clear that a Miranda waiver will be considered voluntary unless it is the result of coercive police activity. In Connelly, the suspect was mentally ill and had confessed to a murder after being told to do so by a command hallucination. In 2000, the Supreme Court upheld Miranda against a legislative attempt to limit its applicability in federal criminal law cases (Dickerson v. United States, 2000). In Missouri v. Seibert (2004), the Supreme Court held that police may not use a question-first interrogation in which they question a suspect until they obtain a confession, then Mirandize the suspect, then question the suspect again in order to obtain an admissible confession.

In just the last few years, the Supreme Court has paid additional attention to Miranda. In Maryland v. Shatzer (2010), the Court defined the length of time for which a rights invocation lasts before a suspect must again clearly reinvoking his or her rights. In a previous case, the Court had extended a suspect’s invocation of his or her right to counsel to subsequent interrogations; however, in Shatzer, the Court held that a Miranda invocation will be automatically extended for only 14 days, not indefinitely. The Court also spoke to the mechanics of rights invocation in Berghuis v. Thompkins (2010), where it held that an invocation of the right to silence (as with an invocation of the right to counsel) must be made explicitly by a suspect, and that remaining silent alone will not constitute a rights invocation. In the same opinion, the Court made clear that rights waivers can be made implicitly, placing the onus on suspects to speak up in order to assert their rights.

In contrast to the recent cases that increased the threshold for Miranda applicability in adult cases, the Court in J. D. B. v. North Carolina (2011) appeared to strengthen the applicability of Miranda in juvenile cases. In J. D. B., the Court made clear that age is a relevant factor that should be considered when using the reasonable person standard to assess whether a juvenile suspect would have felt that he or she was in custody. That is, the Court noted that younger individuals were more likely to feel unable to end an interview and leave, thus lowering the bar for an interview to constitute interrogation and require application of the Miranda warnings.

Overall, though, the Supreme Court seems to be slowly eroding its Miranda precedent, and scholars have suggested that recent cases seriously jeopardize its status (e.g., Weisselberg, 2008; Weisselberg & Bibas, 2010).
Policy regarding adjudicative competence. As detailed earlier in this chapter, the criminal justice system has well-established policies and procedures for raising and adjudicating the relatively common question of CST. Policies are less well developed and less uniform, however, after the adjudication process, when defendants are sent for restoration services.

Competence restoration efforts are commonplace; Mossman (2007) estimated that defendants who are referred for competence restoration occupy at least one-ninth of U.S. psychiatric hospital beds, which is approximately 4,000 patients on any given day. This rate may still be rising, as forensic patients increasingly account for state psychiatric hospital admissions.

As described in the Research and Practice sections of this chapter, defendants who have been deemed IST are ordered to undergo competence restoration efforts before they are adjudicated. As a result, they may be held in a secure facility, such as a forensic psychiatric hospital, without having been convicted of a crime, and often without having met the criteria for civil commitment. Historically, this arrangement left many defendants spending more time in the hospital for restoration efforts than they could have served in prison had they been convicted of their charges (e.g., Laben, Kashgarian, Nessa, & Spencer, 1977; McGarry, 1971). The U.S. Supreme Court addressed this dilemma directly when they considered the case of Theon Jackson, who was an illiterate, mute, and deaf man who allegedly stole $9.00 worth of property (Jackson v. Indiana, 1972). Because experts testified that Jackson was virtually certain to never become competent, defense counsel argued that Jackson’s commitment for competence restoration was, in effect, a life sentence to a psychiatric facility. The Court agreed and ruled that a defendant who is found IST cannot be held beyond “the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [trial competence] in the foreseeable future” (Jackson v. Indiana, 1972, p. 738). Since Jackson, defendants may still be hospitalized with the goal of restoring trial competence, but commitment cannot be based indefinitely on restoration efforts, and ongoing commitment must be justified by ongoing progress toward restoring competence (see also ABA Standard 7-4.13, 1989).

Since the Jackson decision, many state statutes (e.g., Raising Question of Competency, 1982; United States v. Miller, 2005), hospital policies, and courtroom judges require clinicians to make predictions about restoration by opining whether an incompetent defendant is ever likely to gain competence or by estimating the time and services necessary to regain competence. Historically, however, most authorities have concluded that clinicians are not particularly skilled at making predictions about an individual’s restorability (e.g., Hubbard, Zapf, & Ronan, 2003; Nicholson, Barnard, Robbins, & Hanks, 1994; Pinals, 2005; Roesch & Golding, 1980; Samuel & Michaels, 2011; Zapf & Roesch, 2011; cf. Mossman, 2007). One clear challenge to accurate prediction is “the base rate” problem: Because most defendants are restored to competence, clinicians may appear reasonably accurate by predicting that all defendants are restorable, but they have trouble identifying the small minority of patients who are not restorable (Pinals, 2005; Zapf & Roesch, 2011).

Recently, Mossman (2007) suggested a much more optimistic perspective on the potential for clinicians to accurately predict competence restoration. After studying an Ohio sample, Mossman found that a lower likelihood of restoration was associated with having a misdemeanor charge; a longer cumulative length of stay; older age; and diagnoses of mental retardation, schizophrenia, and schizoaffective disorder. He concluded that these findings provide scientific support for testimony that two types of incompetent evaluatees have well-below-average probabilities of being restored: chronically psychotic defendants with histories of lengthy inpatient hospitalizations and defendants whose incompetence stems from irremediable cognitive disorders (such as mental retardation). Nonetheless, courts may still deem low probabilities of success to be “substantial” enough to warrant attempts at restoration.

In short, clinicians may be able to identify, with reasonable success, the defendants who are most likely to remain unrestrably incompetent. But,
because so few defendants are unrestorably incompetent, and restoration efforts are so often successful, courts may still err on the side of caution and encourage at least an initial attempt to restore almost any incompetent defendant.

Finally, although clinicians and research usually treat restorability as an attribute of the defendant, it seems reasonable to think that restorability may depend, at least in part, on the type of restoration services that a defendant receives. Despite the widespread provision of restoration services, however, research about restoration program elements and efficacy is remarkably sparse. Surveys have revealed that most restoration takes place inpatient, at state psychiatric hospitals, and the primary means of restoration is psychiatric medication (GAINS Center, 2007; Miller, 2003; Pinals, 2005). These informal surveys also suggest that a majority of large facilities provide some sort of didactic or psychoeducational intervention, and a substantial minority have some sort of written manual or curricula (Mueller, unpublished survey, as cited in Pinals, 2005). Thus, competence restoration increasingly involves two processes: traditional psychiatric treatment of the underlying mental disorder alongside didactic education regarding legal concepts and the trial process (Noffsinger, 2001).

Other than this minimal overview from informal surveys, our field knows surprisingly little about where, how, and how effectively competence restoration services are delivered. States increasingly allow, or even encourage, outpatient restoration in community clinics or jails (Frost & Gowensmith, 2010). This approach is almost certainly preferable for defendants who do not require inpatient psychiatric hospitalization (see Kapoor, 2011; Miller, 2003) because outpatient approaches are likely far less expensive and better protect defendants’ rights and interests (particularly defendants who are in the community on bond, rather than pending trial in jail). Practically, however, even states that allow or recommend outpatient restoration may fail to provide it consistently, particularly outside urban jurisdictions. Furthermore, we know of few well-established policies or practice guidelines for delivering outpatient restoration services. Thus, developing and disseminating policy for competence restoration—particularly on an outpatient basis—remains one of the primary policy tasks related to adjudicative competence.

**SUMMARY AND CONCLUSIONS**

Studying and evaluating the criminal competencies is a core task of forensic psychology research and practice. Regarding adjudicative competence, the field has well-established practices from the level of policy (i.e., raising and adjudicating the issue) to the level of clinical practice (i.e., assessing competence to stand trial among individual defendants). Yet even for this commonly examined competence, the field has more work to do, particularly in terms of predicting and improving the restorability of some defendants to competence and establishing best practices for competence restoration services.

Regarding the less common criminal competencies—such as waiving *Miranda* rights or facing execution—the efforts to define and evaluate competence are much more recent and less well established. Questions about the capacity to waive *Miranda* rights are relevant to so many defendants that the field will likely give increasing attention to raising and examining these questions and further developing clinical procedures to do so. CFE questions, though they involve only the slightest fraction of defendants, will also likely receive continued attention given the grave significance of these questions. Despite differences across the criminal competencies, all require a case-specific consideration of whether a particular defendant manifests the particular psycholegal capacities necessary for a particular case context. Thus, all will continue to require careful study and evaluation by forensic psychologists.

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Criminal Competencies


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