DEFINING AND ASSESSING COMPETENCY TO STAND TRIAL

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Competency to stand trial is a concept of jurisprudence allowing the postponement of criminal proceedings for those defendants who are considered unable to participate in their defense on account of mental or physical disorder or retardation. Because trial competency issues are raised substantially more often than the insanity defense, psychologists involved in forensic assessment and consultation are likely to have frequent experience with it. It is estimated that between 25,000 and 39,000 competency evaluations are conducted in the United States annually (Hoge et al., 1997; Steadman & Hartstone, 1983). Stated somewhat differently, between 2% and 8% of all felony defendants are referred for competency evaluations (Bonnie, 1992; Golding, 1993; Hoge, Bonnie, Poythress, & Monahan, 1992). Given a steady increase in felony arrest rates, the rate of competency referrals is increasingly steadily as well. In this chapter, we will present an overview of competency laws, research, and methods of assessment with the aim of providing forensic psychologists with the basic information they need to conduct competency evaluations. We do not believe, however, that this chapter will sufficiently prepare a novice forensic psychologist to carry out such evaluations. As we will make clear, the issues surrounding a competency determination are highly complex. An evaluator needs not only a high level of clinical knowledge and skills but also considerable knowledge of the legal system.

We urge the reader interested in pursuing work in the competency area to supplement this chapter with other materials (e.g., Bonnie, 1992, 1993; Grisso, 1992; Melton, Petrila, Poythress, & Slobogin, 1987; Ogloff, Wallace, & Otto, 1991; Roesch, Ogloff, & Golding, 1993; Roesch, Hart, & Zapf, 1996; Winick, 1995, 1996) as well as workshops and other forms of continuing education. The Specialty Guidelines for Forensic Psychologists (Committee on Ethical Guidelines for Psychologists, 1991) also contain important practice standards for competency evaluations.

Defining Competency

Provisions allowing for a delay of trial because a defendant was incompetent to proceed have long been a part of the legal due process. English common law allowed for an arraignment, trial, judgment, or execution of an alleged capital offender to be stayed if he or she "be(came) absolutely mad" (Hale, 1736, cited in Silten & Tulis, 1977, p. 1053). Over time, statutes have been created in the United States and Canada that have further defined and extended the common law practice (see Davis, 1994; Rogers & Mitchell, 1991; Verdun-Jones, 1981; and Webster, Menzies, & Jackson, 1982 for reviews of Canadian competency law and practice). The modern standard in U.S. law was established in Dusky v. United States (1960). Although the exact wording varies, all

states use a variant of the Dusky standard to define competency (Favole, 1983). In Dusky, the Supreme Court held that:

It is not enough for the district judge to find that 'the defendant is oriented to time and place and has some recollection of events', but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him. (p.402)

Although the concept of competency to stand trial has been long established in law, its definition, as exemplified by the ambiguities of Dusky, has never been explicit. What is meant by "sufficient present ability"? How does one determine whether a defendant "has a rational as well as factual understanding"? To be sure, some courts (e.g., Wieter v. Settle, 1960) and legislatures (e.g., Utah Code Annotated, §77-15-1 et seq., 1994) have provided some direction to evaluators in the form of articulated Dusky standards (discussed below), but the typical forensic evaluation is left largely unguided except by a common principle, in most published cases, that evaluators cannot reach a finding of incompetency independent of the facts of the legal case (an issue we will return to later).

The problems in defining and assessing competency leads to a broad range of interpretations of the Dusky standard. Since the courts and legislatures have given mental health professionals a large share of the responsibility for defining and evaluating competency, it should not be surprising to find that mental status issues such as presence or absence of psychosis have played (historically at least) a dominant role in the findings of evaluators. In fact, evaluators initially involved in assessing competency seemed to equate psychosis with incompetency (Cooke, 1969; McGarry, 1965; Roesch & Golding, 1980). Furthermore, evaluators in the past rarely took into account the specific demands of a defendant's case.

This has begun to change in recent years. Early evaluators were employed typically in state mental hospitals settings (the site of the majority of competency evaluations at that time) and had no training either in the assessment of competency or in matters of law. As a consequence, the evaluations were based on the same standard mental status examinations that had been used with other patients in the hospital. If psychological tests were used at all, they were used as a diagnostic tool to determine presence or absence of psychosis.

Over the past 20 years, these entrenched practices have been challenged and changed. Thus, research provided evidence that the presence of psychosis was not sufficient by itself for a finding of incompetency (Roesch & Golding, 1980), and modern empirical studies of competency reports demonstrate that evaluators rarely make that simple conceptual error (Heilbrun & Collins, 1995; Nicholson, LaFortune, Norwood, & Roach, 1995; Skeem, Golding, Cohn, & Berge, 1997). However, while forensic evaluators today typically have more training than in the past, most states still do not

require forensic evaluator training (Farkas, DeLeon, & Newman, 1996) and examiners are usually only "occasional experts" (Grisso, 1987).

The specific psycholegal abilities required of a defendant are the most important aspect of assessing fitness. The contextual nature of competence has been explored by researchers in the area. Some researchers and scholars have argued that competence should be considered within the context in which it is to be used. For example, the abilities required by the defendant in his or her specific case should be taken into account when assessing competence. This contextual perspective was summarized by Golding and Roesch (1988) as follows:

Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue--it must be further demonstrated that such severe disturbance in this defendant, facing these charges, in light of existing evidence, anticipating the substantial effort of a particular attorney with a relationship of known characteristics, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome. (p. 79)

The importance of a contextual determination of specific psycholegal abilities has been repeatedly demonstrated by empirical findings that assessed competencies in one area of functioning are rarely homogenous with competencies in other areas of functioning (Bonnie, 1992; Golding & Roesch, 1988; Grisso, Appelbaum, Mulvey, & Fletcher, 1995; Skeem et al., 1997).

Recent Supreme Court decisions in both the United States and Canada, however, have confused this issue by finding that the standard by which competency to be judged is not context-specific. In Whittle v. The Queen (1994) the Supreme Court of Canada ruled that there is to be only one standard for competency regardless of the specific abilities to be performed by an accused. The Supreme Court of Canada concluded that there is no difference between the essential abilities needed in making active choices about waiving counsel, making decisions at trial, confessing, or pleading guilty. The Court ruled that different standards of competency should not be applied for different aspects of criminal proceedings and that the test to be used is one of "limited cognitive capacity" (p. 567) in each of these circumstances. However, unlike Godinez v. Moran (1993; see below), the forensic examiners had actually evaluated Mr. Whittle in these specific contexts, regardless of whether or not the standard to be applied was the same or different as a function of the context.

In Godinez v. Moran (1993), the United States Supreme Court held similarly that the standard for the various types of competency (i.e., competency to plead guilty, to waive counsel, to stand trial) should be considered the same. Justice Thomas wrote for the majority:

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for "reasoned choice" among the alternative available to him. How this standard is different from (much less higher than) the Dusky

standard -- whether the defendant has a 'rational understanding' of the proceedings -- is not readily apparent to us. ... While the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial.…Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than the defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. (p. 2686)

In his dissent, Justice Blackmun noted that the "majority's analysis is contrary to both common sense and long-standing case law" (p. 2691). He reasoned that competency cannot be considered in a vacuum, separate from its specific legal context. Justice Blackmun argued that "competency for one purpose does not necessarily translate to competency for another purpose" (p. 2694) and noted that prior Supreme Court cases have "required competency evaluations to be specifically tailored to the context and purpose of a proceeding" (p. 2694). What is egregiously missing from the majority's opinion in Godinez however, is the fact that, unlike Whittle, Moran's competency to waive counsel or plead guilty to death penalty murder charges was never assessed by the forensic examiners, regardless of which standard (rational choice or rational understanding) was employed.

The Godinez holding has been subsequently criticized by legal scholars (Perlin, 1996) and courts alike. In the words of the Third Circuit Court of Appeals, "This difficult case presents us with a window through which to view the real-world effects of the Supreme Court's decision in Godinez v. Moran, and it is not a pretty sight" (Government of the Virgin Islands v. Charles, 1995). The problem is not whether or not the standards for various psycholegal competencies are higher, different, or the same, but rather, more fundamentally, whether or not the defendant has been examined with respect to these issues in the first place.

Standards of competence are one area of inquiry whereas the conceptualization of competence is another. Some researchers and scholars have provided re-conceptualizations of competence to stand trial. Winick (1985, 1995) persuasively argued that in some circumstances it may be in the best interests of the defendant to proceed with a trial, even if he or she is incompetent. Winick postulated that this could take the form of a provisional trial wherein the support of the defense attorney would serve to ensure protection of the defendant. This would allow the defendant to proceed with his or her case while maintaining decorum in the courtroom and without violating the defendant's constitutional rights. As well, Bonnie (1992, 1993) has provided a reformulation of competence to stand trial. Bonnie proposed a distinction between two types of competencies--competence to assist counsel and decisional competence. He argued that defendants found incompetent to assist counsel would be barred from proceeding until they were restored to competence. Defendants found decisionally incompetent, on the other hand, may be able to proceed in certain cases where his or her lawyer is able to present a defense.

The past 15 years has also seen the development of better training programs for professionals in forensic psychology and psychiatry. Many graduate psychology programs and law schools cooperate to provide instruction in psychology as well as law, and a number of departments of

psychology include forensic psychology as an area of expertise (Bersoff et al., 1997; Roesch, Grisso, & Poythress, 1986).

Another major change has been the shift in the location of competency assessments. Roesch and Golding (1980) argued that inpatient evaluation, which was the common practice until recently, is unnecessary in all but perhaps a small percentage of cases as most determinations of competency can easily be made on the basis of brief screening interviews (to be discussed later in this chapter). Community-based settings, including jails and mental health centers (see Fitzgerald, Peszke, & Goodwin, 1978; Melton, Weithorn, & Slobogin, 1985; Ogloff & Roesch, 1992; Roesch & Ogloff, 1996) appear to be increasingly used to conduct evaluations. In 1994, Grisso and his colleagues published the results of a national survey they had conducted to determine the organization of pretrial forensic evaluation services in the United States (Grisso, Coccozza, Steadman, Fisher, & Greer, 1994). These researchers concluded that "the traditional use of centrally located, inpatient facilities for obtaining pretrial evaluations survives in only a minority of states, having been replaced by other models that employ various types of outpatient approaches" (p. 388). One compelling reason for this shift is cost. Laben, Kashgarian, Nessa, and Spencer (1977) estimated that the cost of the community based evaluations they conducted in Tennessee was one-third the cost of the typical mental hospital evaluation (see also Fitzgerald, Peszke, & Goodwin, 1978). In 1985, Winick estimated that in excess of $185 million is spent each year on competency evaluation and treatment in the United States. He estimated that these costs could currently be two to three times as high as they were in 1985 (Winick, 1996).

The widespread use of screening instruments would serve to lower these rising costs as the majority of individuals, for whom incompetence is clearly not an issue, would be screened out. Only those defendants whom the screening instrument has identified as potentially incompetent would then be sent on for a more formal assessment of competence. Screening instruments can be administered in outpatient settings as well as in local jails or courthouses, thereby also serving to eliminate the unnecessary detention of clearly competent individuals.

Base rates for competency referrals (from 2% to 8% of felony arrests) and for incompetency determinations (from 7% to 60%) vary widely across jurisdictions and evaluation settings (Nicholson & Kugler, 1991; Skeem, Golding, Cohn & Berge, 1997). This occurs for a number of reasons including variations in examiner training and use of forensically relevant evaluation procedures (Skeem et al., 1997), the availability of pretrial mental health services, the nature of the referral system, inadequate treatment services for the chronically mentally ill and a criminalization of their conduct, and the extent to which judges scrutinize bona fide doubt about a defendant's competency before granting evaluation petitions (Golding, 1992). Nevertheless, the modal jurisdiction typically finds only 20% of those referred incompetent to proceed with their trial. Precise data are not available, but conservatively, half of those found competent presented little or no reason for doubting their competency and could have been detected by adequate screening procedures. This is true in the United States as well as in other countries. Zapf and Roesch (in press) investigated the rate of (in)competence in individuals remanded to an inpatient setting for an assessment of fitness to stand trial in Canada. Their results indicate that only 11% of the remands were unfit to stand trial and, further, that with the use of a brief screening interview 82% of the remands could have been screened out at some earlier time as they were clearly fit to stand trial (Zapf & Roesch, 1997). Many of the assessment procedures we describe

later in this chapter are either explicitly designed for screening or could easily be adapted for use in such settings.

A major change in the past few decades has been the development of a number of instruments specifically designed for assessing competence. This work was pioneered by McGarry and his colleagues (see Lipsitt, Lelos, & McGarry, 1971; McGarry, 1965; McGarry & Curran 1973). Their work was the starting point for a more sophisticated and systematic approach to the assessment of competency. In 1986, Grisso coined the term "forensic assessment instrument" (FAI) to refer to instruments that provides frameworks for conducting forensic assessments. FAIs are typically semi-structured elicitation procedures and lack the characteristics of many traditional psychological tests. However, they serve to make forensic assessments more systematic. These instruments help evaluators to collect important and relevant information and to follow the decision-making process that is required under the law. Since the time that the term was coined, a number of assessment instruments have been developed that are designed to work in this way, and it appears that the use of FAIs has been slowly increasing (Borum & Grisso, 1995; but see Skeem et al.'s 1997 finding that few occasional experts use such devices). This trend is encouraging in that empirical data suggest that trained examiners using FAIs achieve the highest levels of inter-examiner and examiner-adjudication agreement (Golding, Roesch, & Schreiber, 1984; Nicholson & Kugler, 1991; Skeem et al., 1997). Before turning to a review of assessment methods, we will provide a brief overview of the legal procedures involved in competency questions.

Overview of Procedures

Laws regarding competency vary from state to state, although most jurisdictions follow procedures similar to the overview we will describe in this section. Clinicians should consult their own statute for the specific law and procedure applicable in each state .

The issue of competency may be raised at any point in the adjudication process (Golding & Roesch, 1988). If a court determines that a bona fide doubt exists as to a defendant's competency, it must consider this issue formally (Drope v. Missouri, 1975; Pate v. Robinson, 1966), usually after a forensic evaluation which can take place, as we noted, in the jail, an outpatient facility, or in an institutional setting.

One legal issue that may concern evaluators is whether information obtained in a competency evaluation can be used against a defendant during the guilt phase of a trial or at sentencing. While some concerns have been raised about possible self-incrimination (Berry, 1973; Pizzi, 1977), all jurisdictions in the United States and Canada provide either statutorily or through case law that information obtained in a competency evaluation cannot be introduced on the issue of guilt unless the defendant places his or her mental state into evidence at either trial or at sentencing hearings (Estelle v. Smith, 1981; Golding & Roesch, 1988) .

Once a competency evaluation has been completed and the written report submitted (see Melton et al., 1987; Petrella & Poythress, 1983; Skeem et al., 1997, for a discussion of the content of these reports), the court may schedule a hearing. If however, both the defense and the prosecution accept the findings and recommendations in the report, a hearing does not have to

take place. It is likely that in the majority of the states, a formal hearing is not held for most cases. If a hearing is held, the evaluators may be asked to testify, but most hearings are quite brief and usually only the written report of an evaluator is used. In fact, the majority of hearings last only a few minutes and are held simply to confirm the findings of evaluators (Steadman, 1979). The ultimate decision about competency rests with the court, which is not bound by the evaluators' recommendations (e.g., North Dakota v. Heger, 1982). In most cases, however, the court accepts the recommendations of the evaluators (Hart & Hare, 1992; Steadman, 1979; Williams & Miller, 1981).

At this point defendants found competent proceed with their case. For defendants found incompetent, either trials are postponed until competency is regained or the charges are dismissed, usually without prejudice. The disposition of incompetent defendants is perhaps the most problematic area of the competency procedures. Until the case of Jackson v. Indiana (1972), virtually all states allowed the automatic and indefinite commitment of incompetent defendants. In Jackson, the U.S. Supreme Court held that defendants committed solely on the basis of incompetency "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future" (p. 738). The Supreme Court did not specify how long a period of time would be reasonable nor did it indicate how progress toward the goal of regaining competency could be assessed.

The Jackson decision led to revisions in state statutes to provide for alternatives to commitment as well as limits on the length of commitment (Roesch & Golding, 1980). The length of confinement varies from state to state, with some states having specific time limits (e.g., 18 months) while other states base length of treatment on a proportion of the length of sentence which would have been given if the defendant was convicted.

Once defendants are found incompetent, they may have only limited rights to refuse treatment (see Winick, 1983 for a review). Medication is the most common form of treatment, although some jurisdictions have established treatment programs designed to increase understanding of the legal process (e.g., Pendleton, 1980; Webster, Jenson, Stermac, Gardner, & Slomen, 1985), or that confront problems that hinder a defendant's ability to participate in the defense (Davis, 1985; Siegel & Elwork, 1990).

This brief overview of the competency procedures is intended to provide a basic understanding of the process. For a more complete discussion of the legal issues as well as a review of empirical research on the various aspects of the competency procedures, the reader is referred to reviews by Golding and Roesch (1988), Nicholson and Kugler (1991), Roesch et al. (1993), and Winick (1996).

Assessing Competency

Though there has been some confusion over the definition of competency, there nevertheless appears to be generally good agreement between evaluators about whether a defendant is competent or not. The few studies of reliability that have been completed report that pairs of evaluators agree in 80% or more of the cases (Goldstein & Stone, 1977; Poythress & Stock,

1980; Roesch & Golding, 1980; Skeem et al., 1997). When evaluators are highly trained and use semi-structured competence assessment instruments, even higher rates of agreement have been reported (Golding et al., 1984; Nicholson & Kugler, 1991).

When base rates of findings of competency are considered, however, these high levels of agreement are less impressive and they do not suggest that evaluators are necessarily in agreement about the criteria for a determination of competency. A psychologist, without even directly assessing a group of defendants, could achieve high levels of agreement with an examining clinician, simply by calling all defendants competent (base-rate decision). Since in most jurisdictions, approximately 80% of all referred defendants are competent (for reasons discussed later in this chapter), the psychologist and the examiner would have modest agreement, even with making no decisions at all (though the problem of base rates can be corrected through the use of certain statistics such as Kappa, the studies reporting reliability usually have small samples overall and consequently very few incompetent defendants). Most disturbingly, Skeem and her colleagues (1997) demonstrated that examiner agreement on specific psycholegal deficits (as opposed to overall competency) averaged only 25% across a series of competency domains. It is the more difficult decisions, involving cases where competency is truly a serious question, that are of concern. How reliable are decisions about these cases? To date, no study has accumulated enough of these cases to answer this question.

High levels of reliability do not, of course, ensure that valid decisions are being made. Two evaluators could agree that the presence of psychosis automatically leads to a finding of incompetency. As long as the evaluators are in agreement about their criteria for determining psychosis, the reliability of their final judgments about competency will be high. As we suggest throughout this chapter, it is quite possible that the criteria used by too many evaluators inappropriately rely on traditional mental status issues without considering the functional aspects of a particular defendant's case.

Validity is, of course, difficult to assess because of the criterion problem. Criterion-related validity is usually assessed by examining concurrent validity and predictive validity (Messick, 1980). Predictive validity is impossible to assess fully because only defendants who are considered competent are allowed to proceed. It is feasible to look at the predictive validity of decisions about competent defendants, but not possible, of course, to assess the decisions about incompetent defendants, since they are referred for treatment and judicial proceedings are suspended. Concurrent validity is also difficult to determine because it does not make sense to look simply at correlations with other measures (e.g., diagnosis, intelligence) if one adopts a functional, case by case, assessment of a defendant's competency. For these reasons, then, there is no "correct" decision against which to compare judgments.

As we have indicated, the courts usually accept mental health judgments about competency. Does this mean that the judgments are valid? Not necessarily, since courts often accept the evaluator's definition of competency and his or her conclusions without review, leading to very high levels of examiner-judge agreement (Hart & Hare, 1992; Skeem et al., 1997). We have argued (Roesch & Golding, 1980) that the only ultimate way of assessing the validity of decisions about incompetency is to allow defendants who are believed to be incompetent to proceed with a trial anyway. This could be a provisional trial (on the Illinois model) in which

assessment of a defendant's performance could continue. If a defendant was unable to participate, then the trial could be stopped. If a verdict had already been reached and the defendant was convicted, the verdict could be set aside.

We suspect that in a significant percentage of trials alleged incompetent defendants will be able to participate. In addition to the obvious advantages to defendants, the use of a provisional trial could provide valuable information about what should be expected of a defendant in certain judicial proceedings (e.g., the ability to testify, identify witnesses, describe events, evaluate the testimony of other witnesses, etc.). Short of a provisional trial, it may be possible to address the validity issue by having independent experts evaluate the information provided by evaluators and other collateral information sources. We have used this technique in our research and will discuss this later in the chapter. In the next section, we will review various methods for assessing competency.

The Functional Evaluation Approach

We believe the most reasonable approach to the assessment of competency is based on a functional evaluation of a defendant's ability matched to the contextualized demands of the case. While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency. Rather, the mental status information must be related to the specific demands of the legal case, as has been suggested by legal decisions such as the ones involving amnesia. As in the case of psychosis, a defendant with amnesia is not per se incompetent to stand trial, as has been held in a number of cases (e.g., Ritchie v. Indiana, 1984; Wilson v. United States, 1968). In Missouri v. Davis (1983), the defendant had memory problems due to brain damage. Nevertheless, the Missouri Supreme Court held that amnesia by itself was not a sufficient reason to bar the trial of an otherwise competent defendant. In Montana v. Austed (1983), the court held that the bulk of the evidence against the defendant was physical and not affected by amnesia. Finally, in a Maryland decision (Morrow v. Maryland, 1982), the court held that, because of the potential for fraud, amnesia does not justify a finding of incompetence. The court also stated that everyone has amnesia to some degree since the passage of time erodes memory. These decisions are of interest because they support the view that evaluators cannot reach a finding of incompetency independent of the facts of the legal case--an issue we will return to later. Similarly, a defendant may be psychotic and still be found competent to stand trial if the symptoms do not impair the defendant's functional ability to consult with his or her attorney and otherwise rationally participate in the legal process.

Some cases are more complex than others and may, as a result, require different types of psycholegal abilities. Thus, it may be that the same defendant is competent for one type of legal proceeding but not for others. In certain cases, a defendant may be required to testify. In this instance, a defendant who is likely to withdraw in a catatonic like state may be incompetent. But the same defendant may be able to proceed if the attorney intends to plea bargain (the way in which the vast majority of all criminal cases are handled.)

The functional approach is illustrated in the famous amnesia case of Wilson v. United States (1968). In that decision, the Court of Appeals held that six factors should be considered in determining whether a defendant's amnesia impaired the ability to stand trial:

1. The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.

2. The extent to which the amnesia affected the defendant's ability to testify in his own behalf.

3. The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonable possible alibi.

4. The extent to which the Government assisted the defendant and his counsel in that reconstruction.

5. The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

6. Any other facts and circumstances which would indicate whether or not the defendant had a fair trial. (Wilson v. United States, 1968, pp. 463-464).

One could substitute any symptom for amnesia in the above quote. If this were done, the evaluation of competency would certainly be one based on a determination of the manner in which a defendant's incapacity may have an effect on the legal proceedings. In fact, some states, such as Florida (Florida Rules of Criminal Procedure 3.21(a)(1) see Winick, 1983) and Utah (1994), already specify that the evaluators must relate a defendant's mental condition to clearly defined legal factors, such as the defendant's appreciation of the charges, the range and nature of possible penalties, and capacity to disclose to attorney pertinent facts surrounding the alleged offense (see Winick, 1983). Utah's (1994) statute goes the furthest in this direction, specifying the most comprehensive range of psycholegal abilities to be addressed by evaluators (including the iatrogenic effects of medication and decisional competencies) and also requiring judges to identify specifically which psycholegal abilities are impaired when a defendant is found incompetent.

The assessment of competency requires consideration of both mental status as well as psycholegal abilities. Unfortunately, current data indicate that evaluators often do not address an appropriate range of psycholegal abilities and most often do not tie their psychopathological observations to their psycholegal conclusions (Skeem et al., 1997). We will now turn to a review of the history of competency assessment methods.

Measures of Competency

Prior to the 1960s, there were no standard methods for assessing competency. One of the first was a checklist developed by Robey (1965), which focuses on court process issues such as understanding of the legal process. Another early procedure used a checklist and a set of interview questions devised by Bukatman, Foy, and de Grazia (1971). Neither of these early measures was used often (Schreiber, 1978). By far, the greatest impact on competency

assessment came first from the seminal work of A. Louis McGarry and his colleagues at the Harvard Medical School's Laboratory of Community Psychiatry. McGarry, a psychiatrist, was involved in the development of two measures: the Competency Screening Test and the Competency Assessment Instrument. We will discuss these measures in addition to a number of other measures that have since been developed.

The Competency Screening Test.-The Competency Screening Test (CST) was created by Lipsitt et al. (1971) as a screening measure to identify clearly competent defendants and thus minimize the need for lengthy inpatient evaluations. Such a screening process was considered important because the vast majority of defendants referred for evaluations are competent. The reason is that many other factors influence referrals, including the use of the evaluation commitment as a method for denying bail, as a tactical maneuver to delay a trial, as a way of providing a basis for a reduction in charges or sentences, and as a means of getting defendants who are seen as in need of mental health treatment out of the jails and into the hospitals (Dickey, 1980; Golding, 1992; Menzies, Webster, Butler, & Turner, 1980; Roesch & Golding 1985; Teplin, 1984).

The CST, however, has not often been used as a screening device. Many evaluators have not chosen to use the CST because of various validity considerations. The scoring method has been criticized (Brakel, 1974; Roesch & Golding, 1980) because of its idealized perception of the criminal justice system; certain responses may actually reflect a sense of powerlessness in controlling one's outcome in the legal system and may be based on past experiences with the legal system.

The CST has been examined in a number of studies. While it has high levels of inter-rater reliability in terms of scoring the incomplete sentence format (Randolph, Hicks, and Mason, 1981) studies comparing classification based on CST cutoff scores and hospital evaluation decisions reveal that it has a high false positive rate, i.e., it tends to identify many individuals as incompetent who are later determined to be competent in hospital evaluations. (Lipsitt et al., 1971; Nottingham & Mattson, 1981; Randolph, 1981; Shatin, 1979).

The results of these studies lead one to give a mixed review of the CST. While it appears that the CST is a reliable instrument, serious questions can be raised about its usefulness as a screening device because of the potential for misclassifying possibly incompetent defendants. At this point, it is not possible to recommend that it be used as a sole method of screening defendants.

The Competency Assessment Instrument.-The most important measure developed by McGarry, the Competency Assessment Instrument (CAI), contains 13 items related to legal issues. It has served as the basis for the subsequent forensic assessment instruments. The items include "appraisal of available legal defenses," "quality of relating to attorney", and "capacity to disclose pertinent facts...". Each item is scored on a 1 to 5 scale, ranging from "total incapacity" to "no incapacity." The CAI manual contains clinical examples of levels of incapacity as well as suggested interview questions.

The CAI has been used in a number of jurisdictions, although perhaps more as an interview structuring device than in the two-stage screening manner (with the CST) as originally intended by McGarry (see Laben et al., 1977; Schreiber, 1978). Unfortunately, there are few studies

reporting either reliability or validity data. We used the CAI in a North Carolina study (Roesch & Golding, 1980). Thirty interviews conducted by pairs of interviewers yielded item percent agreement ranging from 68.8% to 96.7%, with a median of 81.2%. The interviewers were in agreement on the competency status of 29 of the 30 defendants (26 competent, 3 incompetent). The interviewers' decisions were in concordance with the more lengthy hospital evaluation decisions in 27 of 30 cases, or 90%. In subsequent studies (Golding et al., 1984; others summarized Nicholson & Kugler, 1991) the CAI has shown high levels of trained inter-examiner agreement and examiner-outcome agreement. Obviously the CAI appears to hold promise as a both a screening device and as a full-blown interview. Its primary disadvantage, relative to the IFI, IFI-R and FIT and FIT-R discussed below is in the range of psycholegal abilities articulated and its lack of focus on the nexus between psychopathology and psycholegal impairment.

The Interdisciplinary Fitness Interview. The IFI is designed to assess both the legal and psychopathological aspects of competency (Golding et al., 1984). The original IFI comprised three major sections: (a) legal issues (5 items); (b) psychopathological issues (11 items); and (c) overall evaluation (4 items). The three items in the consensual judgment section reflect post-assessment resolution of differences between judges.

Each of the general items represents an organizing scheme for more specific subareas that have been seen to influence competency decisions. For example, six subareas are subsumed under the broad "capacity to appreciate" which forms the core of item 1. These are (a) appreciating the nature of the state's criminal allegation; (b) ability to provide a reasonable account of one's behavior prior to, during, and subsequent to the alleged crime; (c) ability to provide an account of relevant others during the same time period; (d) ability to provide relevant information about one's own state of mind at the time of the alleged crime, including intentions, feelings, and cognitions; (e) ability to provide information about the behavior of the police during apprehension, arrest, and interrogation; and (f) projected ability to provide feedback to an attorney about the veracity of witness testimony during trial, if a trial is likely to be involved. Note, however, in line with the open-textured nature of the competency construct, that a complete enumeration is not possible; rather, an attempt is made to summarize the general "lay of the land," allowing for specifics to be a matter of personal judgment.

The IFI was designed so that evaluators would have to consider both legal and mental status issues, but neither in isolation. The format of the IFI requires evaluators to relate their observations to the specific demands of the legal situations. For each item, evaluators are asked to rate the degree of incapacity of the defendant, as well as to give the item a score to indicate the influence that the incapacity might have on the overall decision about competency. Thus, a defendant may receive a score indicating the presence of hallucinations (item 10) but receive a low weight score because the evaluator has determined that the presence of hallucinations would not have much effect on the conduct of the legal case. Another defendant with the same symptom may receive a high weight score because the hallucinations are considered to be more of a potential problem during the legal proceedings.

A training manual is available for use of the IFI has been developed as a guide for evaluators. For each item, the manual provides a set of suggested questions and follow-up probes and also gives clinical guidance for the handling of typical problems.

Golding et al. (1984) used the IFI in a study of pretrial defendants in the Boston area who were referred by court clinics to a state mental hospital for competency evaluation. They were interviewed by teams composed of a lawyer and either a psychologist or a social worker. While the interviews were conducted jointly, each evaluator independently completed the IFI rating form. The results demonstrated that judgments about competency can be made in a reliable manner by lawyers and mental health evaluators. They were in agreement on 97% of their final determinations of competency. By type of decision, the interviewers found 58 defendants to be competent, 17 incompetent, and disagreed on the remaining 2 cases.

The IFI has recently been revised (Golding, 1993) to reflect changes in constitutional law and the adoption by many states of "articulated" competency standards (e.g., Utah, 1994). In its current form, the Interdisciplinary Fitness Interview-Revised taps 31 relatively specific psycholegal abilities organized into 11 global domains. The IFI-R was developed on the original model used by Golding et al. (1984), but was altered to reflect a decade of experience, numerous court opinions and the accumulated professional literature on competency assessments. For example, it specifically addresses the issue of the iatrogenic effects of psychotropic medications (Riggins v. Nevada, 1992), a defendant's decisional competency to engage in rational choice about trial strategies, proceeding pro se or pleading guilty (see discussion of Godinez v. Moran, 1993, above) and competency to confess. It was developed to mirror Utah's (1994) new articulated competency code which mandates that examiners address its 11 global domains. While it has not yet been empirically studied, a revised and comprehensive training manual is available (Golding, 1993).

Golding et al. (1984) also commented on one of the research problems inherent in studies of competency assessment. Since most defendants are competent (77% in the above study), it is difficult to obtain a sufficiently large sample of incompetent defendants. It is clear to us that decisions about most defendants referred for competency evaluations are straightforward -- that is, they are competent to stand trial, a finding which is evident regardless of the method of assessment. The potential value of the IFI-R or other structured assessment methods, we believe, is in assessing defendants whose competency is truly questionable.

The Fitness Interview Test. The Fitness Interview Test (FIT; Roesch, Webster, & Eaves, 1984) was originally created in 1984 to assess fitness to stand trial in Canada. It has since been extensively revised and the current version is referred to as the Fitness Interview Test - Revised (FIT-R; Roesch, Webster, & Eaves, 1994). The FIT-R focuses on the psycholegal abilities of the individual. The scoring system has been changed to a 3-point scale, with a score of "0" meaning definite or serious impairment, "1" meaning possible or mild impairment, and "2" meaning no impairment. As well, the items on the FIT-R were developed to parallel the standards for fitness that were established in section 2 of the 1992 revision of the Criminal Code of Canada.

The FIT-R takes approximately 30 minutes to administer and consists of a structured interview which taps into three main areas: (a) the ability to understand the nature or object of the proceedings, or factual knowledge of criminal procedure, (b) the ability to understand the possible consequences of the proceedings, or the appreciation of personal involvement in and importance of the proceedings, and (c) the ability to communicate with counsel, or to participate in the defense. Each of these three sections is broken down into specific questions which tap into

different areas involved in fitness to stand trial. The first section assesses the defendant's understanding of the arrest process, the nature and severity of current charges, the role of key players, legal processes, pleas, and court procedure. The second section assesses the defendant's appreciation of the range and nature of possible penalties, appraisal of available legal defenses, and appraisal of likely outcome. The final section assesses the defendant's capacity to communicate facts to the lawyer, relate to the lawyer, plan legal strategy, engage in his or her own defense, challenge prosecution witnesses, testify relevantly, and manage courtroom behavior.

Recent research indicates that the FIT-R demonstrates excellent utility as a screening instrument (Zapf & Roesch, 1997). In this study, results of the FIT-R and an institution-based fitness assessment were compared for 57 defendants remanded to an inpatient psychiatric institution for an evaluation of fitness. The FIT-R correctly predicted fitness status (i.e., fit or unfit) for 49 of the 57 individuals. The remaining 8 individuals were judged to be unfit by the FIT-R and fit as a result of the inpatient assessment. This was to be expected as a screening instrument should overestimate the rate of unfitness without making any false negative errors. There was 100 % agreement between the FIT-R and the institution-based assessment for those individuals deemed fit to stand trial.

The Georgia Court Competency Test (GCCT). The Georgia Court Competency Test (GCCT) was originally developed by Wildman et al. (1978) and has since gone through a number of revisions (see Bagby, Nicholson, Rogers, & Nussbaum, 1992; Johnson & Mullet, 1987; Nicholson, Briggs, & Robertson, 1988; Wildman, White, & Brandenburg, 1990). The original version consisted of 17 items and the revised version, referred to as the Mississippi State Hospital Revision (GCCT-MSH) consists of 21 items. The first seven items of the GCCT-MSH require the defendant to visually identify the location of certain participants in the courtroom. This is then followed by questions related to the function of certain individuals in the courtroom, the charges that the defendant is facing, and his or her relationship with the lawyer.

Recent research on the GCCT-MSH has indicated that this instrument displays high levels of reliability and validity (Nicholson, Robertson, Johnson, & Jensen, 1988). Three factors have been identified by Nicholson et al. (1988): Courtroom Layout, General Legal Knowledge, and Specific Legal Knowledge. These same three factors were later replicated by Bagby et al. (1992). It was later suggested that this three factor solution may only be appropriate for defendants who have been ordered to undergo assessment at the pretrial stage (Ustad, Rogers, Sewell, & Guarnaccia, 1996). These researchers indicated that a two-factor solution (Legal Knowledge and Courtroom Layout) may be more appropriate for defendants who have been adjudicated incompetent and who are undergoing inpatient treatment to restore competence. The major drawback of the GCCT-MSH is that it focuses upon foundational competencies and relatively ignores the more important decisional competencies stressed in the IFI and FIT approaches (Bonnie, 1992).

The MacArthur Competence Assessment Tool - Criminal Adjudication. The MacArthur Competence Assessment Tool - Criminal Adjudication (MacCAT-CA; Bonnie, Hoge, Monahan, & Poythress, 1996) was developed as part of the MacArthur Network on Mental Health and the Law. This instrument is currently only being released for research purposes. It was developed

from a number of research instruments (see Hoge et al., 1997, for a complete discussion of its development) and assesses three main abilities: understanding, reasoning, and appreciation.

The MacCAT-CA consists of 22 items and takes approximately 30 minutes to administer. The basis of the items is a short story about two men who get into a fight and one is subsequently charged with a criminal offense. The first 8 items assess the individual's understanding of the legal system. Most of these items consist of two parts. The defendant's understanding is first assessed and, if it is unsatisfactory or appears to be questionable, the information is then disclosed to the defendant and his or her understanding is again assessed. This allows the evaluator to determine whether or not the individual is able to learn disclosed information. The next 8 items assess the individual's reasoning skills by asking which of two disclosed facts would be most relevant to the case. Finally, the last 6 items assess the individual's appreciation of his or her own circumstances. A large study is currently underway to determine national norms for the MacCAT-CA.

Other Specialized Assessment Instruments. In recent years, there has been a move toward the development of competence assessment instruments for specialized populations of defendants. We will not go into detail about these specialized instruments here but the reader should be aware that they exist. Everington (1990) has developed an instrument designed to assess competence with mentally retarded defendants called the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR) . Recent research on the CAST-MR has indicated that this instrument shows good reliability and validity (Everington & Dunn, 1995). Other researchers have focused their efforts on another special population--juvenile defendants (see Cooper, 1995; Cowden & McKee, 1995). Research in this area has indicated that there appears to be a negative correlation between age and competency status. That is, younger defendants are more likely to be found incompetent (Cooper, 1995; Cowden & McKee, 1995).

Guidelines for Evaluators

We conclude our chapter with a discussion of several issues to which an examiner must pay special attention when conducting an evaluation of competency (see generally, Committee on Ethical Guidelines for Psychologists, 1991). Even before seeing a defendant face to face, it is good clinical practice to speak with both the defense and prosecuting attorneys in order to determine as accurately as possible why the fitness issue was raised, what evidence was offered, and what sort of trial and dispositional alternatives are being considered by both sides.

All indications of prior mental health contacts should be pursued before the interview takes place, so that the examiner has as complete a set of mental health records as possible. Similarly, complete police reports of the alleged crime are necessary and a past criminal history record helpful, particularly if the defendant has cycled through the criminal justice and mental health systems several times. Obviously, if the defendant is an inpatient, observational records should be consulted, as well as all routine psychological test data. Finally, the examiner should maintain an accurate record of when, where, and how information about the defendant was made available, as well as a date and time record of all contacts with the defendant, attorneys, and other mental health professionals. These records are invaluable at later stages if legal tactics designed to confuse or mislead a witness are attempted.

Having prepared for an examination in this fashion, one can conduct an efficient and comprehensive interview in a short period of time. Most delays in conducting an evaluation and most time spent in an inpatient status can thus be avoided, and a more relevant examination conducted, if these steps are taken. Prior to the interview, the defendant should be fully informed about any limitations on the interview's confidentiality. The possibility of recording the interview should be discussed, although permission should also be obtained from the defendant's attorney.

The examiner should be aware of any aspects of the interview and the resulting report that are covered by statute or accepted practice within the jurisdiction. As an example of the former, some states require Miranda-like warnings that inform the defendant of the limitations of confidentiality that may apply. Similarly, other states dictate the form of the report to the court, and an examiner's report may be excluded if it does not comply with the required format.

In People v. Harris (1983), for example, a psychiatrist's report (that the defendant was competent) was excluded, and the defendant's subsequent conviction was reversed because the opinion was presented in conclusory terms and failed to give the clinical facts and reasons upon which it was based, thus precluding the trier of fact from independently assessing the weight to be given such an opinion. The current competency statutes in Illinois (as in Florida and Utah) are in many ways models of this developing trend. They require the examiner to address the facts upon which the conclusion is based, to explain how the conclusion was reached, to describe the defendant's mental and physical disabilities and how these impair the ability to understand the proceedings and assist in the defense, to discuss the likelihood that the defendant will respond to a specified course of treatment, and to explain procedures that would be employed to compensate for the defendant's disabilities, if any. We applaud this sort of specification and urge examiners to adopt the practice, even if it is not mandated in their own jurisdiction.

The conduct of a competency evaluation and the reports prepared for court should therefore be in complete accord with both the spirit and the letter of contemporary legal standards. The examiner must therefore be thoroughly acquainted with the legal literature and in some sense anticipate developments in one's practice. For example, Estelle v. Smith (1981) clearly prohibits the introduction of material obtained under court-ordered competency proceedings at a "critical" (guilt or sentencing) stage of trial. Many states mirror this in their statutes but nevertheless do not regulate the common practice of requesting competency and sanity evaluations at the same time, often resulting in a combined report. We believe this practice is unfortunate, and recommend that separate interviews, with distinct reports, be prepared. While a trier of fact is required to separate these issues, it is cognitively almost impossible to do so when the reports are combined. A defendant who is clearly psychotic and "legally insane" at the time of an assault may respond rapidly to treatment upon arrest and be just as non-psychotic and "legally fit" when actually examined. Caution and fairness dictate keeping the reports separate so that the two issues can be considered independently by the courts.

Conclusions

This chapter touches upon only a small selection of the vast amount of research and writing on competence to stand trial. The purpose of this chapter was only to give a brief overview of competency law, research, and assessment. For a comprehensive review of the recent empirical

research on competence to stand trial, the reader is referred to Grisso (1992) and Cooper and Grisso (1996). These authors review the research on the evaluation of competence in two 5-year intervals (1986-1990 and 1991-1995). As well, Nicholson and Kugler (1991) conducted a meta-analysis using 30 studies and over 8000 defendants that provides a quantitative review of the comparative research on competence. These references as well as those listed in the introductory paragraph of this chapter will provide the reader with a more in-depth understanding of competency to stand trial.

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