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## Competence to Proceed: A Functional and Context-Determinative Decision

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**ABSTRACT:** Legally, the defendant's competence at any stage of criminal proceedings is defined in terms of the test set forth in *Dusky v. United States*, a test establishing minimum rationality as the basis for determining mental competence. A number of investigators have attempted to devise testing instruments to assist clinicians in applying this test to individual defendants being examined for competence. Competence, however, is both context-determinative and functional in nature. The evaluator must insist on being given specific information relating to the functions that the defendant is expected to perform. The evaluator must then assess the defendant's measurable skills in the light of those specified functions and articulate his findings to the court in terms of the skills and functions rather than in terms of conclusory legal labels. Competence is then best determined by the court as a legal, not a mental, health decision under the somewhat nebulous but nonetheless appropriate criterion of "fundamental fairness" in the light of the defendant's mental state.

**KEYWORDS:** jurisprudence, psychiatry, competency, witnesses, competence to stand trial, expert witnesses, psychiatric expert, Dusky test

### Doctrinal Development

That the principles underlying the doctrines of mental competence to proceed in a criminal case are based on concepts of mental function and procedural fairness were established early in common law jurisprudence. As early as the mid-eighteenth century, Sir William Blackstone noted the fact that mental competence, as it affects the criminal process, is a multifaceted concept, applying with differing focus to mental incapacity at time of arraignment and plea, time of trial, time of sentence, and time of execution. Blackstone analyzed that competence needed at the different procedural stages in terms of the function to be performed at each such stage: a defendant should not be arraigned if incompetent because he cannot "plead with that advice and caution that he ought"; he should not be put to trial, "for how can he make his defence"; and he should not be sentenced or executed if incompetent for, had he "been of sound memory, he might have alleged something in stay of judgment or execution" [1]. The decisions of English common law courts early established the principles that conviction and punishment of one incompetent would not serve as a deterrent to other potential offenders and that it was fundamentally unfair to proceed against one who was incompetent, since such a defendant would be unable to furnish evidence in his defense [2,3].

In the United States, the concept of fairness was translated into the language of due process of law, the turn-of-the-century cases holding it to be a violation of concepts of fairness to try

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one "insane" at time of trial [4,5]. While the early formulations of the test for determining competence varied, in 1960 the Supreme Court established the criteria to be used in the case of *Dusky v. United States*, setting forth a rather broad, three-pronged test:

. . . 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 [6].

Concomitant with the solidification of the legal doctrines of incompetence to stand trial and insanity at the time of the offense occurred the development of greater medical sophistication in diagnosis and treatment of mental illness, with the logical progression to legal reliance on psychiatric opinion as the basis for legal decisions on competence and to the use of mental health experts in the courtroom to assist in determining such issues. The extent to which mental health experts, primarily psychiatrists, have become involved in this system has been much criticized, whether the criticism focuses on the legal profession for permitting usurpation of its societal role, or on members of the psychiatric profession for attempting to do more than is permitted by their discipline and training. Uncritical acceptance of the undefined role of the expert has led the legal system to abdication of the traditional judicial decision-making function, supplanting that task by almost total reliance on and "rubber stamping" of those opinions [7,8]; the opinions themselves have been criticized by the psychiatric profession as of quite low reliability, having "little or no independent validity" and as serving to "distort the fact-finding process" [9].

Despite the tandem development of the two disciplines, neither the legal nor mental health systems provided consistent principles for determination of the legal issue of mental competence to stand trial. The resultant idiosyncratic interpretations of both the legal and medical constructs have led professionals in each discipline to begin to search for ways to make the process more consistent and more intelligible to the psychiatrists and to the lawyers and judges involved, generally by attempting to establish specific criteria to guide the evaluators and decision makers. Legal criteria are exemplified by those of the American Law Institute, adopted both in New Jersey and in the Western District of Missouri. Such criteria include:

That his elementary mental processes are such that he understands: (a) that he is in a court of justice charged with a criminal offense; (b) that there is a judge on the bench; (c) that there is a prosecutor present who will try to convict him of a criminal charge; (d) that he has a lawyer who will undertake to defend him against that charge . . . (g) that he has the ability to participate in an adequate presentation of his defense [10,11].

Members of the psychiatric profession created their own lists of criteria, one of the first of which, published by Dr. Ames Robey in 1965, included such general items as "Comprehension of Court Proceedings," with sub-categories of "Surroundings," "Procedure," "Principals," "Charges," and the like [12]. A more comprehensive method for determining competence was later developed by the Laboratory of Community Psychiatry of Harvard Medical School [13]. Popularly known as the "McGarry Test," the method included both an initial screening test and a more intricate assessment instrument. Dr. McGarry's goal was to express the legal tests in clinical language, establish appropriate clinical criteria, and then to translate the clinical findings into "relevant legally oriented data." Although both the screening test and assessment instrument have proved popular with both the legal and mental health professions, as they offer apparently precise guidelines along which the inquiry into competence may be conducted, they have been criticized as substituting political judgments for objective clinical findings and as being less than successful in screening out the incompetent [14,15]. Nonetheless, the Laboratory product represents a major stride in interdisciplinary communication in that it specifies areas of inquiry, it recognizes competence to be functional in nature, and it repudiates the doctrine that incompetence is equated to psychosis; the effort falls short, how-

ever, because of its attempt to translate clinical observations into abstract legal criteria by universal formulae.

### Discussion

It is the thesis of this paper that checklists of areas of relevant clinical findings can be valuable insofar as they standardize areas of inquiry into the defendant's understanding of the process and functional ability. However, insofar as a checklist permits or requires the examiner's ultimate legal conclusions on the adequacy of that understanding and those functions as they relate to competence to stand trial, it represents a determination made on the basis of potentially insufficient data and unarticulated premises. No specific formula, whether developed by the legal or the medical community, can be effective to translate adequately relative legal concepts into objective clinical criteria, nor to translate putatively objective clinical findings into legal requirements.

Competence to stand trial is a determination that involves three factors: first, the legal concept of competence as requiring a minimal mental ability to understand certain concepts and to achieve a certain level of functional performance in the legal proceedings; second, clinical opinion based on evaluation and observation; and, third, a judgment about the fundamental fairness of subjecting to trial a defendant with a diagnosed level of mental capacity which permits a certain level of understanding or performance. Direct translation of these variables into a single objective checklist or psychiatric diagnosis cannot be adequate to address the relativity of the concepts.

The first factor, that of the legal standard for competence, is not absolute, but is directly related to the function to be performed by the defendant in the system [16, 17]. While there are some minimal requirements for competence applicable to all defendants, others will vary, depending upon the complexity of the case and the extent of the defendant's necessary participation. Since it is not generally known at the time of the examination into competence which functions a defendant must be able to perform nor the extent to which the defendant must be able to perform the requisite functions, it is premature in many cases for an opinion on competence to be reached at the time of the initial examination.

In all cases, for example, competence to stand trial requires some level of understanding, as yet undefined, of the nature of the legal proceedings, but may not require that the defendant be able to testify. The necessity that the defendant be able to testify is directly dependent on the tactical decision of whether the defendant will be required to take the witness stand in his defense or will remain silent. Although the mental ability to recall and to relate factual information is generally required for a defendant to be found competent to stand trial, some cases have held this not to be a necessary function, particularly when the ultimate fairness of the trial is not affected by the defendant's inability to do so [17].

The standard for competence to enter a plea of guilty obviously does not include the ability to testify relevantly, but encompasses, at least in part, the mental ability to make a reasoned choice among alternatives [18]; further, the defendant must have the mental ability to realize that important constitutional rights will be waived by a plea [19]. While there may be some question as to whether this is a "higher" standard than that of competence to stand trial, clearly it is "different." In this context, therefore, checklists are valuable. The list of possible functions to be performed guides the evaluator to areas of clinical evaluation that will be of most value to the court. Since the evaluator cannot know which of the functions will be required in any given instance, however, or the relative importance of any particular functional ability, the evaluator cannot validly render an ultimate opinion on competence, that is, which competence may or may not require that function.

Although clinical diagnosis is an important factor to be considered in determining competence, it is clear that the presence or absence of diagnosable mental illness does not translate into legal conclusions. The variability of clinical opinion is evident, both as to diagnosis and

application of that diagnosis to legal concepts [20,21]. Even within the concept of "psychosis" lie many varied mental aberrations, some of which may affect the defendant's legal competence, others which may well be irrelevant to it. Within specific diagnoses the mental state may or may not be relevant to the judicial proceeding. Thus, a defendant's delusion may relate to something that has no connection with judicial proceedings and that does not affect his understanding or ability to participate in those proceedings, although it may well have affected his commission of the act to be tried.

The case of A. B. is illustrative. The defendant is an intelligent, articulate individual who well understands the concepts of a trial. As a diagnosed paranoid schizophrenic, he entertains the delusion that he is a ranking officer in the intergalactic space force. Because of the delusion, the defendant has been evaluated as incompetent to stand trial although he is functional in all other respects. In contrast stands the case of *People v. Kurbegovic*, a case in which a defendant, otherwise competent, had Messianic delusions that affected the trial. The court accepted the defendant as competent to stand trial despite the delusion, reasoning that the delusional structure did not affect the defendant's understanding of the proceedings [22]. Psychiatric diagnosis, therefore, whether a diagnosis in terms of general categories (such as "psychosis") or specifically defined mental illnesses, is not properly equated to the legal criterion for competence; the mental state of the defendant must be evaluated not in the light of possible medical diagnosis, but in the light of the defendant's ability to understand and to perform certain legal functions, regardless of the presence or absence of diagnosable mental illness.

The third factor that must be considered, always subliminally present, usually unarticulated and, therefore, both unreviewable and potentially idiosyncratic is that of basic or fundamental fairness. Not only must the function to be performed be balanced against the defendant's ability to perform that function, but it must be so balanced in light of the interest in the fairness of the proceedings, both for society and the individual [16,17]. In terms of a functional understanding of the courtroom personnel, for example, the "judge on the bench" or the "principals" of Dr. Robey, the extremes pose no difficulty. The defendant deliriously disoriented as to time and place obviously is in no condition to stand trial under any concept of fairness. Since, however, the concept of "judge" may be understood at varying levels between the extremes, the more difficult inquiry is to establish the point on the continuum of understanding of judicial function that the defendant must be found to have attained so that it is not unfair to require that he stand trial. This evaluation of the relative degree of understanding and of functional ability underlies every determination of competence, but is seldom, if ever, articulated either by the evaluating experts or even by the courts themselves.

An example of the difficulty may be seen in document NFETC MRI-013, the Competency Evaluation Instrument used in the State of Florida, based on the McGarry checklist (see Fig. 1). The Instrument lists and explains the various categories of evaluation, one of which is "Understanding of the Legal Process," then permits the evaluator to circle one of four possible categories: "Unacceptable," "Questionable," "Acceptable," or "Not Applicable." Use of the terms "acceptable" or "unacceptable" implies clearly that a value judgment is being made; the referent of the values applied is never set forth. At the least, an opinion that the defendant's understanding of the legal process is "acceptable" posits a judgment that the defendant has attained a point on the continuum of functional ability that renders it fair for the defendant to be put to trial and expresses this judgment in terms of acceptability. The value referent, being unarticulated, is not subject to question or to review, and it is potentially idiosyncratic.

One other area which well demonstrates the interplay of the various factors is that of the defendant's "ability to testify relevantly." As has been pointed out, at the time of the evaluation, the evaluator does not know whether the defendant will be required to testify. Even if it is known that the defendant's testimony will be required in a given case, significant gradation exists among possible conclusions depending on the evaluator's perception of the fairness of the process. For example, a defendant may be able to testify if taking psychotropic medication; if continuation of such medication is permitted during trial, this defendant may well be compe-

tent, however, if the trial is held in a jurisdiction not permitting trial of a defendant on psychotropic medication, the defendant would be considered incompetent [23]. A complicating factor is that of the jury's obligation to assess the veracity of a witness, the bases for the assessment being explained in the instruction that in determining believability, the jury may properly take into consideration the witness's "demeanor while testifying" and his "frankness or lack of frankness." A pervasive question, if a defendant on psychotropic medication is to testify, is the fairness of the defendant exhibiting inappropriate affect while testifying, when the affect itself will have some bearing on the jury's determination of the defendant's credibility. Fundamental to these decisions, all based on some continuum of evaluation rather than a black-and-white picture, is the societal value underlying the entire concept of competence to stand trial, that of fairness to the defendant and to society, yet the basis on which the evaluator makes the judgment is never expressed. Certainly the use of the terms "acceptable" or "unacceptable" do not express that standard, nor how the evaluator has taken that factor into account in reaching the decision.

### Conclusion

The ultimate decision on incompetence to stand trial is, therefore, a balancing of the three disparate factors of procedural function, mental capacity, and fundamental fairness. At the time of an evaluation of competence to stand trial, however, in all but the extreme cases, the examiner is generally not in a position to evaluate the defendant in terms of at least two of those factors. Seldom, at the time of the initial evaluation, does the evaluator know the particular functions that will have to be performed, nor the extent to which the defendant's lack of understanding or functional ability will affect the defense ultimately to be raised. It is imperative, therefore, that the evaluator not permit himself to be required to report to a court in the form of conclusions—conclusions necessarily based on information not yet available and on conjectural considerations of fairness.

The posture of the evaluator, therefore, must be one that takes into account the imprecision of the definition as it relates to the importance of the functions evaluated. Unless a situation exists where, in no instance could a defendant be considered capable of performing any such functions to even a minimal degree, the evaluator's report to the judicial system should not contain subliminal value judgments expressed in terms of legal conclusions, for example, the "acceptability" of the defendant's ability to testify relevantly. Rather, the report must be limited to expression of clinical observations in the light of the functions to be performed, stressing not the acceptability of such performance but describing the level of performance which might be expected of the individual defendant. In the absence of specifically delineated functions, the evaluator may properly use a function checklist such as the McGarry review of the evaluator's findings. The evaluator, however, must leave to the judiciary the tasks of ascertaining function and of evaluating fairness in the light of mental capacity and function, and of rendering the ultimate legal conclusion about the competence of the defendant to proceed.

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DEPARTMENT OF

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Bob Graham, Governor

COMPETENCY EVALUATION INSTRUMENT

PATIENT & NO. \_\_\_\_\_ DATE: \_\_\_\_\_

1. APPRECIATION OF CHARGES: Assessment of the accused's understanding or literal knowledge of the charges against him, and to a lesser extent, the seriousness of the charges. It is important that the defendant understands that he is being accused of having committed an offense. Seriousness is important only insofar as it contributes to his indifferent cooperation.

UNACCEPTABLE                      QUESTIONABLE                      ACCEPTABLE                      NOT APPLICABLE

2. APPRECIATION OF RANGE AND NATURE OF POSSIBLE PENALTIES: Assessment of the accused's concrete understanding and appreciation of the conditions and restrictions which could be imposed on him if found guilty, and their possible duration.

UNACCEPTABLE                      QUESTIONABLE                      ACCEPTABLE                      NOT APPLICABLE

3. UNDERSTANDING OF THE ADVERSARY NATURE OF THE LEGAL PROCESS: Does the defendant understand that (1) his attorney is trying to assist him, (2) the State Attorney is trying to convict him, and (3) the Judge and jury are impartial.

UNACCEPTABLE                      QUESTIONABLE                      ACCEPTABLE                      NOT APPLICABLE

4. CAPACITY TO DISCLOSE TO ATTORNEY PERTINENT FACTS SURROUNDING THE ALLEGED OFFENSE: Assessment of the accused's capacity to give a basically consistent, rational, and relevant account of his movements and mental state at the time of the alleged offense. Intelligence, memory, and the validity of claimed amnesia should be assessed. Disparity between what an accused is willing to share with a clinician versus what he will share with his attorney should be considered.

UNACCEPTABLE                      QUESTIONABLE                      ACCEPTABLE                      NOT APPLICABLE

5. ABILITY TO RELATE TO ATTORNEY: Assessment of the capacity of the accused to communicate relevantly with his attorney. Assessment is based on accused's interpersonal communication with the interviewer. If the defendant has interacted with his attorney, assess the defendant's attitude toward him.

UNACCEPTABLE                      QUESTIONABLE                      ACCEPTABLE                      NOT APPLICABLE

6. ABILITY TO ASSIST ATTORNEY IN PLANNING DEFENSE: Assessment of the degree to which the accused can understand, participate and cooperate with his counsel in planning a defense consistent with the reality of his circumstances.

UNACCEPTABLE                      QUESTIONABLE                      ACCEPTABLE                      NOT APPLICABLE

NFETC MRI-013

FIG. 1—Document NFETC MRI-013, the Competency Evaluation Instrument used in the State of Florida, based on the McGarry checklist.

Competency Evaluation Instrument  
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7. CAPACITY TO REALISTICALLY CHALLENGE PROSECUTION WITNESSES: Assessment of the accused's capacity to recognize distortions in prosecution testimony and to aid his attorney in the confrontation of other witnesses. Relevant factors include attentiveness and memory.
- |              |              |            |                |
|--------------|--------------|------------|----------------|
| UNACCEPTABLE | QUESTIONABLE | ACCEPTABLE | NOT APPLICABLE |
|--------------|--------------|------------|----------------|
8. ABILITY TO MANIFEST APPROPRIATE COURTROOM BEHAVIOR: Assessment of the defendant's current behavior and his probable behavior when placed under the stress of courtroom proceedings. Evaluate his attitude and beliefs toward the legal system and the legal process.
- |              |              |            |                |
|--------------|--------------|------------|----------------|
| UNACCEPTABLE | QUESTIONABLE | ACCEPTABLE | NOT APPLICABLE |
|--------------|--------------|------------|----------------|
9. CAPACITY TO TESTIFY RELEVANTLY: Assessment of the accused's ability to testify with coherence, relevance, and independence of judgement, including both cognitive and affective factors which might influence his ability to communicate.
- |              |              |            |                |
|--------------|--------------|------------|----------------|
| UNACCEPTABLE | QUESTIONABLE | ACCEPTABLE | NOT APPLICABLE |
|--------------|--------------|------------|----------------|
10. MOTIVATION TO HELP SELF IN LEGAL PROCESS: Assessment of the accused's motivation to appropriately utilize legal safeguards to adequately protect himself. Passivity or indifference do not justify low scores on this item although actively self-destructive manipulation of the legal process arising from mental pathology does.
- |              |              |            |                |
|--------------|--------------|------------|----------------|
| UNACCEPTABLE | QUESTIONABLE | ACCEPTABLE | NOT APPLICABLE |
|--------------|--------------|------------|----------------|
11. CAPACITY TO COPE WITH STRESS OF INCARCERATION PRIOR TO TRIAL: Assessment of accused's emotional stability at time of evaluation including his appropriateness and lability of affect, with particular emphasis on its consistency with thoughts expressed and degree of emotional display. Suicidal ideation, paranoid delusions regarding the legal system, and ability to adapt to present environment should be considered.
- |              |              |            |                |
|--------------|--------------|------------|----------------|
| UNACCEPTABLE | QUESTIONABLE | ACCEPTABLE | NOT APPLICABLE |
|--------------|--------------|------------|----------------|
12. CONCLUSIONS:

\_\_\_\_\_  
EVALUATOR  
\_\_\_\_\_

FIG. 1—continued

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