

# Competency & WIC §709

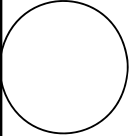
## Part 2: The Evaluation

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21 April 2021



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# Testing for Competency

Karen Franklin, PhD  
21 April 2021

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*... sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding ... a rational as well as factual understanding of the nature of the charges or proceedings against him or her.*

*W&I §709(a)(2)*

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## Which standard?

- Adult norms standard
- Lower bar
  - Adolescent norms
  - Age-peer norms
- Adjusted bar
- Flexible bar

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Standard	Description	Application
Adult norms	Standard application of Dusky standard, without adjustment to take into account the differing demands and purposes of the juvenile court	Likely incompetent
Adjusted bar	Higher standard if transfer to adult court contemplated; lower standard for 'ordinary' juvenile cases. Requires only rudimentary understanding and basic communication abilities. Eliminates the need for decisional capacities.	Likely competent
Age-peer norms	Lowers standard Dusky abilities to a lesser level. A minor's capacities are compared with average children his age.	Likely incompetent
Adolescent norms	Lowers Dusky abilities to a lesser level. Juvenile's capacities are compared with those of the average adolescent.	Likely incompetent
Flexible bar	Case-specific standard, adjusting the required level of competency to match the level of needed protection in light of the severity of sanctions being faced.	Judicial determination

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Note: A larger version of this table can be found in the back of handout.

#### To test or not to test?

- Any tool: 58%
- 65 different tools
- Only 3 competency tools in top 10
  - ECST-R (5<sup>th</sup> place, 7%)
  - MacCAT-CA (9<sup>th</sup> place, 5.6%)
  - JACI (10<sup>th</sup> place, 5%)
- California – new study:
  - < 30% used structured tool to assess CST
  - Only 17% tested for feigning

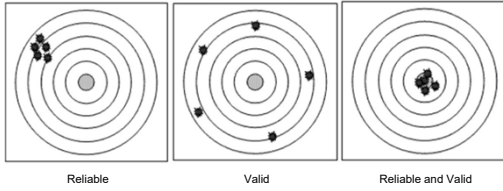
Neal & Grisso (2014); Hill et al (2021)

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<b>Why use?</b>	<b>Why not use?</b>
<ul style="list-style-type: none"> <li>• Credibility</li> <li>• Evidence-based</li> <li>• Standardized</li> </ul>	<ul style="list-style-type: none"> <li>• Trust my clinical judgment</li> <li>• Time</li> <li>• Tools' limitations</li> <li>• Costs</li> <li>• Lack of familiarity</li> </ul>

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### Reliability versus validity



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### Meta-analysis of field reliability

- 6 studies
- combined kappa = .49
- “moderate” reliability

*Guarnera & Murrie 2017*

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### Evaluator variability

- Rates of incompetency findings vary hugely by evaluator
  - 0% to 62%
  - 9% to 77%
- Experienced evaluators conducting 30+ CST evaluations per year
  - 1 in 10 incompetent
  - 3 in 4 incompetent

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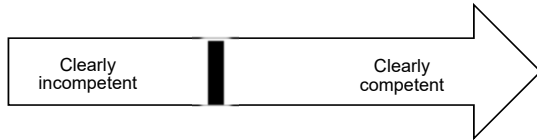
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## Continuum



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## Sources of variance

- How legal standard operationalized
- Nature and adequacy of training
- Lack of standardized procedures
- Biases
- Adversarial allegiance
- Drive-by evaluations
- True change in defendant over time

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## Competency Screening Test (1971)

- The lawyer told Bill that \_\_\_\_\_.
- Jack felt that the judge \_\_\_\_\_.
- If Ed's lawyer suggests he plead guilty, he \_\_\_\_\_.
- What concerns Fred most about his lawyer \_\_\_\_.
- When I think of being sent to prison, I \_\_\_\_\_.

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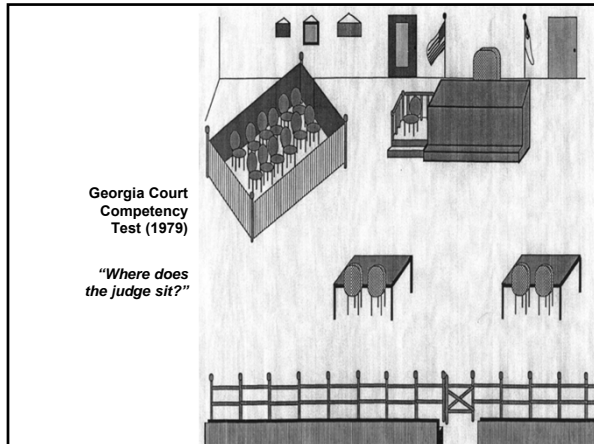
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### Competency Assessment Instrument

- Understanding of charges
- Appreciation of penalties
- Appraisal of available defenses
- Understanding of roles of court personnel
- Appraisal of likely outcome
- Planning of legal strategies
- Capacity to testify
- Capacity to challenge prosecution witnesses ...

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- "Second generation"

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## Tests

- Standardized administration
- Scoring rules
- Normative data
- Keyed to legal criteria

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## CAST-MR (1992)

- Intellectually disabled
- 4<sup>th</sup>-grade level
- Adults (18+)
- 50 items
  - Vocabulary & concepts (25 items)
  - Ability to assist in defense (15 items)
  - Relation of factual events (10 items)

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## CAST-MR (1992)

- When do you go to the penitentiary?

(a) when you are found guilty and the judge orders a sentence

(b) when you are out of control and the supervisor gets you

(c) when people don't like you and want to get rid of you

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### CAST-MR (1992)

- *Let's pretend that you are on the stand in court and the prosecutor tries to make you tell a lie. What would you do?*

- (a) tell the prosecutor off
- (b) tell your lawyer
- (c) refuse to answer more questions

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- Quantitative fetishism

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### MacArthur Competence Assessment Tool – Criminal Adjudication (MacCAT-CA)



"Two men, Fred and Reggie, are playing pool at a bar and get into a fight. Fred hits Reggie very hard with a pool stick. Reggie falls and hits his head on the floor so hard that he nearly dies."

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### Understanding subscale

- A. "If Fred pleads guilty, he would give up some legal rights. What are they?"
- B. *"If Fred pleads guilty, he will be giving up some legal rights. There won't be a trial. And, the prosecutor won't have to prove the charge against him. In your own words, tell me what Fred just found out about his legal rights."*

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### Reasoning subscale

Here are two facts:

Fact #1: At the time of the fight, Fred was frightened because Reggie was acting like a tough guy.

Fact #2: At the time of the fight, Fred had been getting along well with his girlfriend.

- *If Fred's lawyer wants to know what Fred might have been thinking at the time of the fight, which of these two facts would be more important to tell his lawyer?*
- *What are your reasons for picking that fact?*

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### Appreciation subscale

*We have talked a lot about Fred's case. I would now like to ask you some questions about your situation.*

Compared to other people who are in trouble with the law, do you think that you are more likely, less likely, or just as likely to be treated fairly by the legal system?

- What are your reasons for thinking that?

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<b>Pros</b>	<b>Cons</b>
<ul style="list-style-type: none"> <li>• Large validation samples</li> <li>• Most researched</li> <li>• Excellent interrater reliability</li> <li>• Good construct validity: Scores correlate with psychoticism, etc.</li> <li>• Distinguishes competent from incompetent</li> </ul>	<ul style="list-style-type: none"> <li>• Hypothetical vignette – fails <i>Daubert</i>?</li> <li>• Not strictly designed for Dusky standard</li> <li>• Cannot use with intellectually disabled</li> <li>• Applicability to juveniles?</li> </ul>

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<p>Use with minors</p> <ul style="list-style-type: none"> <li>• Children under 16 do worse than adults</li> <li>• Vignette less applicable with minors</li> <li>• Vocabulary less applicable</li> <li>• Juvenile-specific issues not addressed</li> <li>• Lack of reliability/validity data</li> <li>• Caution in use with minors</li> </ul>
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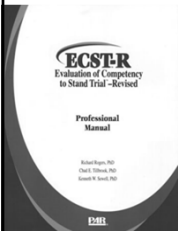
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<p>ECST-MR (2004)</p> 	<ul style="list-style-type: none"> <li>• Hybrid (structured &amp; semi-structured)</li> <li>• Comports with Dusky             <ul style="list-style-type: none"> <li>• Factual Understanding</li> <li>• Rational Understanding</li> <li>• Consult with Counsel</li> </ul> </li> <li>• Assesses for feigning</li> <li>• Little independent research</li> <li>• Adults only</li> </ul>
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### Juvenile Adjudicative Competency Interview (2005)

- Clinical guide – NOT a test
- No scoring
- No norms
- Very little research
- Becoming the standard of practice

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### JACI (2005)

- Developmental maturity:
  - perceived autonomy
  - perceptions of risk
  - time perspective
  - abstract thinking

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### Example

Q: If you actually did the thing the police say you did, can you plead not guilty?

A: I guess I'd have to plead guilty.

(Q) Because if you did it, you have to tell the truth.

(Q) You can't lie in court. You have to tell the truth or you get in trouble.

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## Reasoning and decision-making

- Let's pretend that you are being offered a plea bargain.... If you agree to plead guilty to \_\_\_\_\_, the prosecutor will agree to probation for \_\_\_\_\_ months and everything will be over ... you can go home. While you are on probation, if you do something wrong again, you will get sent to [locked facility].
- Or you can choose not to take the deal, plead not guilty, and take the case to trial. Let's say your lawyer tells you there is a pretty good chance you could be found not guilty and not have any punishment. But ... she can't promise ... [and] it will take ... several months ... and you'll be in detention during that time.

*What would you do? And why?*

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## Reasoning and decision-making

- Now let's pretend that the situation is a little different. The prosecutor offers the same deal: If you agree to plead guilty to \_\_\_\_\_, the prosecutor will agree to probation for \_\_\_\_\_ months and everything will be over ... you can go home. But your lawyer says that you probably have just a 50-50 chance of winning a trial.

*What would you do? And why?*

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## JACI (2005)

- Capacity checks (like MacCAT-CA):
  - Example: If youth has difficulty on the item about defense lawyer's role, explain and ask for youth to re-state in own words
  - 3 are included, but examiner can do capacity check with any other item
- Retesting for retention
  - For each capacity check needed during initial administration, repeat the question at a *second session, a few days later*

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**ATTORNEY CST QUESTIONNAIRE\***

TO (Client's Attorney): \_\_\_\_\_ DATE: \_\_\_\_\_

FROM (Evaluator): \_\_\_\_\_ (Docket # \_\_\_\_\_) has been referred to me for the evaluation of competency to stand trial. I would greatly appreciate your completion of the following form, which will provide valuable assistance in beginning this evaluation. Please do not hesitate to phone me if you have any questions not covered here. My contacts are as follows:

Your client: \_\_\_\_\_ E-Mail: \_\_\_\_\_

Telephone: \_\_\_\_\_ FAX: \_\_\_\_\_

Agency & Address: \_\_\_\_\_

Who brought your client's competency to the attention of the court?

☐ Myself ☐ Prosecuting attorney ☐ Court's own motion ☐ Probation officer

☐ Parent/guardian ☐ Detention staff ☐ Arresting officers ☐ Other \_\_\_\_\_

What historical factors, if any, contributed to the perceived need for a competency evaluation?

Check all that apply: \_\_\_\_\_ Describe factors checked: \_\_\_\_\_

☐ History of mental illness

☐ History of psychiatric medication

☐ History of psychiatric hospitalization

☐ History of counseling/therapy

☐ History of criminal record

☐ History of mental retardation

☐ History of learning problems

☐ Client's young age

☐ Other \_\_\_\_\_

One aspect of competency is the client's understanding of the charges and possible disposition associated with them. To help me assess this, please describe:

The charges against your client: \_\_\_\_\_

The nature of dispositions that your client might face, given these charges and your client's past record (optional): \_\_\_\_\_

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## Self-incrimination

"Describe to me what happened that got you arrested by the police."

*Instructions: Engage in conversation such as an attorney might have with the youth to discover youth's report of events surrounding the charges. Note degree to which you are able to follow the youth's story, and youth's ability to respond to questions that you ask as the story unfolds.*

**(NOTE: Do not record content here, in "Clinician's Record," or in written report.)**

- Note clarity of youth's description
- Note internal consistency of youth's description

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## Attorney-client observation

- Direct evidence of capacities
- Ground rules

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## General testing

- Mental status exam
- Intelligence
- Achievement
- Adaptive functioning
- Specific conditions (psychosis, autism spectrum, etc.)

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## Developmental maturity

- Temperance (self-control)
- Perspective ("decentration")
  - Reasoning and problem-solving skills
  - Risk perception (temporal perspective)
  - Decisions/judgments weigh larger contexts
- Responsibility
  - Autonomy
  - Resistance to influence
  - Awareness of one's values/beliefs

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## Measuring maturity

- Adaptive behavior measures (e.g., Vineland II)
- Risk-Sophistication-Treatment Inventory
- Behavior Rating Inventory of Executive Function
- Future Outlook Inventory
- Weinberger Adjustment Inventory (impulse control, consideration of others)
- Resistance to Peer Influence scale
- Psychosocial Maturity Inventory

➤ **COLLATERAL SOURCES**

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## “Response style”

### ***Inventory of Legal Knowledge***

- Age 12 and older
- 5<sup>th</sup>-grade reading level
- Not validated with intellectually impaired
- Caution with adolescents; no cutoff scores
- Feigning opinion only if score is significantly below chance
- *Shoplifting is a more serious crime than armed robbery*
- *The judge is in charge of the courtroom.*

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## Evaluation components [§709(b)(3)]

- Records review: Medical, education, special education, probation, child welfare, mental health, Regional Center, court records ... and any other
- Interview and age-appropriate testing specific to competency
- Developmental history
- Consultation: Minor's counsel and any other person who gave information to the court about the minor's competency
- Proficiency in minor's preferred language, or use of certified interpreter and linguistically/culturally appropriate tools

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## Collateral interviews

- Attorney
- Parent, guardian, other involved adult(s)
- Probation officer
- Juvenile hall clinicians / staff
- Others

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**STANDARDS FOR JUVENILE COMPETENCY**

Standard	Description	Application
Adult norms	Standard application of Dusky standard, without adjustment to take into account the differing demands and purposes of the juvenile court	
Adjusted bar	Higher standard if transfer to adult court contemplated; lower standard for "ordinary" juvenile cases. Requires only rudimentary understanding and basic communication abilities. Eliminates the need for decisional capacities.	
Age-peer norms	Lowers the standard Dusky abilities to a lesser level. A minor's capacities are compared with average children his age.	
Adolescent norms	Lowers the standard Dusky abilities to a lesser level. A juvenile's capacities are compared with those of the average adolescent.	
Flexible bar	Case-specific standard, adjusting the required level of competency to match the level of needed protection in light of the severity of sanctions being faced.	<i>Judicial determination</i>

*Table 1: Different standards for competency to stand trial in juvenile proceedings*



### **CHECKLIST FOR JUVENILE COMPETENCY REPORTS**

- ☐ Evaluator qualifications (not necessarily included in the report)
  - Expertise in child and adolescent development?
  - Forensic psychology?
  - Juvenile competency?
- ☐ Materials reviewed (should be a section of report)
  - Charging documents
  - Police reports
  - School records (including IEP)
  - Medical/psychiatric/therapy records
- ☐ Collateral contacts
  - Attorney
  - Parent/guardian or other close relative
  - Other collateral informants / information
- ☐ Cultural competency
  - Proficiency in minor's preferred language, or use of certified interpreter?
  - Were tools culturally and linguistically appropriate?
- ☐ Testing
  - Any structured method?
  - Appropriate for population?
  - Limitations addressed?
  - Measure of response style (effort; feigning)?
- ☐ Report contents
  - Adequate psychosocial history
  - Mental status exam
  - Avoided extraneous detail, especially pejorative or potentially prejudicial
  - Linking of any competency deficits to their source (e.g., IQ, maturity level, psychiatric impairment, etc.)
  - Correct legal standard?

### BRIEF BIBLIOGRAPHY – SUGGESTED READINGS

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- \* Zapf, P. A., & Roesch, R. (2009). *Evaluation of Competence to Stand Trial*. New York, NY: Oxford University Press.

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KAREN FRANKLIN, PhD is a forensic psychologist with extensive specialized training and experience in the evaluation of competency to stand trial. As an adjunct professor at Alliant University in San Francisco, she taught a semester-long graduate course on assessing legal competencies. She has testified as an expert on best practices in the evaluation and remediation of competency to stand trial in both juvenile and adult courts. In her forensic practice, she specializes in the evaluation of adult criminal defendants and juveniles. She has served on state and local ethics committees and hosts a blog focusing on ethics issues in forensic psychology practice. Her peer-reviewed research, focusing on ethics issues in forensic practice, garnered a 2012 *Distinguished Scientific Achievement in Psychology Award*. She holds psychology licensure in two states (California and Washington). Before becoming a psychologist, she was a legal affairs journalist and a licensed private investigator. More on her background can be found at her website, [www.karenfranklin.com](http://www.karenfranklin.com).