PART 1

CRIMINAL MATTERS

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CHAPTER 1

Competence to Stand Trial

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INTRODUCTION

Competence to stand trial has long been recognized as ''the most significant mental health inquiry pursued in the system of criminal law'' (Stone, 1975, p. 200), reflecting both the prevalence of court-ordered competency evaluations, and the concern regarding trial competence reflected in the body of case law on this subject.

Hoge, Bonnie, Poythress, and Monahan (1992) estimated that pretrial competence evaluations are sought in 2% to 8% of all felony cases. LaFortune and Nicholson (1995) reported that judges and attorneys estimate that competency is a legitimate issue in approximately 5% of criminal cases, although only two-thirds of these defendants whose competency is questionable are actually referred for formal competency evaluations. Stafford and Wygant (2005) found that nearly all defendants referred for competency evaluation by a mental health court in misdemeanor cases were found incompetent to proceed, and remained incompetent after 60 days of hospitalization.

Trial Competence Defined

The Supreme Court of the United States, in *Dusky v. U.S.* (1960), established the minimal constitutional standard for competency to stand trial as whether the defendant ''has sufficient present ability to consult with his lawyer with a reasonable degree of rational

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understanding—and whether he has a rational as well as factual understanding of the proceedings against him'' (p. 789).

In the case of *Wieter v. Settle* (1961), the Court outlined functional criteria for competence, noting that mental illness does not necessarily mean that a defendant lacks the mental faculties required to stand trial. According to *Wieter*, defendants should have the mental capacity:

1. To appreciate their presence in relation to time, place, and things.
2. To appreciate that they are in a court of justice, charged with a criminal offense, with a judge on the bench, a prosecutor who will try to convict them of a criminal charge, and a lawyer who will undertake to defend them against that charge.
3. To appreciate that they will be expected to tell their lawyer to the best of their mental ability the circumstances, the facts surrounding them at the time and place where the offense is alleged to have been committed.
4. To appreciate that there is, or will be, a jury present to pass upon evidence adduced as to their guilt or innocence.
5. For memory sufficient to relate those things in their own personal manner. (pp. 321–322)

BASIS FOR RAISING THE ISSUE OF COMPETENCE

In *Pate v. Robinson* (1966), the Supreme Court of the United States held that a trial judge must raise the issue of competency if either the court's own evidence, or that presented by the prosecution or defense, raises a ''bona fide doubt'' about the defendant's competency. In *Drope v. Missouri* (1975), the Court clarified that evidence of the defendant's irrational behavior, demeanor at trial, and any prior medical opinion on competence to stand trial are relevant to determine whether further inquiry is required during the course of the proceedings.

AMNESIA AND COMPETENCE

In *Wilson v. U.S.* (1968), a federal appellate court upheld the conviction of a man who had sustained head injuries in the course of a

high-speed chase by police and was therefore amnesic for the offenses. However, the court remanded the case for more extensive posttrial findings on the issue of whether amnesia deprived the defendant of a fair trial and effective assistance of counsel. Six factors were articulated to assist the trial court in determining whether the fairness and accuracy of the proceedings had been compromised and the conviction should be vacated:

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 reasonably possible alibi).
4. The extent to which the prosecution assisted the defendant and his counsel in that reconstruction.
5. The strength of the prosecution's case.
6. Any other facts and circumstances that would indicate whether or not the defendant had a fair trial. (pp. 463–464)

Competence to Plead Guilty

Over 90% of criminal cases in the United States are resolved by pleas of guilty, often the result of plea bargaining. The competency of defendants to plead guilty involves the waiver of the right to a jury trial, of the right to confront one's accusers, and of the privilege against self-incrimination. The majority of the circuits have concluded that the standard of incompetence to plead is the same as that of incompetence to stand trial (*Allard v. Hedgemoe*, 1978). The *Allard* court agreed that the waiver of rights and the plea of guilty need to be closely examined, but suggested that the capacity to make such decisions be considered part of the *Dusky* standard.

In an earlier decision (*North Carolina v. Alford*, 1970), the Supreme Court of the United States had ruled in a capital case that defendants may waive their right to trial and plead guilty even if they deny their guilt. The court focused on the logic of the defendant's reasoning in choosing to plead guilty to a murder he stated he did not commit.

COMPETENCE TO REFUSE THE INSANITY DEFENSE

The prevailing view by federal appeals courts is that a trial judge may not impose a defense of insanity over the defendant's objections if a competent defendant intelligently and voluntarily decides to forgo a defense of insanity (*Frendak v. U.S.*, 1979). An earlier case, *Whalem v. U.S.* (1965), did provide that a trial judge may impose an insanity defense when the defense would be likely to succeed, but it was overturned by *U.S. v. Marble* (1991) and is not followed in most jurisdictions. If it appears that competency to waive an insanity defense may be an issue in a given case, it is prudent for the evaluator to address it as part of the trial competency evaluation.

COMPETENCE TO WAIVE COUNSEL

The Supreme Court of the United States ruled in *Westbrook v. Arizona* (1966) that a competency to stand trial hearing was not sufficient to determine competence to waive constitutional rights to the assistance of counsel and to conduct one's own defense. In *Faretta v. California* (1975), the Court noted that waiver of counsel must be knowing and intelligent, but that defendants' ability to represent themselves has no bearing on their competence to choose self-representation. In *Godinez v. Moran* (1993), the Court held that the competency standard for pleading guilty or waiving the right to counsel is the same as the *Dusky* standard for competency to stand trial, reasoning that ''the defendant has to make a number of complicated decisions during the course of a trial, and that a trial court must in addition satisfy itself that the waiver of his constitutional rights is knowing and voluntary. . . . In this sense, there *is* a heightened standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*'' (pp. 400–401).

The concurring opinion in *Godinez* suggests that the *Dusky* competence standard should not be viewed too narrowly, as a defendant must be competent throughout the proceedings, from arraignment to pleading, trial, conviction, and sentencing, and whenever the defendant must make a variety of decisions during the course of the proceedings. In this regard, Melton et al. (2007) noted that to ensure that defendants are competent to stand trial, it is important to ask every defendant about his or her understanding of the rights that are waived by a plea of guilty.

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In *Indiana v. Edwards* (2008), the Court considered the issue of competence to waive counsel in the case of a mentally ill defendant who intended to represent himself at trial, rather than to plead guilty. Mr. Edwards disagreed with counsel's defense strategy, lack of intent, and instead wished to claim self-defense. The Court ruled that the Constitution does not preclude states from adopting a higher standard for competency to waive counsel than for competency to stand trial. For the examiner conducting competency evaluations, this finding implies that the capacity to waive counsel, as well as the capacity to make decisions about trial strategy, is a consideration in conducting a competency evaluation in such cases. Input from defense counsel, always important in conducting competency evaluations, would be critical in terms of understanding the basis of the defendant's preferences. Morris and Frierson (2008) articulate the challenge of addressing the individual's unique abilities and limitations without addressing legal abilities or points of law beyond the experience of most forensic psychologists and psychiatrists.

Decisional Competence

In *U.S. v. Duhon* (2000), a federal district court emphasized the ability to make decisions in rejecting the opinion of hospital forensic examiners that a mentally retarded defendant was competent to stand trial. The court ruled that the defendant's factual understanding of the proceedings, after hospital staff taught him to memorize and retain some information, was insufficient. Rather, the defendant lacked the ability to consult with an attorney with a reasonable degree of rational understanding, to otherwise assist in his defense, and to have a rational understanding of the proceedings.

The Standard of Proof

In *Cooper v. Oklahoma* (1996), the Supreme Court of the United States ruled unanimously that Oklahoma, in imposing the higher standard of clear and convincing evidence for a defendant to prove incompetence (rather than the lower standard of preponderance of the evidence) violated due process by allowing "the State to put to trial a defendant who is more likely than not incompetent" (p. 369). The Court termed the consequences of an erroneous competency

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determination *dire,* impinging on the defendant's right to a fair trial. In contrast, the consequence to the state of an erroneous finding of incompetence when a defendant is malingering was termed *modest,* as it is unlikely that even an accomplished malingerer could ''feign incompetence successfully for a period of time while under professional care'' (p. 365). The Court added that ''the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system'' (p. 367).

LENGTH OF TREATMENT FOR INCOMPETENCE TO STAND TRIAL

In *Jackson v. Indiana* (1972), regarding a hearing-impaired defendant who could not speak, and whom treatment staff did not believe would ever learn the communication skills necessary to stand trial, the Supreme Court of the United States ruled that incompetent defendants can be hospitalized only for the ''reasonable'' period of time necessary to determine whether there is a substantial probability that competency can be attained in the foreseeable future. The Court held that continued commitment could be justified only on the basis of progress toward the goal of competency restoration. Otherwise, the alternatives would be release of the defendant or initiation of civil commitment proceedings.

Similarly, in the above-referenced *U.S. v. Duhon* (2000), a federal district court ordered the release of a mentally retarded defendant who was not dangerous to any persons or property and would never achieve trial competency.

INVOLUNTARY MEDICATION

The issue of involuntary medication of defendants during trial was addressed by a federal appellate court in *U.S. v. Charters* (1987). In this case, the court held that forced administration of psychotropic medication to an incompetent defendant requires a separate judicial decision, using the substituted judgment/best interests standard. One year later, the court endorsed a reasonable professional judgment standard with the availability of judicial review (*U.S. v. Charters*, 1988). The *Charters* cases were not appealed to the Supreme Court of the United States in light of the Court's 1990

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decision in *Washington v. Harper* (1990). In this prison case, the Court held that the reasonable professional judgment review of involuntary medication in the treatment of prisoners was constitutional.

In *Riggins v. Nevada* (1992), the Supreme Court considered the issue of involuntary administration of psychotropic medication of pretrial detainees. The trial court had found Riggins competent and denied his motion to suspend administration of psychotropic medication during his murder trial in order to show the jurors his true mental state as part of his insanity defense. He was subsequently convicted and sentenced to death. Riggins argued that involuntary medication had infringed on his freedom, and that the effects on his mental state during trial denied him due process in presenting his insanity defense. The Court reversed Riggins's conviction and extended the *Washington v. Harper* (1990) ruling on the right to refuse medication to pretrial detainees, absent an ''overriding justification and a determination of medical appropriateness'' (p. 135). Once the defendant stated that he wanted his medication discontinued, the state had to ''establish the need for Mellaril and the medical appropriateness of the drug,'' which could have been established by showing that the medication was essential for the defendant's safety or the safety of others, or that the state could not obtain an adjudication of ''guilt or innocence by using less intrusive means'' (p. 135).

In *Sell v. U.S.* (2003), the Court ruled that before ordering forced medication to restore competence, trial courts must find that important governmental interests are at stake in bringing the defendant to trial; that the proposed medication would be substantially likely to render the defendant competent without causing side effects that would interfere with his ability to work with his attorney; that involuntary medication is necessary to further governmental interests and that alternative, less intrusive treatments are unlikely to restore the defendant's competence; and that the proposed involuntary medication is in the patient's best medical interest in light of his medical condition.

PREPARATION

Doubts about competency to stand trial may be raised by defense or prosecution, or by the court on its own motion. Psychologists and psychiatrists generally conduct competency evaluations upon the

order of the court, whether the defense, prosecution, or the court itself raises the issue. However, defense counsel may also retain an examiner to conduct a competency evaluation under attorney–client privilege. Defense counsel would generally disclose the results of this consultative evaluation only if they raise or support concerns about the defendant's competency. The ultimate finding of competence or incompetence to stand trial is always made by the court.

There are a number of steps to take in preparing for, and conducting, a trial competency evaluation. Throughout the process, ethical issues specific to forensic practice are likely to surface. Although the steps enumerated here consider these issues, it is recommended that the examiner refer to relevant practice guidelines and ethical standards, listed in the reference section, for guidance when specific issues arise.

In response to a referral for evaluation of competence to stand trial, we recommend that the psychologist or psychiatrist:

- Consider whether he or she has relevant training and expertise to conduct the evaluation.
- Determine whether this particular case raises any ethical issues, such as multiple relationships with the defendant, the referring party, the court, or the victim, that would preclude objective involvement in the matter.
- Review the relevant case law regarding competence to stand trial.
- Review the competency standard for the jurisdiction in which the case is to be heard.
- Establish the source of the referral—defense attorney, or the court upon its own motion or upon the motion of defense or prosecution—through either a retainer letter by counsel or a court order to conduct the evaluation.
- Clarify how and to whom the results of the evaluation are to be communicated.
- Ask the referral source to describe any specific concerns or doubts about the defendant's competence regarding the case at issue.
- Ask defense counsel what is likely to be required of the defendant in order to assist counsel in this case (occasionally, inclusion

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of the attorney in part of the evaluation may be helpful in observing or understanding the defendant's difficulty in assisting counsel).

- Review relevant court case information, such as the complaint or indictment, the definition and potential sentence of the charges, and criminal investigation reports of the alleged offenses, obtained from defense counsel, the prosecutor, or the court.
- Consider whether it would be appropriate or disruptive to include a third-party observer in the evaluation, such as defense counsel, or psychiatry residents or psychology interns.
- Weigh the advantages and disadvantages of recording the evaluation (if psychological testing is to be administered, taping might be discontinued at that point of the evaluation to avoid deviation from standard administration and test security problems).
- Ensure that the evaluation can be scheduled in a quiet setting, relatively free of distractions, for an adequate period of time (this can be a challenge when the defendant must be seen in a jail or detention facility).

In preparing to conduct the competency evaluation, the issue of third-party observers is sometimes raised. Evaluations are often completed in settings that provide training to psychology or psychiatry interns, residents, or fellows. Although this is standard professional practice, the impact of a second professional on the forensic assessment of defendants must be considered, particularly with defendants who are overly anxious, suspicious, or delusional.

Defense counsel might be involved at the beginning of the assessment, to inform the defendant of the purpose of the evaluation and encourage cooperation, or to illustrate the difficulty he or she is having in working with the defendant, but the presence of defense counsel throughout a competency evaluation is not standard practice. Guidelines for dealing with the presence of third party observers are provided by sources that also raise concerns about test validity and security when nonclinical observers wish to be present (American Academy of Clinical Neuropsychology, 2001; Committee on Psychological Tests and Assessment, 2007; National Academy of Neuropsychology, 2000).

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DATA COLLECTION

GENERAL STEPS FOR PROCEEDING

There are general, comprehensive references regarding competency to stand trial, as well as recent, detailed guidelines published for conducting competency to stand trial evaluations, by both psychologists (Stafford, 2003; Zapf & Roesch, 2009) and psychiatrists (Miller, 2004; Mossman et al., 2007). The following steps reflect general professional consensus on conducting a competency evaluation:

1. Provide the defendant a verbal and written explanation of the purpose of the evaluation, and how and to whom the results will be communicated, at a level the defendant is likely to understand.
2. Seek the defendant's verbal and written assent or consent to the evaluation.
3. Conduct a targeted clinical interview of the defendant, including relevant history and a structured mental status examination.
4. Administer psychological tests, as needed, to assess for intellectual functioning, literacy, neurocognitive deficits, psychopathology, and malingering.
5. Use structured competency assessment instruments when appropriate.
6. Review relevant third-party information, such as school, employment, and military records; medical and mental health treatment records; and legal history, witness statements, and investigation of the alleged offenses.
7. Interview third parties, if necessary, to clarify history and level of functioning.

THIRD-PARTY INFORMATION

Interviews of third parties, written documents, computer records, laboratory data, and multimedia information are often obtained in the process of investigating and prosecuting offenses. The indictment and court docket of events in cases are increasingly available online in many jurisdictions. Criminal investigation materials can sometimes be obtained through access to the prosecutor's file, or through information provided by the prosecutor to the defense attorney in the process of discovery. Access to such information is

helpful in determining whether defendants understand the basis for the charges and how realistic they are in appraising the strength of the case and the attorney's defense options.

Input from the defense attorney, who generally raises the issue of competency to stand trial, is essential in understanding counsel's concerns about the defendant's competence, counsel's experience in meeting with the defendant (including time spent in a private setting), and what the defendant needs to be able to do so that the attorney can resolve the case in a reasonable fashion. Grisso (2002) lists potential case-related demands that could be reviewed with defense counsel. Zapf and Roesch (2009) provide a questionnaire that may be sent to an attorney to complete, or used as an interview guide, to determine the attorney's specific concerns about the defendant's competency. These guides do not include questions about the quantity and quality of time the attorney has been able to spend with the defendant, often a critical factor in serious cases and with defendants who are suspicious or distressed or have other emotional or cognitive limitations.

Educational and treatment records, interviews with family members and treatment providers, and behavioral observations by correctional staff are often helpful in identifying factors that could affect competency to stand trial. This information can help to clarify issues of malingering, versus genuine symptoms or impairment, in considering ability to proceed. For individuals with a major mental disorder, information about the defendant's current access to, and compliance with, psychotropic medications and therapeutic support is important in determining whether the defendant is likely to remain stable enough over the course of the proceedings to resolve the case in a reasonable manner, or whether the defendant's mental state is precarious and likely to deteriorate with the stress of court proceedings.

The forensic clinician must ultimately consider the reliability and objectivity of third-party information in determining the weight it is accorded in assessment of trial competency. When the clinician personally conducts interviews of third parties, the clinician's role and purpose in seeking the information, and the potential for the disclosure of the information and its source in a report or testimony, must be conveyed to the third party at the outset of the contact. Heilbrun, Warren, and Picarello (2003) address the use of third-party information in forensic assessment in greater detail.

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COMPETENCE ASSESSMENT INSTRUMENTS

Several instruments have been developed for the purpose of structuring and informing trial competence evaluations.

- *Competency Screening Test (CST).* The CST (Laboratory of Community Psychiatry, 1973) employs hypothetical situations in a sentence completion format to identify defendants who might require a fuller, hospital-based competency evaluation. However, studies of the CST found problems in terms of classification accuracy and utility (Nicholson, Robertson, Johnson, & Jensen, 1988; Roesch & Golding, 1980). The last major research published on the CST (Bagby, Nicholson, Rogers, and Nussbaum, 1992) found that there was little stability in factor structure across studies for the CST, making it difficult to determine just what aspects of competency this instrument measures.
- *Competency to Stand Trial Assessment Instrument (CAI).* The CAI, a rating scale of 13 functions derived from the legal literature and clinical/courtroom experience, has generally been used as an interview guide rather than as a psychometric instrument (Schreiber, 1978). Studies indicated high levels of interrater reliability among trained examiners (0.87 to 0.90) and significant correlations between competency status and CAI ratings (Nicholson & Kugler, 1991). Like the CST, this instrument served an important function in training mental health professionals about the concept of competency to stand trial, but is infrequently used now, as other measures have been developed to reflect changes in case law about decisional competence.
- *Interdisciplinary Fitness Interview (IFI).* Golding, Roesch, and Schreiber (1984) developed the IFI to assess symptoms of psychopathology and assess understanding of legal concepts/functions through a structured, joint interview by a psychologist and a lawyer. The potential strength of the instrument lies in its attempt to assess the defendant's functioning in the context of the anticipated demands of his or her particular legal situation. Preliminary data found 95% agreement among the IFI interviewers on opinions regarding competence, and substantial interrater reliability on most of the psychopathology items. Golding (1993) updated the instrument

(Interdisciplinary Fitness Interview—Revised [IFI-R]) in the context of new case law, and a study of competency reports (Skeem, Golding, Cohn, & Berge, 1998). Empirical studies of the IFI-R have not been published. The IFI-R is a promising interview guide that tailors the assessment to the individual case, ensures lawyer input, and highlights the connection between psychopathology and psycholegal impairment.

- *Georgia Court Competency Test (GCCT).* The GCCT (Wildman et al., 1978) is a screening instrument that uses a courtroom drawing as a reference point for 12 questions about the physical positions and functional roles of court participants in a trial. It also consists of five questions about the defendant's charge(s) and defense. Nicholson et al. (1988) created the Mississippi State Hospital version (GCCT–MSH) by adding four questions about knowledge of courtroom proceedings and changing the weights of some items. They reported excellent interscorer reliability ($r = -0.95$) and classification accuracy of 81.8%. The false-positive rate was high, in that 67.7% of individuals rated as incompetent by the test were considered competent by a hospital evaluation, but the false-negative rate was low, as 3.8% of defendants considered competent by the test were evaluated as incompetent at the hospital. Nicholson and Johnson (1991) found that the GCCT or GCCT-MSH was the strongest predictor of competency decisions on an inpatient unit, and that the GCCT did not correlate highly with diagnosis. A factor analytic study (Bagby et al., 1992) confirmed the finding of Nicholson et al. that the GCCT-MSH yielded stable, independent factors: general knowledge, courtroom layout, and specific legal knowledge. This screening instrument does not address ability to make decisions in consultation with counsel, and to assist in one's defense.
- *Fitness Interview Test (FIT).* Roesch, Webster, and Eaves (1984) developed the FIT, a Canadian interview schedule focused on legal issues and assessment of psychopathology. McDonald, Nussbaum, and Bagby (1991) reported a high degree of correspondence between FIT ratings and legal decisions about competence, but the legal decisions were made with knowledge of the FIT ratings. Bagby et al. (1992) found that factor analyses of the FIT legal items failed to yield a stable factor structure

across samples, most likely due to the uniformity of item content. The Fitness Interview Test—Revised (FIT-R) was subsequently developed for use in both Canada (Roesch, Zapf, Eaves & Webster, 1998) and the United States (Roesch, Zapf & Eaves, 2006) as a screening instrument that focuses on legal issues. The authors recommend its use in conjunction with a structured clinical interview of psychopathology, such as the Brief Psychiatric Rating Scale (Overall & Gorham, 1962) or the Structured Clinical Interview for DSM-III-R, Patient Edition (Spitzer, Williams, Gibbons, & First, 1990). They report that the FIT-R is a promising screening measure to determine whether an inpatient competency evaluation is required (Zapf, Roesch & Viljoen, 2001). However, in jurisdictions where thorough competency evaluations are routinely completed outside of a hospital setting, the utility of a screening measure is limited.

- *Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR).* The CAST-MR (Everington & Luckasson, 1992) consists of three scales developed to assist in evaluation of competency to stand trial of mentally retarded defendants, including Basic Legal Concepts (multiple-choice items addressing essential courtroom notions); Skills to Assist Defense (multiple-choice items about hypothetical situations the defendant may face in working with his or her attorney); and Understanding Case Events (open-ended questions tapping understanding of aspects of case events in his or her own court case). Everington, Notario-Smull, and Horton (2007) instructed adjudicated criminal defendants with mental retardation to try to pretend that they did not know the answers to the CAST-MR, even though they did. These persons scored significantly lower than mentally retarded individuals who took the test under standard instructions. The authors maintained that these results demonstrated that defendants with mental retardation are able to lower their scores when told to do so; however, such results do not establish that these defendants would malinger under standard instructions, as mentally retarded individuals tend to be acquiescent and strive to do their best under standard instructions on most tasks.
- *MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA).* The MacCAT-CA (Otto et al., 1998) is an

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abbreviated, clinical version of a more extensive research instrument designed to assess distinct competence-related abilities, rather than merely current knowledge. It attempts to measure the ability to *understand* information related to law and adjudicatory proceedings, and the ability to *reason* about specific choices that confront a defendant in the course of adjudication. The Understanding and the Reasoning scales each contain eight items that are based on a hypothetical legal scenario. The Appreciation scale taps the ability to *appreciate* the meaning and consequences of the proceedings in the defendant's own case, through six items that refer to the specific legal situation. The authors noted that the MacCAT-CA does not include measures of response set, that the possibility of malingering needs to be assessed through other methods, and that the MacCAT-CA should be employed in the context of a comprehensive competency evaluation.

- *Evaluation of Competency to Stand Trial—Revised (ECST-R).* Rogers, Tillbrook, and Sewell (2004) developed the ECST-R to assess aspects of the *Dusky* standard in the defendant's own case, and to assess feigned incompetency in a standardized manner. The ECST-R contains scales tapping Factual Understanding of the Courtroom Proceedings, and Overall Rational Ability (combined measures of Rational Understanding of the Courtroom Proceedings, and Consult With Counsel). The ECST-R also contains a measure of response style comprised of items tapping realistic, psychotic and nonpsychotic, and impairment types of items. The scales are reported to have high internal consistency and interrater reliability. It is a promising guide to systematically assessing competency to stand trial.

Other Psychological Tests

Psychological tests that assess cognitive abilities, psychopathology, and/or malingering provide measures relevant to considering actual lack of *capacity* to understand and participate in court proceedings, when defendants appear to have *functional* deficits on the face valid measures of understanding the proceedings or assisting counsel in their defense. They may also be useful in assuring the judge, attorney, and prosecutor that defendants' histories of mental disorder

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have been carefully considered in nevertheless reaching the opinion that they are able to proceed, particularly in serious cases.

DATA INTERPRETATION

The process of data interpretation involves integration of multiple sources of data. These include information regarding legal concerns about the defendant's competence; the likely demands of the case, defense strategy, and the attorney–client relationship; third-party information from legal and mental health records; mental status and behavioral observations; structured assessment of relevant aspects of trial competency through interview and assessment instruments; targeted psychological testing; and consideration of treatment needs and current response to medication.

Experienced examiners often note that, particularly in complex or serious cases, or with defendants who have limitations, they are not sure of their opinion regarding competency until all of this information is summarized in a report, the strength of converging and diverging sources of information is weighed, inconsistencies are noted and resolved, and a thoughtful opinion is reached. Opinions in complex cases may often include conditions, noting, for example, the need for a possible updated evaluation should a mentally ill defendant's condition deteriorate, or treatment is refused, prior to resolution of the proceedings, or for defense counsel to be afforded extra time and a private space to work with the defendant in preparing for court.

COMMUNICATION

Reports and testimony regarding trial competency should convey, to the extent relevant in a particular case, the following components:

- Disclosure to the defendant of the purpose and limited confidentiality of the evaluation.
- Legal criteria for competence to stand trial in the jurisdiction in question.
- Consideration of the demands of the defendant's own case and other input from defense counsel.
- The defendant's appreciation of the charges and proceedings.

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- Discussion of decisional abilities, particularly the waiver of constitutional rights, such as the right to counsel, the right to a jury trial, the right to testify, and implications of a guilty plea, given the prevalence of resolution of criminal cases through plea bargaining.
- Documentation of other decisional capacities that were directly assessed, such as the ability to make a knowing and intelligent decision about the insanity defense, and the level of ability the defendant displayed in considering those specific decisions.
- Results of competency assessment instruments, if used, and their implications for this defendant and his or her case.
- A summary of relevant treatment, educational, and other third-party information.
- Discussion of psychological test results in terms of malingering and indications of mental conditions that could impair the defendant's psycholegal functioning.
- Substantiation of diagnosis, including the possibility of malingering.
- The linkage between any psycholegal deficits and symptoms of psychopathology or cognitive impairment.
- Discussion of medication issues, such as need for medication, the defendant's compliance, the effect of the medication on the defendant's demeanor and awareness, and changes in mental state from his or her mental state at the time of the offense as the result of treatment with psychotropic medication.

Because the forensic psychologist or psychiatrist provides an expert opinion and does not make the ultimate decision about trial competency, it is essential to provide elucidated reasoning in support of forensic conclusions. Reports and testimony should provide an accurate and understandable presentation of the defendant's psychopathology, specific psycholegal abilities and impairments, and the relationship, if any, between psychopathology and competence deficits. Experts should integrate information from multiple sources and include the facts and reasoning underlying the opinion in detail sufficient for the court to understand the basis for the opinion and to make an independent finding. They must also be prepared to answer questions about the opinion through testimony in a straightforward, factual, and understandable manner.

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