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The Expert's Role in Competency to Stand Trial Determinations

Joseph Jakuback

Introduction

The role of forensic psychology in litigation has grown exponentially in recent decades. At present, psychological experts are utilized in a wide variety of practice areas; testifying in criminal court, evaluating plaintiffs in workers compensation cases, presenting findings in the child custody context, and myriad others.[1] In criminal cases, forensic psychologists are crucial in determining competency to stand trial and can serve as the fulcrum in insanity defense and diminished capacity cases. Experts can testify on behalf of either party or, somewhat uniquely, neither party and instead at the behest of the court.[2] Such cases, where an expert is appointed by the court, are more often seen in pretrial competency hearings and present their own set of unique ethical dilemmas.[3]

In the criminal context, the testimony of psychological experts often plays a pivotal role. Typically, experts evaluate defendants. Most notably, an expert psychologist or psychiatrist is employed in determining if a defendant is competent to stand trial, or in support of or opposition to an insanity, diminished capacity, or other similar defense.[4] With competency in particular, the opinion of the expert is paramount; determinations are rarely contested and the expert is asked to reach a conclusion as to competency.[5] Additionally, psychological experts have been used to evaluate other parties in the criminal realm. One such utilization of a psychological expert is to impeach the credibility of witnesses.[6] However, such instances are rare and typically subject to

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[1] Novotney, *Helping Courts and Juries Make Educated Decisions* APA Monitor on Psychology 48, 70 (2017)
[2] e.g. Alaska Stat. § 12.47.070
[3] APA, *Protecting Patient Privacy When the Court Calls*, APA Continuing Education Vol. 47, 7 (2016)
[4] Slobogin, *Psychiatric Evidence In Criminal Trials,* William and Mary Law Review, Vol. 40, 7 (1998)
[5] 18 USCS § 4241
[6] *Id*. at 14

some level of scrutiny.[7] While superficially similar, the role of the expert is vastly different in instances where capacity is at issue as opposed to in cases of certain defenses. The methods employed also vary greatly based on the specific purpose of the expert in question.

Regardless of which particular methods are employed, there are some inconsistencies between jurisdictions and even within jurisdictions.[8] These arise out of differences in state and federal law and differences individual judges. Along with concerns over inconsistencies is the uneasiness accompanied by a system of unstructured and often disorganized credentialing.[9] Some of these issues arise out of the nature of mental health evaluation. The testability of theories and evaluation can often be called into question because of the differences between psychological evaluation and expert testimony in so called 'hard sciences.' Even more closely related medical experts do not encounter the same set of difficulties. While an expert in a hard science or medicine can fall back on readily verifiable truths, psychological examinations involve the systematic testing of hypothesis after hypothesis and "rarely will the thoughtful psychiatrist regard this hypothesis as a statement of factual 'truth."[10]

Even still, it is important to note that the place of psychological experts in court is well settled. Legislators have gone as far as requiring psychological experts to play a role particularly when competency is at issue.[11] However, aforementioned issues regarding inconsistency and

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[7] See *State v. Foret*, 628 So. 2d 1116, 1125 (LA 1993)
[8] Rogers, *Evaluating Competency to Stand Trial with Evidence-Based Practice* J Am Acad Psychiatry Law 37, 451 (2009)
[9] Otto, *Training and Credentialing in Forensic Psychology*, Behavioral Sciences and the Law, Vol. 8, 218 (1990)
[10] Showalter, *Distinguishing Science From Pseudo-Science In Psychiatry: Expert Testimony in The Post-Daubert Era*, 2 Va. J. Soc. Pol'y & L. 211, 229 (1995)
[11] e.g. Alaska Stat. § 12.47.070

credentialing, as well as problems with uniformity in employed methodology does call into question the credence of some psychological testimony even in a post-*Daubert* landscape.

Competency to stand trial is critical in any criminal proceeding. Competency determinations have been called "the most significant mental health inquiry pursued in the system of criminal law"[12] Often, the issue presents itself early on in the process. Courts find a defendant incompetent if they "presently…suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[13] Such a determination is vital as trying an incompetent defendant is a due process violation.[14] While jurisdictions differ as to the specifics of competency testing, the determination is typically predicated on a court-appointed expert's evaluation and corresponding report.[15] As with any expert, these evaluators are held to the *Daubert* standard federally and in certain jurisdictions.

***Frye, Daubert,* and Competency**

Rule 702 of the Federal Rules of Evidence defines the boundaries of expert testimony. The rule allows "a witness qualified as an expert by knowledge, skill, experience, training, or education [to] testify in the form of an opinion or otherwise" in instances where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue."

[12] Pirelli, *A Meta-Analytic Review of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 2 (2011)
[13] 18 USCS § 4241
[14] See *Dusky v. United States*, 362 U.S. 402, 402 (1960)
[15] Kaplan, *The Forensic Psychology Report,* ABA (2018)

Previously, the determination of who qualified as an expert was based on the Supreme Court's holding in *Frye v. US*. The Court in *Frye* based its determination on the acceptability of the proposed expert's methods and determinations within the relevant scientific community.[16] In looking at "scientific recognition" the *Frye* court left the greater scientific community as the gatekeeper of expertise. While *Frye* remained intact after rule 702's passing the Court moved away from this approach beginning with *Daubert v. Merrell Dow Pharmaceuticals* in 1993. In *Daubert,* the Court downplayed the importance of the scientific community holding that, while "general acceptance" remains relevant to whether or not a proposed witness is an expert, it is one of many factors to determine an expert's admissibility.[17] Doing so removed the scientific community as gatekeepers of expertise and placed that responsibility in the hands of judges. Instead of relying on general acceptability, judges were to weigh several factors in making their determinations. The Court included a non-exhaustive list of factors to consider such as: whether the expert's technique or theory can be tested and assessed for reliability, whether the technique or theory has been subject to peer review and publication, the known or potential rate of error of the technique or theory, and the existence and maintenance of standards and controls, along with the existing "general acceptability in the scientific community" standard.[18]

Daubert gave the gatekeeping function in the expert witness context to judges. It also noted that challenges to a ruling either excluding or allowing expert testimony were reviewed with the deferential abuse of discretion standard.[19] This, along with the holding serve to complicate matters for forensic psychological experts. "For mental health experts, the practical

[16] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
[17] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. (1993)
[18] *Id.*
[19] *Id.*

effect of this ruling is that different trial judges within the same jurisdiction may legitimately reach opposite conclusions about the admissibility of specific methods."[20]

The decision in *Daubert* caused confusion beyond inconsistences in the way experts were handled. With the advent of the court's factor-weighing test, some academics renewed questions regarding the classification of psychological expertise. These questions emerged as "differences of opinion as to whether psychological expert testimony…should be classified as "scientific" or as "other specialized knowledge."[21] Further, some argue that a strict adherence to *Daubert,* disproportionality limits the defense as the burden of production with state of mind evidence is routinely placed on the defense.[22] The argument follows that a defendant's argument regarding mental state is often "closer to social constructions than objective facts" and that a strict reading of *Daubert* would make it harder for such "soft sciences" to find their way into court.[23]

One concern in the context of *Daubert* is the lack checks stemming from the adversary system. As competency is determined largely by a court-appointed expert, the idea that opposing experts could rebut any presumption is lacking. Therefore, the role of the judge as gatekeeper is even more important than in other contexts.

Training and Credentialing

Daubert unquestionably altered the landscape for forensic mental health experts. While its effect deals in broader, discipline-wide determinations, it also should raise issues as to the

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[20] Rogers, *Evaluating Competency to Stand Trial with Evidence-Based Practice* J Am Acad Psychiatry Law 37, 451 (2009)
[21] Goodman-Delahunty, *Forensic Psychological Expertise in the Wake of Daubert,* Law and Human Behavior, Vol. 21, 125 (1997)
[22] Slobgin, *The Structure of Expertise in Criminal Cases*, Seton Hall Law Review, 34 109 (2003)
[23] *Id.* at 110

validity of individual experts. The role of a forensic psychologist, whether in the competency setting or with insanity and similar defenses, is fundamental to the judicial process. The testimony given is of an exceeding specialized nature. "Research suggests that forensic psychology is a discrete, unique body of knowledge that is not mastered by the majority of mental health clinicians in general practice."[24] In light of this specialization, experts should be drawn, not from the clinical community as a whole, but from the ranks of those versed in this "discrete, unique body of knowledge."[25] Whether a result of scarcity in specialized professionals or by some oversight by courts, this is not the case. Instead, "most of the psychologists and psychiatrists providing services to courts have come from the ranks of professionals who have not graduated from special forensic training programs."[26] Therefore, experts who employ techniques or theories which may be acceptable under *Daubert* are being allowed to participate, whether through testimony or in competency reports, despite a lack of expertise in those particular techniques or theories.

This issue is caused, in large part, by a scarcity in both specialized training programs, and individuals who have reached some level of proficiency in forensic psychology.[27] However, inconsistent credentialing standards also play a part. Looking at those individuals allowed to serve as court ordered experts, states have taken two approaches. To either statutorily create and require some form of credentialing whereby the state certifies that an individual is qualified, or by leaving the decision to judges to ensure that a given expert has some level of expertise.[28] In

[24] Otto, *Training and Credentialing in Forensic Psychology*, Behavioral Sciences and the Law, Vol. 8, 218 (1990)
[25] *Id*
[26] *Id.* at 225
[27] *Id.*
[28] *Id.* at 227

either case, credentialing should be seen as a threshold issue and not replace the judge's unique role as a gatekeeper.[29]

Credentialing also exists at the national level. The American Board of Forensic Psychology, in concert with the American Board of Professional Psychology, acts as the national credentialing body. Candidates undergo vigorous testing and are subjected to a wide variety of other educational and experiential requirements.[30] However, a very small number of individuals have achieved national certification from the American Board of Forensic Psychology.[31] The vast majority of experts have not achieved this level of accreditation.[32] Even assuming the rare occasion where a psychological expert has achieved national accreditation, there is little to suggest that, despite the rigorous process, these experts are more qualified than others in the field.[33] In fact, no empirical study has been conducted to demonstrate the value of the American Board of Forensic Psychology's credentialing process.[34]

Relying on an untested process for accreditation raises obvious concerns. The fact that nothing has been presented to validate the results of ABFP evaluations suggests that such evaluations could be arbitrary results independent of an individual defendant's condition. Further, the use of standardized evaluations presents a parallel predicament. While uniformity encourages consistent results, blindly implementing a predestined test could fail to meet a defendant's particular situation; some tests may be better served for certain mental illnesses than others.

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[29] *Id.* at 228
[30] *Id.* at 229 see also American Board of Forensic Psychology https://abfp.com/about/
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

Despite a lack of demonstrable value, board certification holds a lofty place in the purview of states. States which do not require independent credentialing place weight on such accolades, while the lack of empirical evidence of value is likely overlooked or unknown.[35] In fact, some states go as far as to statutorily mandate board certification from the American Board of Forensic Psychology for its competency experts.[36] Again, issues can be raised as to the value of this certification. When examining the problem through the lens of *Daubert*, it becomes clear that despite the judge's renewed power as gatekeeper, confusion can arise as to the veracity of a proposed expert's testimony. This is especially true of instances in which a defendant's competency to stand trial is at issue and the court itself provides the examining expert.

Competency Standard

Determinations of a defendant's competency to stand trial have long been critical in due process analysis. Courts have also held that failing to seek a competency hearing in certain circumstances constitutes ineffective assistance of counsel.[37] Practically speaking, such determinations are made based on the report of an expert who has examined the defendant- "most states requires that the examining psychologist provide the court with written signed reports of their findings, which address whether the individual is competent to stand trial."[38] The Supreme Court has held that trying an incompetent defendant violates due process. In 1960, the Court defined competency, stating that in order for a defendant to be competent to stand trial they must have "sufficient present ability to consult with his lawyer with a reasonable degree of

[35] *Id.* at 228
[36] E.g. Alaska Stat. § 12.47.070
[37] *Williamson v. Ward*, 110 F.3d 1508, 1513 (10th Cir. 1997)
[38] Kaplan, *The Forensic Psychology Report,* ABA (2018)

rational understanding" while also looking to "whether he has a rational as well as factual understanding of the proceedings against him."[39] Congress codified the Court's definition of competency saying a defendant is incompetent to stand trial if the defendant is found to "presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[40]

Subsequent cases expand on the method through which such a determination is made. This determination requires the aide of experts in the field. "First, when the court appoints a psychiatrist under 18 U.S.C. § 4244, the psychiatrist, even if he may have hitherto acted in a personal relationship, should now consider himself an officer of the court, not responsible to prosecution or defense. Second, the expert appointed should have a substantial opportunity to observe the accused, and prior to the hearing required by section 4244, should file with the court a written report summarizing his observations and indicating whether he thinks the accused competent within the meaning of *Dusky v. United States***.**"[41]

Issues with *Dusky*

The first portion of the 1st Circuit's interpretation opens up questions about ethical issues. The initial issue arises in instances where a defendant involved in a competency dispute has previously had contact with a medical health professional. Had the defendant seen a psychiatrist or psychologist previously, the court could seek the aide of that psychiatrist or psychologist in making a competency determination. In this context and others where records or testimony of

[39] *Dusky v. United States*, 362 U.S. 402, 402 (1960)
[40] 18 USCS § 4241
[41] *In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970), see *Dusky*

professionals who have previously seen a defendant are sought, obvious confidentiality issues abound.[42] The American Psychological Association (APA) has attempted to address the issue by providing materials and continuing education programs on the subject.[43] However, much confusion remains.[44]

The second portion of the 1st Circuit excerpt begins by decreeing that the expert should have "a substantial opportunity to observe the accused."[45] No clarification has been given on what constitutes a substantial opportunity, leaving more room for inconsistent rulings on competency. More concerning is the responsibility the court places on the expert. In requiring an expert who evaluates a defendant's competency to include whether they "think the accused [is] competent within the meaning of *Dusky v. United States*" the first circuit creates a tenuous situation. As an initial matter, it is well grounded that the testimony of an expert witness should not extend to the "ultimate issue," particularly in cases of state of mind.[46] Here the Court requires that experts make ultimate conclusions regarding competency. This is complicated by the actual standard articulated by statute and in both *Dusky* and *Harmon*. Competency requires that a defendant understand the proceedings and consequences while ably participating in their own defense. While diagnosing falls squarely within the expert's criteria, making such determinations seemingly does not. Here, what is essentially a medical diagnosis is required to include the defendant's ability to assist in their own defense and understand the proceedings.

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[42] APA, *Protecting Patient Privacy When the Court Calls*, APA Continuing Education Vol. 47, 7 (2016)
[43] *Id.*
[44] Zur, *Subpoenas and How to Handle Them: Guidelines for Psychotherapists and Counselors*, Zur Institute
[45] *Dusky v. United States*, 362 U.S. 402, 402 (1960)
[46] See *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997)

Traditionally, the clinical bases of forensic psychology were ill equipped to address such issues.[47]

The *Dusky* standard is problematic in requiring non-medical opinion from a medical expert. It raises ethical issues in the use of non-affiliated, court-appointed experts. It has also been "criticized for both its brevity and ambiguity by mental health professionals and legal scholars alike."[48] Brevity issues speak to the open-endedness of the decision; questions abound as to what level of "aid" the defendant must be capable of providing and to what extent the defendant can understand proceedings. There are also concerns as to inconsistences brought on by its open-ended nature. "Despite these concerns, the Dusky standard, or some variation of it, has been adopted by every state in the United States."[49] While there exists a possibility for inconsistencies in determinations based on the circumstances, there is, at least, a consistency across jurisdictions.

While diagnosing a "mental disease or defect" presents its own challenges, the difficulty for courts, and pertinently experts, comes from the other statutory requirements. Determining an individual defendant's ability to a) comprehend the nature and consequences of proceedings, and b) assist in their own defense,[50] can prove to be incredibly troublesome. A defendant have "a reliably diagnosed mental disorder within the psychotic spectrum (e.g., paranoid schizophrenia), or may have a substantial physical illness that affects mental capacity (e.g., advanced cerebral arteriosclerosis) or may even have total amnesia for the events surrounding the alleged crime,

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[47] Rogers, *Evaluating Competency to Stand Trial with Evidence-Based Practice* J Am Acad Psychiatry Law 37, 451 (2009)
[48] Pirelli, *A Meta-Analytic Review of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 2 (2011)
[49] *Id*
[50] *Dusky v. United States*, 362 U.S. 402, 402 (1960)

and still be found competent to stand trial."[51] Part of the issue comes from the well-established idea that competency, unlike insanity, is relevant at the time of trial rather at the time the crime was committed. Therefore a defendant could be suffering from a mental illness at the time the crime was committed and be competent, or be competent at the time of the crime but incompetent to stand trial due to later developments.

In response, psychological experts could base examinations on the statutory language. Devising some criteria whereby an expert, and by extension the court, could evaluate an individual's illness with specific emphasis on comprehending proceedings and aiding in their defense would simplify matters.[52] This is not the case. "Oftentimes, experts do not base their evaluations on competency criteria. Instead, fitness for trial is equated with the absence of symptoms of major psychiatric disorders."[53] By evaluating for symptoms, competency determinations miss out on the bulk of the statutes requirements. Identifying symptoms does not speak to the defendant's ability to assist counsel or comprehend proceedings.

The open-endedness of the statutory language and associated holding, coupled with the reliance on experts to make final determinations could prove problematic. Some states have addressed this issue, laying out far more detailed criteria for competency. New Jersey, for example, has codified competency in N.J.S.A 2C:4-4 which reads:

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[51] Golding, *Assessment And Conceptualization Of Competency to Stand Trial: Preliminary Data on The Interdisciplinary Fitness*, Law and Human Behavior Vol. 8 323 (1984)
[52] Rogers, *Evaluating Competency to Stand Trial with Evidence-Based Practice* J Am Acad Psychiatry Law 37, 451 (2009)
[53] Golding, *Assessment and Conceptualization Competency to Stand Trial,* Law and Human Behavior, Vol. 8, 323 (1984)

a. No person who lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

b. A person shall be considered mentally competent to stand trial on criminal charges if the proofs shall establish:

(1) That the defendant has the mental capacity to appreciate his presence in relation to time, place and things; and

(2) That his elementary mental processes are such that he comprehends:

(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;

(e) That he will be expected to tell to the best of his mental ability the facts surrounding him at the time and place where the alleged violation was committed if he chooses to testify and understands the right not to testify;

(f) That there is or may be a jury present to pass upon evidence adduced as to guilt or innocence of such charge or, that if he should choose to enter into plea negotiations or to plead guilty, that he comprehend the consequences of a guilty plea and that he be able to knowingly, intelligently, and voluntarily waive those rights which are waived upon such entry of a guilty plea; and

(g) That he has the ability to participate in an adequate presentation of his defense.[54]

By enumerating what it means to "comprehend the proceedings" and "assist in one's defense" New Jersey, like other states, allows for a more precise determination of competency. This heightened awareness of the intricacies of competency determinations is evident in subsequent decisions. In *State ex rel J.C.* the Appellate Division found an evaluation to be deficient despite its inquiry into the defendant's ability to comprehend the proceedings and assist in their own defense, the original federally-appropriate *Dusky* standard.[55] That examination, and subsequent expert report, included information regarding the *Dusky* factors and a determination that the defendant would be unable understand the proceedings and assist counsel.[56] In fact, the evaluating expert testified that the defendant would not "be able to comprehend the information that -- is going back and forth during . . . [at] a hearing or a trial"; and "would not be able to . . . work with [defense counsel] or answer . . . questions or understand the gravity of it."[57] Even still, the court held that the evaluator failed to consider the non-*Dusky* factors enumerated in 2C:4-4 and reversed the trial court's findings that the juvenile defendant was incompetent to stand trial.[58]

While trying an incompetent defendant is a clear due process violation,[59] it would be unfeasible to hold a hearing in every instance. Instead, New Jersey places the onus on the court deciding that "if there exists a "bona fide doubt" regarding a defendant's competency to stand

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[54] *N.J. Stat. § 2C:4-4*
[55] *State ex rel. J.C.*, 2019 N.J. Super. Unpub. 1344, (App. Div. 2019)
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] State v. Auld, 2 N.J. 426, 435, 175 (App. Div. 1949)

trial, the court should hold a competency hearing."[60] Additionally, the court has placed particular emphasis on defense counsel to raise the issue of competency where appropriate given counsel's unique ability to observe a defendant.[61]

It is easier for an expert to make a determination on competency when given precise guidelines. Further, the more precise language allows for the development of better tests for competency which could be administered universally. Even still, as jurisdictions continue to adhere to the more general federal standard, concerns could be raised. On a micro level, there are issues with case by case discrepancies in competency determinations given the broad language. Looking more globally, there are concerns about the methodology used and the need for more precise evaluative tools.

Evidence Based Testing

In response to these and similar concerns, the field of forensic psychology has made strides in tailoring evaluations to their precise need. So called "evidence based practice" has developed particularly in the area of competency.[62] These approaches however, are not without their detractors. While the use of these newer methods has increased in recent years, the field as a whole has been weary to adopt the practice in part due to "seasoned practitioners who see the possibility that their decades of experience will be devalued or even discredited by evidence based approaches."[63] Additional pushback has been felt as a result of perceived objectivity

[60] *State v. Lambert*, 275 N.J. Super. 125, 128 (App. Div 1994) see also *State v. Spivey*, 65 N.J. at 37, 461 (NJ 1974)
[61] *State v. Lucas*, 30, N.J. 37, 74 (NJ 1959)
[62] Rogers, *Evaluating Competency to Stand Trial with Evidence-Based Practice* J Am Acad Psychiatry Law 37, 451 (2009)
[63] *Id.*

concerns stemming from the emphasis placed on payment and publication, rather than traditional clinical standards.[64] Still others in the field object to the cost, both monetary and in terms of time, associated with evidence based tests for competency.[65] Even still, the evidence based approach has spawned several discreet tests specifically for determining competency.[66]

Twelve competency assessment instruments have been developed over the past 40 years intended to address a defendant's psychological abilities, ranging from informal checklists to structured, criterion--based scoring instruments:[67]

1. The Competency Screening Test,[68]
2. The Competency to Stand Trial Assessment Instrument,[69]
3. The Georgia Court Competency Test,[70]
4. The Computer-Assisted Determination of Competency to Proceed,[71]
5. The Competence Assessment for Standing Trial for Defendants with Mental Retardation,[72]
6. The Interdisciplinary Fitness Interview,[73]
7. The Fitness Interview Test,[74]
8. The Metropolitan Toronto Forensic Service (METFORS) Fitness Questionnaire,[75]

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[64] *Id.*
[65] *Id.*
[66] Pirelli, *A Meta-Analytic Review Of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 3-4 (2011)
[67] *Id.*
[68] Lipsitt, *CST* (1971)
[69] Laboratory of Community Psychiatry, CAI (1973)
[70] Briggs, *GCCT/GCCT-MSH* (1988)
[71] Barnard, *CADCOMP* (1991)
[72] Everington *CAST-MR* (1992)
[73] Golding, *IFI/IFI-R* (1993)
[74] Roesch, *FIT/FIT-R* (1998)
[75] Nussbaum, *MFQ* (1998)

9. The MacArthur Competence Assessment Tool--Criminal Adjudication,[76]
10. The Mosley Forensic Competency Scale,[77]
11. The Evaluation for Competency to Stand Trial--Revised,[78] and
12. The Test of Malingered Incompetence.[79]

These tests, though not universally accepted, have at least some grounding in verifiable data.[80] However, the profession as a whole has been slow to adopt modern, uniformed, testing procedure. Many tasked with competency determinations continue to utilize traditional methods of clinical evaluation, methods which were "designed to primarily measure broad psychological constructs (e.g., intelligence or personality)" and not competency as prescribed by statute.[81]

One of the earliest attempts at an evidence-based competency evaluation was the "Competency Screening Test."[82] The test consists of twenty-two open ended questions specifically designed to evaluate a defendant's ability to comprehend proceedings, and assist in defense.[83] The test questions were developed with six criteria in mind: (1)Relationship to one's attorney in establishing a defense, (2) Understanding and awareness of the nature of the court proceedings, (3) Affective response to the court process in dealing with accusations and feelings of guilt, (4) Judgmental qualities in engaging in the strategy and evaluation of the trial, (5) Trust

[76] Poythress, *MacCAT-CA* (1999)
[77] Mosley, *MFCS* (2001)
[78] Rogers, *ECST-R* (2004)
[79] Colwell, *TOMI* (2008)
[80] Pirelli, *A Meta-Analytic Review Of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 4 (2011)
[81] *Id*.
[82] Lipsitt, *CST* (1971)
[83] Nottingham, *A validation study of the Competency Screening Test*. Law and Human Behavior, 5, 331 (1981)

and confidence in the attorney, and (6) Recognition of the seriousness of the situation.[84] Questions like "when I go to court my lawyer will___" are scored from zero to three with scores added up and viewed holistically."[85] A score of twenty or lower results in a determination that the test-taker is incompetent to stand trial.[86] Studies of the Competency Screening Test show it has significant interrater reliability and produces generally consistent results.[87]

Despite the advancements of evidence based testing, there is some concern that the existence of twelve discreet tests for evaluating competency shows its arbitrary nature. It is safe to assume that different tests could yield different results for the same defendant. This would mean that competency determinations, despite the across-the-board acceptance of *Dusky*, suffer from a striking lack of consistency. The fact that a defendant could be competent under one test and incompetent when evaluated using another has serious due process implications.

The similarities between the tests could be used to assuage some of this concern.[88] The twelve currently-employed tests are based on the same principle and vary only in the specific language of questions.[89] It could be that minor differences would not yield different results. Another explanation could be the evolving nature of the field. The Competency Screening Test, developed in 1971, was groundbreaking. The subsequent eleven widely-used tests could be seen as evolutions of the original method. However, the still widespread use of the original test[90] further complicates the issue. If these, essentially similar, tests were just evolutions of the CST,

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[84] *Competency Screening Test,* http://criminal-justice.iresearchnet.com/forensic-psychology/competency-screening-test-cst/
[85] *Id.*
[86] *Id.*
[87] *Id.* see also Nottingham
[88] Pirelli, *A Meta-Analytic Review Of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 4 (2011)
[89] *Id.*
[90] *Id.*

tweaked to better fit the changing field, some fears of inconsistency could be avoided. But, the lack of a consensus, evidenced by the still in use CST, is still somewhat problematic.

Even still, evidence based testing as a whole, seems to be an improvement. The fact that these tests are specifically tailored to legal competency sets them apart from traditional diagnostic measures. While traditional methods were developed independent of *Dusky* or any other standard; "Competency assessment instruments…address competence-related abilities directly per the relevant legal standard"[91]

Evidence based testing also does much to assuage concerns about the validity of certain experts. In competency determinations, issues about training and credentialing take on an even more important role. With court appointed experts the need for uniformity and verifiability are even more critical. Before recent developments, uniformity and verifiability were scarce in the arena of psychological expertise.[92] Few studies had been done on extant testing and credentialing of proposed experts and their methodologies.[93] Studies which have been conducted show flaws in methodologies, particularly with an eye towards traditional clinical approaches.[94] By implementing uniformed, evidence based testing, experts could avoid this lack of verifiability. Consistent methodologies would lessen the need for intensive credentialing and training, while adopting modern approaches to testing would do much to right the wrongs of flawed traditional models.

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[91] *Id.*
[92] Otto, *Training and Credentialing in Forensic Psychology*, Behavioral Sciences and the Law, Vol. 8, 218 (1990)
[93] *Id.*
[94] [94] Slobogin, *Doubts About Daubert: Psychiatric Anecdata as a Case Study*, Washington and Lee Law Review, 57 3 920 (2000)

Adopting evidence based evaluations does not solve the consistency problem however. The existence of different tests, each purporting to evaluate insanity and each based on *Dusky*, is on its own, evidence of inconsistency. This places a burden on the field and on experts themselves to adopt methods which render uniform results. This is compounded by the unique nature of available tests which, despite a general adherence to the codified standard set out in *Dusky,* do vary in their language.[95] In a global sense, certifying bodies or the courts themselves could mandate a specific test be used instead of allowing the expert to decide. Without such a uniform determination, "evaluators must be mindful when choosing which measure to use because of variability in their in their utility."[96]

The importance of the shift towards evidence based evaluations is made abundantly clear by the available data. Early studies of emerging evidence based testing found consistent consensus among examiners utilizing the novel techniques.[97] The same could not be said of traditional clinical methods, particularly in light of their typically non-criminal purposes. However, the availability of data on traditional evaluative methods is somewhat lacking, particularly in the context of some comparative analysis between such methods and emerging, evidence based testing.[98] Even still, the development of tests based specifically on *Dusky* is a step forward.[99] The fact that modern standards for forensic psychology encourage the use of

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[95] Pirelli, *A Meta-Analytic Review Of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 4 (2011)
[96] Grisso, *Evaluating competencies: Forensic assessments and instruments* (2nd ed.). New York: Kluwer Academic/Plenum Publishers. (2003)
[97] Golding, *Assessment and Conceptualization Competency to Stand Trial,* Law and Human Behavior, Vol. 8, 323 (1984)
[98] Pirelli, *A Meta-Analytic Review Of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 4 (2011)
[99] *Id.*

evidence based competency assessment but declines any professional mandate leaves Judges to fulfill their roles as gatekeepers of substandard methods.[100]

Competency vs Insanity

While both competency and the insanity defense utilize the same type of expert, share evaluative tools, and touch on similar subjects, competency to stand trial is not the same as insanity. Determinations of competency have little to do with the insanity defense, "since the standards are quite different."[101]

Just as competency is critical to due process, the use of an expert in defenses is constitutionally mandated.[102] The Supreme Court has held that the Constitution requires that the court provide an expert for indigent defendants in insanity defense cases.[103] However, the differences in standards and applications set the two apart.

The insanity defense is codified federally as the 1984 Insanity Defense Reform Act.[104] The Act standardizes the expert's role, limits ultimate issue conclusions, and eliminates non-insanity mental-health defenses.[105] The federal rules of evidence further limits expert testimony: prohibiting an expert witness in a criminal trial from "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime

[100] Golding, *Assessment and Conceptualization Competency to Stand Trial,* Law and Human Behavior, Vol. 8, 323 (1984)
[101] DOJ, *Insanity-Mental Competency to Stand Trial Distinguished*, Justice Manual 635 (2020), See *Pate v. Robinson*, 383 U.S. 375 (U.S. 1966)
[102] *Ake v. Oklahoma*, 470 U.S. 68, 74 (U.S. 1985)
[103] *Id.*
[104] *18 USCS § 4242*
[105] *Id*

charged or of a defense. Those matters are for the trier of fact alone."[106] However, neither the act nor subsequent case law sets a uniform standard for insanity. Instead states have enacted various test for insanity based upon one of four general tests: the M'Naghten Rule, the Irresistible Impulse Test, the Durham Rule, and the MPC Test. While the four differ in their specific evaluations, all four are similarly different from *Dusky*. *Dusky* and competency in general look at the defendant's ability to understand the proceedings and assist in their defense. Competency determines if a defendant can be tried fairly. Insanity looks instead at the ability form criminal intent or comprehend one's actions. While an individual could theoretically be not guilty by reason of insanity *and* incompetent to stand trial, the tests differ.

The two are also set apart by the window of time which is evaluated. While competency looks at the defendant's state of mind at the time of trial, insanity is based on the state of mind at the time the crime was committed.

Additionally, the two vary in their level of consistency across jurisdictions. When evaluating competency, every court in the United States uses the *Dusky* test.[107] The same uniformity is not present in insanity tests. In insanity, both the substance of the test and the ultimate question at issue varies greatly by state. This jurisdictional variance serves to limit what can and cannot be testified to by the defendant's expert. In *Clark v. Arizona* the Supreme Court held that a state's limitation of evidence of an underlying mental illness to an insanity plea was not a violation of due process.[108] In *Clark,* at trial, the defendant was disallowed from

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[106] USCS Fed Rules Evid R 704

[107] Pirelli, *A Meta-Analytic Review of Competency To Stand Trial Research*, 17 Psych. Pub. Pol. And L. 1, 2 (2011)

[108] *Clark v. Arizona*, 548 U.S. 735, 743 (U.S. 2006)

introducing the testimony of a psychiatric expert to show that he lacked the requisite mens rea.[109] Instead, such evidence was limited to the context of an insanity defense.[110] In upholding this limitation, the Court found that restricting such evidence to insanity did not violate due process.

In *Kahler v. Kansas*, the Supreme Court recently held that due process is not violated when a state bars evidence of mental illness in the guilt phase of trial outside of challenging that a defendant had a particular intent.[111] Contrasting with the federal system for insanity pleas, such a system essentially eliminates insanity as an option, forcing the defendant to instead challenge mens rea. Based on the holding, states are free to institute a system directly opposite to that seen in *Clark*. In such a system, evidence of mental illness remains the baseline; whether challenging intent or demonstrating insanity in its most common legal form, it is paramount that an expert can opine as to a precipitating, underlying condition. However, in either test the existence of a condition alone is not sufficient. Instead, expert testimony is needed to take the additional step of either negating intent or proving insanity based on the given state's definition.[112] While *Kahler*'s effects remain to be seen, the decision assuredly complicates the arena of psychological expert testimony.

Accepting the holdings in *Clark* and *Kahler* is to accept that states are free to define insanity however they wish, even going as far as to virtually eliminate the availability of the defense. The holdings allow great variance between states. They also create substantial inconsistencies in the examination, methodology, and eventual testimony required of psychological experts. With varying tests and increasingly stringent limitations, the role of the

[109] *Id.*
[110] *Id.*
[111] *Kahler v. Kansas*, 206 L. Ed. 2d 312, 318 (U.S. 2020)
[112] *Id.*

expert becomes muddled. A psychological expert who had examined a defendant could provide testimony showing that that defendant's mental illness prevented them from intending a crime but not that it prevented them from comprehending right from wrong in Kansas, while the reverse is true in Arizona.

Competency is determined by a uniform test, employed in all jurisdictions. Insanity varies greatly from state to state.

The issues experts face in the *Daubert* context also differ between competency and insanity. Much of the concern with competency arises as a result of the fact that experts are appointed by the court, virtually unchecked by either party. With experts testifying either in support of or against a particular defense, the adversary system does a great deal to cure such concerns. Even still, a court appointed expert in a defense context would raise the same issues. When a party utilizes a psychological expert for the purposes of asserting or contesting a defense, their counterpart is exceedingly likely to present their own expert. Assuming said experts are admitted under a consistent standard, and with the role of the factfinder to evaluate credibility, issues are less likely than in a competency setting.

While insanity may have more relevance with *Daubert* and standards for experts generally, many of the issues present in competency determinations are assuaged by the nature of the use of experts in the defense context. Even still issues, particularly based on the interplay with *Daubert* and other standards, as well as issues with court appointed experts, do present themselves.

Conclusion

Psychological expert testimony takes on a number of forms in the criminal realm. Whether testifying in cases of insanity or evaluating competency, participating as the expert of a party or at the court's appointment, psychological experts need to consider a wide array of interests while being aware of potential pitfalls. These experts fall into a difficult area in the post-*Daubert* era, an area in which, while some would read *Daubert* as limiting their applicability in court, their role has expanded.

In the competency setting, psychological experts have the somewhat unique ability to testify free of affiliation to either party. In that role, the court's position as gatekeepers becomes even more crucial. Without the checks of impeachment and the overall nature of the adversary system, court appointed experts making competency determinations have far more freedom. Thus, it is the courts job to assure that these experts meet the standard set out in *Daubert* and solidified in state competency law. The same is true of the expert's methodology. While a portion of this methodology has moved towards more modern, evidence-based testing, much of the field is still reliant on traditional standards. Standards which could fall short of *Daubert*'s criteria.

In the context of defenses, psychological experts have a constitutionally mandated place in litigation. Yet, with recent Supreme Court decisions, the exact nature of that role is unclear. Much jurisdictional variance exists as to what the expert can testify to, particularly in regards to insanity defense cases. Still, the place of the expert is incontrovertible.