



Competence to Stand Trial


Defense Use of Experts

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*Poor Psychology
Produces Poor Law,*
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16, No. 2, 233 (1992)

Both Psychology and Law are concerned with human behavior. Law depends on what everyone knows and believes about human behavior, upon common knowledge. In contrast, psychology distrusts common knowledge and substitutes knowledge based on empirical data systematically gathered and rationally analyzed. This conflict may cause misunderstanding between law and psychology.



When one doubts a client's Mental Capacity to Understand the Charges and/or Legal Process.

- o Penal Code Section 1368 et seq
- ❖ Law: If as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of the defense in a rational manner. Penal Code Section 1367 (a).

● ● ● | **Competence: Determination to be Made**

- The ability to consult with his/her attorney and understand trial proceedings:
 - Three essential elements:
 - Understand the nature and purpose of the proceedings;
 - Comprehend his or her own status and condition in reference to such proceedings and
 - Assist his or her attorney in conducting the defense

● ● ● | **Ability to Assist Counsel; the ability to consult with his/her lawyer and understand trial proceedings:**

- The ability to communicate pertinent information to counsel concerning the facts of the case
 - Understanding information relevant to the specific decision
 - Thinking rationally about alternative courses of action
 - Appreciating one's situation as a defendant confronted with a specific legal decision
 - Expressing a choice among alternatives

● ● ● | **Cases**

- Dusky v. U.S. (1960) 362 U.S. 402
- Pate v. Robinson (1966) 383 U.S. 375
- Drope v. Missouri (1975) 420 U.S. 162, 171
- Godinez v. Moran (1993) 509 U.S. 389
- Medina v. California (1992) 505 U.S. 437
- Cooper v. Oklahoma (1996) 517 U.S. 348

● ● ● | Role of Defense Counsel

- Strickland v. Washington (1984) 466 U.S. 668
- Wiggins v. Smith (2003) 539 U.S. 510
- People v. Pope (1979) 23 Cal3d 412
- People v. Corona (1978) 80 CalApp3d 684
- In re Saunders (1970) 2 Cal3d 1033
- U.S. v. Duhon (2000) 104 FSupp2d 663;

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- **Common Misconceptions:**
 - Stubborn
 - Manipulative
 - Inflexible
 - Difficult
 - In denial/ willful suppressions of knowledge
- **Do Not Expect:**
 - Gratitude
 - Compliance
 - Receptiveness
- **Expect:**
 - Frustration
 - Cynicism
 - suspiciousness

● ● ● | Recognition: what to look for

<ul style="list-style-type: none"> ○ The offense: <ul style="list-style-type: none"> ● Intoxication ● Bizarre behavior (wits, cops, client) ● Physical appearance (disheveled) ● Statements (wits, family) 	<ul style="list-style-type: none"> ○ Incarceration: <ul style="list-style-type: none"> ● Withdrawal symptoms ● Medicated ● Intervention by jail staff ● Suicide or mutilation attempts ● Behavior ● Physical restraints
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● ● ● | Recognition

- Interview with Client
 - History
 - Appearance
 - Motor activity
 - Reality testing/ comprehension
 - Speech characteristics
 - Mood and Affect
 - Memory/ concentration
- Interaction with you
 - Combative
 - compliant
- A word about Malingering

● ● ● | **MALINGERING**

- Tests may or may not validly test or infer malingering (effort vs. malinger)
- MMPI-II validity scales (cultural issues)
- Tests of Memory Functioning
 - Wechsler Memory Scale – Revised (WMS; WMS-R)
- Test of Memory & Malingering (TOMM); Validity Indicator Profile (VIP); Rey 15 Item Test
- Don't let perceived effort, or lack, be determinative

● ● ● | **MALINGERING**

- Every evaluation must explicitly address response style (effort)
 - Malingering
 - Defensiveness
- Mental Health Professional must be able to document validity of results for the trier of fact
- Assertion of malingering often dispositive (although often not valid)

MALINGERING
(Thanks to James Sullivan, Ph.D.)

- o Malingering and authentic impairment are NOT mutually exclusive (Rogers 2005)
 - Especially cognitive impairment
- o Malingering is NOT more likely in individuals with ASP (Rodgers 1997)
- o People are NOT good lie detectors
 - Studies show MHP's, lawyers, law enforcement are unable to identify deception at better than a chance rate (coin flip)

MALINGERING

- o Professional experience is NOT correlated with accuracy of clinical judgment (Dawes 1989)
 - "Based on my years of experience . . ."
 - Knowledge often outdated because they do not stay current
- o Actuarial approaches to detection of malingering are considered vastly superior to clinical or intuitional approaches (Faust, et al, 1991)

MALINGERING

- o Administration of multiple formal and valid measures of malingering
- o Assess feigning of cognitive and mental disorders each session
- o Record review to substantiate defendant report(s) (needs to be in MHP's report)
- o Both attorney and MHP discuss with defendant openly



WHAT TO DO: A PRIMER

- Research the literature on the tests
- What is it designed to measure; how well does it do so (reliability; validity)
- Who is it designed to assess (normed population)
- Consider a consulting expert, even before you seek an expert for evaluation purposes
- Alternative experts – psychometricians; literature researcher



MMPI-II

- Prosecutors love to back door this test!
- Current Edition
- Administration methodology and requirements (e.g. 6th to 8th grade reading level; conditions; never leave test; no reading it)
- Short form norms insufficient
- Computer generated reports
- Normed population (minority; culture)



Axis I vs. Axis II

- The State tries to put symptoms into Axis II - - conditions that sound dangerous and with difficulty of treating.
- The defense will try to put an Axis II diagnosis into Axis I – this is a mental disorder not a personality disorder.



Issue of Diagnosis of APD

- Did the evaluator rule out other explanations for the client's behavior?
- Was the DSM used like a checklist or cookbook?
- Was there a bias to diagnose under a particular Axis?
- Were reasons for certain patterns of behavior reviewed?



What the Defense Must Do

- Properly identify the mental health issues
- Challenge faulty state diagnosis
- Properly relate conditions to competence
- Recognize the client's humanity
- Put the client's actions and abilities in context with a life that was chosen by others
