

THE ABILITY TO MAKE RELEVANT DECISIONS: IMPLICATIONS FOR COMPETENCE TO STAND TRIAL EVALUATIONS

Thomas Grisso

Law and Psychiatry Program
University of Massachusetts Medical School

A few years ago the DFP Committee began asking DFP examiners to assess defendants' decisionmaking capacities when performing evaluations for competence to stand trial. We're all pretty clear on the other three capacities that have been part of CST evaluations for a longer time: "understanding the charges and their consequences," "understanding the trial process," and the "ability to assist counsel." But what exactly do we mean by that fourth CST ability in our report guidelines-- *the "ability to make relevant decisions?"* How might deficiencies in decisionmaking ability manifest themselves in competency cases? How can the ability be assessed? What difference does the ability make, legally and practically?

Examples

First let's consider some hypotheticals, all of which focus on choices about pleading. How might deficient abilities in deciding about pleading arise in competency evaluation cases?

Case #1: Ms. DeMeener, a homeless woman about age 60, was arrested for trespassing on private property when she was searching for clothes in garbage cans in people's backyards. She seemed to have a basic understanding of the charges, the possible consequences, and alternative pleas, as well as the legal process and the roles of its participants. The attorney had no questions about her cooperation with him. But when he talked to her about pleading guilty, she demurred, said "Maybe," and seemed to be confused when he tried to engage her in a process of exploring her options.

In the CST evaluation, the examiner observed that she seemed unable to compare everyday objects or situations. For example, the examiner asked her to name two things that she liked a great deal ("Ice cream and candy!"), then to choose between them ("Ice cream!"). When asked to explain her choice, she said, "I *like* ice cream! When it was pointed out that she also said she liked candy, she agreed, but despite extensive probing by the examiner, she could not explain her choice. While the consequences of this were trivial, Ms. DeMeener manifested the same inability to compare things in conversation about other more important matters in her life as well. She obtained a WAIS-R IQ of 78 but no credit on WAIS-R Similarities.

Case #2: Samson Ite, a 32 year old man with a history of mental illness, was arrested for assaulting a police officer with a suitcase. The officer had been called when Mr. Ite approached an airline ticket agent at Logan Airport to "collect the free ticket to Panama that God had reserved for me so that I can go down there and begin the great religious revival that will save the world." Mr. Ite showed no deficits in his abilities to understand the nature of the trial and to assist his attorney. However, he refused to plead guilty or not guilty by reason of mental illness. He clearly understood the legal consequences typically associated with all of the possible pleas. When asked to explain his decision to plead not guilty, he said that God had made a bargain with him. If he would take the risk of pleading not guilty, God had told him, then God would see it as a sign of his faith and would arrange for his trip to Panama "sooner or later."

Case #3: Del Inkwant, a 14 year old who looked 12, was charged with multiple counts of arson. He was indicted in juvenile court, which meant that he could receive a sentence extending into his adult years if he were found guilty. The prosecutor, however, was willing to drop all but one of the arson charges and to accept a juvenile sentence if the youth would plead guilty to that one arson charge. Del's attorney urged him to do so. But Del insisted on pleading not guilty, even after the attorney spent several sessions impressing upon Del the long-range consequences. Whenever he was asked to explain his choice, Del said that he had always wanted to be the center of a big trial, and besides, it wasn't cool to plead guilty. He wanted to look good in the eyes of his friends.

Decisional Deficits

These three cases exemplify at least three types of deficits in decision making that might be relevant to consider when evaluating a defendant's competence to stand trial.

The case of Ms. DeMeener represents a class of cases in which the ability to reason about one's alternatives--to make comparisons between options based on the relative desirability of their consequences--is impaired due to *cognitive deficits*. The cognitive deficit may be the consequence of dementia, organic brain trauma, or mental retardation. Often the condition will produce difficulties in other areas that relate to competence to stand trial (e.g., understanding of the trial process). But occasionally the deficit will be specific to the processing of information to reach a decision, and therefore will not manifest itself in tasks involving simple understanding, perception, or communication.

Mr. Ite's case exemplifies cases in which problems in decision making are a consequence of *delusions associated with a mental illness*. The reasoning process is sound, in that the conclusion is logical if one accepts the premise, that is, the assertion that God has offered the defendant a bargain pertaining to a mission to Panama to save the world. The premise, however, is related to a delusional belief system. In many cases, a person's delusions will be manifested in several areas that are assessed in competence to stand trial evaluations--for example, the

individual's ability to work with the attorney. But sometimes delusions are limited in the way they impair an individual's functioning. Thus they may not be apparent when one is examining the defendant's understanding of the trial process or ability to relate to an attorney, but only when the defendant is asked to make choices.

The case of Del is a challenge. Here there is no mental illness and no cognitive deficits. Yet an examiner might conclude that Del is not prepared to decide about his plea because *his judgment is impaired by immaturity*. He can reason, and he is not delusional. But the examiner might conclude (based on other psychological data obtained in the evaluation) that Del's choice is a consequence of attitudes associated with a developmental stage that he is passing through, during which he is egocentric, over-values peers' perceptions of himself, and has not yet developed a sense of long-range future consequences for his choices. It is not clear that all judges would consider this a basis for incompetence to stand trial. But it would be appropriate for the examiner to bring the matter to the court's attention, in light of the consequences that Del might suffer because of his immature thinking.

Assessment

In all of these cases, the way to assess defendants' decisionmaking ability is to ask them to make and explain a decision. Whenever possible, the decision ought to pertain to a problem that is relevant for the defendant's own legal situation. For example: "You've explained to me what might happen if you plead guilty and if you plead not guilty. If you were deciding today which of these you wanted to do, what would you choose?" The choice is less important than the next step. "Now tell me--what makes [chosen option] seem better than [option not chosen]?" How much this is explored will depend on the nature of the defendant's answer and the examiner's own clinical common sense.

What does the examiner look for? I suggest that the examiner might attend to the following questions while the defendant is explaining the choice:

- Is the examinee actually *attending to the alternatives*, or just focusing on one of them and talking about it? If there are more than two options, is the examinee attending to all of them?
- Does the examinee seem to be *comparing the consequences* of the two options, or just talking about the two options without actually describing what it is that makes one or the other more or less desirable? Can the examinee make comparative statements when pressed to do it?
- Does the examinee's *choice seem to follow logically* from the reasoning that the examinee has offered (if you accept the examinee's beliefs on which the reasoning is premised), or would the examinee's explanation actually lead you to the option that the examinee is rejecting?

- Does the examinee's explanation contain a *patently false belief related to the examinee's mental illness*, and upon which the examinee's choice is greatly dependent?

As in other areas of ability we assess in competence evaluations, it is important not to merely presume that the examinee "lacks the ability" if this inquiry into decision making raises doubts. For example, if the examinee only talks about one option while explaining the reason for choosing it, the examiner may want to probe: for example, "Okay, but what makes it seem better than [the rejected option]?" Or, "What about [the rejected option]?" Patently false beliefs (delusions) can be questioned and at least mildly challenged, and the short-sightedness of immature reasons for making choices can be explained, in order to determine whether the examinee can respond differently.

It is important to recognize that whether or not the defendant can make the "best," "wisest," or "most advisable" choice is not the issue. Defendants can make whatever choice they want, as long as they can engage in a logical process of comparative decision making and do not have a delusional view of the consequences.

So What?

What is the significance of assessing defendants' capacities to make decisions for themselves? Why is this important?

In *Godinez v. Moran* (1993), the U.S. Supreme Court decided that the *Dusky* standard for CST (*Vailes* in Massachusetts) applied to all of the functions that individuals have to exercise as defendants in legal proceedings against them. Some earlier appellate courts had supposed that certain capacities, especially those required to make "reasoned decisions," were not included under *Dusky* and therefore required an additional and separate consideration when decisional capacities were in doubt. *Godinez*, however, seemed to indicate that a person's capacity to make relevant decisions was part of competence to stand trial. The U.S. Supreme Court's discussion in *Cooper v. Oklahoma* (1996) affirmed this, clearly including in *Dusky*'s orbit the importance of defendants' capacities to make decisions about waiving or asserting important rights in the trial process. It was because of these U.S. Supreme Court decisions that we decided to include "the ability to make relevant decisions" in our CST evaluations in Massachusetts.

Take note of the word "relevant." Not all decisions that defendants might have to make are equally important. Legal counsel is expected to make many decisions about trial strategy that defendants need not be competent to make. Choices about the waiver of important legal rights, however, can be made only by the defendant. The decision to plead guilty, for example, requires the waiver of the right to avoid self-incrimination, the right to a trial by a jury or judge, and the right to cross examine one's accuser.

Being able to make the decision about pleading is especially important when we remember that about 90% of defendants with felony charges plead guilty. Often this happens after the prosecutor has raised the possibility that the defendant can avoid the chance of being convicted of an offense with a heavy penalty by pleading guilty to a lesser offense. Most defendants never participate in a formal trial.

In this light, it is somewhat ironic that we typically spend a great deal of time in our evaluations determining whether a defendant knows what the courtroom is like, what juries do, and whether the defendant will be able to testify at a trial that is unlikely to take place, while spending little time assessing whether the defendant can make decisions that are required in almost every case.