

The elusive competence to  
stand trial element:(in)ability  
to assist counsel: how to  
consider it; how to evaluate  
it

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# What are we covering?

- Deciding **how to operationalize** the ability to assist element
- **Understanding the legal requirements**
- **Establishing the sufficiency** of the assessment'
- **Factual investigation of the ability to consult with counsel and assist in the preparation of the defense**

Threshold questions—prepare yourself to answer:

WHAT IS A DEFENSIBLE COMPETENCE ASSESSMENT ?

WHAT ARE THE PROTOTYPICAL ABILITY TO ASSIST CONSIDERATIONS?

WHAT ARE THE TOOLS NECESSARY TO GAUGE WHETHER YOUR ASSESSMENT IS PROFESSIONALLY DEFENSIBLE? [Standards, Practice [assessment] Guidelines, Best Practices, Statutes and Case Law, Administrative Codes/Regulations, Literature, Consulted As Necessary]

# Operationalization

‘Operationalization means turning abstract concepts into measurable observations. Although some concepts, like height or age, are easily measured, others, like spirituality or anxiety, are not. Through operationalization, you can systematically collect data on processes and phenomena that aren’t directly observable.’

## Prototypical Ability to Assist Considerations (see Rogers and Shuman, *Fundamentals of Forensic Practice*)

1. Is there an inability to communicate thoughts and decisions coherently?
2. Is there an inability to act autonomously?
3. Is there a lack of ability to autonomously act out of self interest?
4. Are there distorted expectations or descriptions of the lawyer?
5. Is there an inability to make relevant decisions?

# Specific Considerations

- Are there thought disorders present?
- Are there measurable impairments in receptive or expressive language?
- Is there demonstrable incoherence?
- How autonomous?
- What is the level of understanding of charges/defenses and procedure?
- Is there measurable awareness of outcome options and evident ability to explain decisions?
- Is there evident awareness of the right to testify and an ability to explain the advantages and disadvantages of testimony?
- Is there evidence of discrimination between self-destructive and self-preserving behaviors and decisions?

# A Competence Evaluation is a type of Adaptive Functioning Evaluation

- HOW DOES THIS CLIENT DO IN THE WORLD OF THE COURT ?
- CAN HE/SHE SPEAK AND UNDERSTAND THE LANGUAGE WITHOUT ASSISTANCE ?
- DOES SHE/HE UNDERSTAND THE GOAL(S) OF THE PROCESS ?
- IS HE/SHE ABLE TO DESCRIBE THE GOALS/HIS GOALS WITHOUT ASSISTANCE ?
- CAN SHE/HE EXPLAIN WHAT HIS/HER CHOICES ARE AND WHY HE IS INCLINED TO MAKE THEM
- CAN SHE TESTIFY RELEVANTLY TO RESPOND TO THE CHARGES
- CAN HE TELL YOU WHY HE SHOULD NOT TESTIFY ?

*Godinez v. Moran*, Kennedy  
concurrency

“...the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify....”

*Id.*, at 403-04

# If a Judge asked you about the sufficiency of your assessment, how would you respond ?

*United States v. Duhon*, 104 F. Supp. 2d 663, 673-4 (W.D. La, 2000)

“Dr. Berger admitted that the FCI report does not address Duhon's ability to assist counsel in discussing strategies for his defense:

THE COURT: Do you think that that is a factor that should be considered in determining competency, **whether the person has any ability to understand strategies based upon his understanding of the charges and relevant outcome, based upon whether they testify or don't testify which of course would involve an understanding of what the testimony they would give and the effect it would have on the Judge and jury, how it could be refuted by the witnesses, et. cetera . . .** Just focusing on his ability to even engage in that type of conversation, do you think that should be a factor in assessing competency?

THE WITNESS: Yes.”

# Existing tools are not likely to be sufficient

- Existing inventories and tools are not sufficient
  - Competency Screening Test
  - Georgia Court Competency Test
  - Computer Assisted Determination of Competency to Proceed
  - Competency Assessment Instrument
  - FIT; FIT-R [Fitness Interview Test]
  - Interdisciplinary Fitness Review
  - MacCAT-CA [new editions]
  - ECST-R
  - CAST-MR

*Dusky v. United States*, 362 U.S. 402  
(1960)

“The ‘test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding...’” and has “a rational as well as factual understanding of the proceedings against him.”

# Assist in preparing his defense...

- In *Indiana v. Edwards*, 554 U.S. 164, 170-71 (2008), the Court emphasizes that in *Drope v. Missouri*, 420 U.S. 162 (1975), it explained that part of competence required the accused to have the capacity “**to consult with counsel and to assist in preparing his defense...**” *Indiana, supra*, at 169.

# CALCRIM 3451

## 'Present Mental Competence of Defendant'

The defendant is mentally competent to stand trial if (he/she) can do all of the following:

1. Understand the nature and purpose of the criminal proceedings against (him/her);
2. Assist, in a rational manner, (his/her) attorney in presenting (his/her) defense; and
3. Understand (his/her) own status and condition in the criminal proceedings.

**Zapf & Roesch: An Investigation of the Construct of Competence:  
A Comparison of the FIT, the MacCAT-CA, and the MacCAT-T, 29 L &  
Hum. Behav 229 (2005)**

“These competence-related abilities can be arranged in hierarchical ...the four tests are (1) the ability to communicate a choice, (2) the ability to understand relevant information, (3) the ability to appreciate the nature of the situation and its likely consequences, and (4) the ability to rationally manipulate information.” Id. at 233

# Grisso, *Competency to Stand Trial Evaluations* (2014)

‘Ability to consult’ means more than being able to talk: “It refers to participation in the defense for which the attorney is responsible.... Defendants must be able to **convey their thoughts to others** and **manage their behavior** in ways that do not disadvantage their defense....” (page 18)

Zapf and Roesch  
*Evaluation of Competence to Stand Trial*

“Since the defense attorney is the only party who knows what will be required of the defendant for the particular case, **it is important to speak with him (or request this information in writing)** to gain an understanding of the complexities of the case and the requirements of the defendant in participating or assisting in her defense.” *Id.*, at 90.

Strickland v Washington 466 US 668 (1984)

- **“...inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.” *Id.*, at 691.**

# Competency to Stand Trial (Group for the Advancement of Psychiatry)-Examples

• TABLE 6.1. List of Items Relevant to

- 4. To understand the legal issues and procedures in his case.
- 5. To understand legal defenses available in his behalf.
- 6. To understand the dispositions, pleas, and penalties possible.
- 7. To appraise the likely outcomes.
- 9. To identify and locate witnesses.
- 10. To relate to defense counsel.
- 11. To trust and to communicate relevantly with his counsel.
- 12. To comprehend instructions and advice.

# MacCAT-CA; ABILITY TO ASSIST COUNSEL

- 9. Reasoning about evidence suggesting self-defense.
- 10. Reasoning about evidence related to criminal intent.
- 11. Reasoning about evidence related to provocation.
- 12. Reasoning about motivation for one's behavior.
- 13. Reasoning about impact of alcohol on behavior
- 14. Ability to identify information relevant to choice of trial versus accepting a plea agreement.
- 15. Ability to identify advantages and disadvantages of a choice(i.e., to plead guilty or go to trial).
- 16. Ability to compare options (i.e., pleading guilty versus going to trial) in terms of advantages and disadvantages.

*Godinez v. Moran*, 509 U.S. 389 (1993)

- Accused needs to understand fundamental rights: trial; waive trial; plead guilty; assist counsel
- Decisions: trial or not; cross-examine or not; put on one or more defenses and which to consider. *Id.*, at 398-99

# How does a lawyer/expert 'operationalize' the competence question ?

- WRITE OUT YOUR FORMULATION OF THE PROBLEM PRESENTED:

- - **'NOT ABLE TO ASSIST'**=CANNOT RETRIEVE INFORMATION;  
CANNOT COMMUNICATE IN LINEAR AND COHERENT MANNER;  
UNABLE TO MAINTAIN ATTENTION ON SUBJECTS IN CONVERSATION;  
CANNOT DESCRIBE OUTCOME OPTIONS, OR DECISIONMAKING BASES  
CANNOT EXPLAIN THE CHARGES OR DEFENSES  
CANNOT EXPLAIN THE REASONING FOR A DECISION TRIAL/NO TRIAL  
HAS NO DECISION ABOUT WHETHER TO TESTIFY OR NOT/NO REASONING  
CANNOT CONTROL BEHAVIOR OR FOCUS OF SPEECH OVER 15 MNS  
CANNOT EXPLAIN CASE FACTS IN A RATIONAL MANNER  
CANNOT EXPLAIN PURPOSE OF A TRIAL, OR A PLEA AGREEMENT

# Philipsborn, “Competent on Competence” *ABA Criminal Justice & NACDL (2018-19)*

- Four of many suggested domains for counsel to evaluate:
  1. Can client communicate and consult with counsel on the charges and provide a basis for making decisions about investigations; litigation; and defense strategies?
  2. Can the client discuss whether defenses or mitigation can be supported by identifiable witnesses?
  3. Can the client discuss whether there is a rational and factual basis for trial, including a claim of innocence, or in the alternative, settlement?
  4. Can the client discuss possible trial testimony in a rational and factual manner, using language that is comprehensible and sufficiently organized to convey information to a jury?

# 2018 AAPL Practice Resource Eval.

## *Competence*

- References assessment of ability to assist both in passing and specifically
- At S49, “...the psychiatrist should contact the defendant’s attorney to assess the defendant’s ability to assist counsel”
- “The psychiatrist should also assess the **defendant’s capacity to make legal decisions in collaboration with defense counsel and to participate in other activities that counsel may require** [plea bargain; waive jury trial; testify]; focus on how well defendant “can appreciate the situation, **manipulate information related to the trial process, and work with counsel...in making decisions**”

# AAPL Practice Resource

## 46 AAPL Journal 2018 Supp.

- Note the *AAPL Guideline* and *Practice Resource* emphasize the need for examiners to have knowledge of the content of statutes and case law
- Reviews reported cases in which the accused gives **appropriate responses; writes letters; no family member expressed concern** S14
- Discusses **physical impairments as indicative of barriers to assistance**

There are basics that should influence the assessment

- Can this person explain the most basic decision—whether to go to trial or not—and her reasoning for the stated decision?
- Can this person explain what her lawyer needs to know in order to defend the case ?
- Can this person explain what role the lawyer plays at trial (argue the case/cross-examine/object) ?

*McCoy v. Louisiana*, 138 S.Ct. 1500 (2018)

“Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant’s own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial.”

*Id.*, at 1508-09.

*People v. Amezcua and Flores*  
(2019) 6 Cal.5<sup>th</sup> 886

“Thirty years of precedent...have consistently held, **among the core of fundamental questions over which a represented defendant retains control is the decision whether or not to present a defense at the penalty phase of a capital trial, and the choice not to do so is not a denial of the right to counsel or a reliable penalty determination.**”

*Id.*, at 925-26, referencing *McCoy v. Louisiana* (2018)

# A Right Extended to Non-Capital Cases

- *People v. Eddy* (2019) 33 Cal.App.5<sup>th</sup> 472, 483-84: defendant has the right to insist on presentation of not guilty theory in non-capital case, and counsel has no right to argue for lesser included offense when actual innocence asserted.
- *People v. Flores* (2019) 34 Cal.App.5<sup>th</sup> 270 – non-capital case, counsel not entitled to take a position contrary to client's insistence that he did not commit criminal acts.

# Approaching the Assessment With the Legal Requirements In Mind

- **You construct the template applicable to the case;**
- **You construct the structured interview that applies to the case;**
- **You outline the decisions that apply in the case**
- **You prepare to explain how each domain of case related communication and decisionmaking was evaluated**

## Best Practice:

- **Formulation of the assessment of ability to assist, with its focus on knowledge of case specifics, basic understanding of procedure, and ability to discuss decisions and options requires interaction with defense counsel, prosecutors in learning about the case;**
- **Use of generic competence assessment interviews, and specialized assessments will not get at the issues presented in any given case**
- **Documenting/videotaping case specific assessments will enhance reliability of reported assessment**

## Third Party Interviews & Extrinsic Information

- ***Kasim* and *Gigante* examples (jail based observations; medical center observations; recordings of calls)**
- ***Drope* and *Merriweather* interviews of family members; visitors**

# Expert preparation/direct examination

- Differentiating clinical appraisals of functioning and diagnosis from forensic assessment of competence
- **Establishing standards of practice:** (1)AAPL Standards and Guidelines; (2)professional literature; (3)extensive training available to mental health professionals
- **Explain that competence assessment:** (1) Best practice=collaborative effort; (2) Condition is LEGAL not psychiatric; (3) Best practices=using the tools most appropriate to THIS CASE
- **Current thinking in forensic mental health: URAC [understanding; reasoning; appreciation; communication]**

# The Literature

- Grisso – *Competence to Stand Trial Evaluations*
- Zapf/Roesch – *Evaluation of Competence to Stand Trial*
- APA Publishing – *Textbook of Forensic Psychiatry* (3<sup>rd</sup> Edition)
- Melton, et al. – *Psychological Evaluations for the Courts*