

**Psychological Evaluation and Habilitation of  
Defendants with Mental Retardation  
for Competency to Proceed in Criminal Cases**

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I. What is mental retardation [hereinafter: MR]?

A. American Psychiatric Association's *Diagnostic and Statistical Manual*, 4<sup>th</sup> ed. (*DSMIV-TR*) (American Psychiatric Association, 2000) defines MR as:

1. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test.
2. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
3. Onset is before age 18 years.

B. Note that the deficits/impairments in adaptive functioning required for a diagnosis of MR do not clearly include violating the law, though it could be argued that criminal behavior is evidence of impaired social/interpersonal skills.

C. Mild MR is defined as a Full-Scale IQ of 55-70.

1. 70-90% of MR persons fall in the Mild range.
2. Most have no physical differences that are related MR.
3. Most can acquire reading and math skills equivalent to 3<sup>rd</sup> - 6<sup>th</sup> grade level.
4. Can be taught vocational skills and integrated into general community.

II. Characteristics of MR Criminal Defendants as Shown by National Research

A. As is true in the general population, the vast majority of MR defendants in the criminal justice system are mildly MR (Garcia & Steele, 1988; Santamour, 1986).

B. Most MR defendants are not referred for competency evaluations (Applebaum & Applebaum, 1994).

- C. Warren, *et al.* (2006) found that 70% of MR defendants who are referred for competency evaluations in Virginia were found competent.
- D. Some research has suggested a relationship between substance abuse and propensity of MR persons to be charged criminally (Holland, Clare, & Mukhopadhyay, 2002).
- E. African Americans are overrepresented in populations of MR defendants, though contributing factors to this overrepresentation are not yet understood (Ho, 1999).
- F. Hawk, Rosenfeld, & Warren (1999) showed that a relatively high percentage of MR defendants are charged with sexual crimes in a criminal justice population.
- G. In their survey of all psychiatric admissions in a Danish birth cohort, Hodgins, Mednick, Brennan, Schulsinger, & Engberg (1996) found no link between a diagnosis of MR and type of crime (though sexual crimes were not specifically examined).

### III. How Forensic Psychologists Assess a MR Defendant's Competency to Proceed

- A. Interview defense lawyer to obtain: (1) reason for referral; and (2) his/her perspective as to defendant's ability to understand legal proceeding and assist in defense.
- B. Review of clinical records regarding the defendant, *e.g.*, clinical records from jail, hospital records, school records, and previous forensic evaluations.
- C. Review criminal complaint and police reports. Check defendant's record on CCAP to see if s/he has previous experience with the court process.
- D. Interview other people with recent meaningful contact with the defendant, *e.g.*, jail staff, relatives, friends, co-workers, etc. regarding defendant's recent functioning.
- E. Clinical interview of defendant is typically 1-2 hours and includes the following:
  1. Notification and discussion of the fact that the interview will result in a report to the Court and attorneys, and is, therefore, not confidential.
  2. Information from defendant about his history of: family life, childhood, adolescence, education, physical health, mental health, substance use, employment, public benefits, criminal charges/convictions, and other relevant biographical data. This part of the interview is intended to obtain relevant information and to assess the defendant's cognitive abilities, *e.g.*, memory, verbal abilities, reasoning, processing speed, etc.
  3. Asking defendant what charge(s) s/he faces and maximum possible penalty. Discussion of circumstances leading to arrest, what has happened in court, how s/he is relating to his/her lawyer, what s/he is hoping for in the case. Pose hypothetical dispositional options to assess defendant's response.

4. Asking general questions about roles of key actors in criminal court process, pleas available, sentences possible, factors considered by judge in sentencing, and other basic information about the criminal court process.
  5. Behavioral observations about defendant's: appearance; orientation (time, place, person, situation); concentration; memory; manner of relating; affect and mood; thought content and organization; fund of knowledge; reasoning; judgment; paranoia; hallucinations; homicidal/suicidal ideation.
- F. Cognitive assessment may be based on administration of psychological tests unless reliable test data is already available. Commonly used cognitive assessment tests:
1. Wechsler Adult Intelligence Scale, 3<sup>rd</sup> ed. (WAIS-III).
    - a. Considered the “gold standard” for intellectual assessment. Administration time is 1½ - 3 hours, depending on examinee.
    - b. Shorter intellectual assessment tests, such as the Wechsler Abbreviated Scale of Intelligence (WASI) and the Kaufman Brief Intelligence Test, 2<sup>nd</sup> ed. (KBIT-2) are sometimes used. Reliance on WASI for important decisions has been questioned (Axelrod, 2002).
    - c. WAIS-III consists of 14 subtests (3 of which are optional) that assess verbal and nonverbal (“performance”) abilities that are quantified in a Verbal IQ score, a Performance IQ score, and a composite Full-Scale IQ score – all of which are based on the large developmental sample of the examinee’s age-related peers.
    - d. Many abilities assessed by WAIS-III are relevant to question of defendant’s competency to proceed, as shown by these examples:
      1. Vocabulary subtest measures knowledge of English language.
      2. Picture Completion subtest measures ability to attend to visual detail – helpful to understand what is going on in court.
      3. Picture Arrangement subtest tests ability to visualize events in a logical manner – another skill useful for defendant in court.
    - e. WAIS-III (and all intelligence testing) has been criticized as: (1) being overly reliant on *acquired* knowledge (*e.g.* Vocabulary subtest) rather than *innate* abilities; and (2) biased in favor of European-American cultural values (*e.g.*, questions about interpretation of European-origin proverbs on Comprehension subtest).

2. Wide-Range Achievement Test, 4<sup>th</sup> ed. (WRAT4).
  - a. A quick measure of reading, spelling, and math abilities.
  - b. The 4<sup>th</sup> edition (WRAT4) includes a subtest for assessing reading *comprehension*. The still widely used 3<sup>rd</sup> edition (WRAT3) only measures word recognition ability, not reading comprehension.
  - c. Testing reading comprehension relates to defendant's ability to read legal documents, but literacy is generally not required for competency.
3. Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR).
  - a. This 3-part, 50-item test is a normed and validated instrument designed for assessment of competency of MR defendants to stand trial.
  - b. Part I measures the defendant's understanding of basic legal concepts by asking questions and offering three multiple-choice answers.
  - c. Part II measures the defendant's skills to assist in his/her defense by asking questions and offering three multiple-choice answers.
  - d. Part III measures the defendant's understanding of case events by asking open-ended questions.
  - e. Defendant's score on each part, and on entire test, can be compared to the mean scores of the 3 groups of defendants in the developmental sample: (1) MR defendants found competent; (2) MR defendants found incompetent; and (3) non-MR defendants.
  - f. Strengths of the CAST-MR:
    - 1) The test uses simple wording and sentence structure. It does not require that the examinee be literate.
    - 2) Multiple-choice format means that many MR defendants who lack linguistic ability to respond to open-ended questions can demonstrate their knowledge (or lack thereof) by being given response cues.
    - 3) Has good inter-evaluator reliability.
  - g. Potential criticisms of the CAST-MR:

- 1) Developmental sample size was small: 51 MR defendants who were competent and 37 MR defendants who were incompetent.
- 2) The evaluator's assessment of the quality of the defendant's description of case events in Part III is arguably subjective, though guided by criteria in the CAST-MR manual.
- 3) Legal knowledge and skills assessed in Parts I and II may not be pertinent to a particular case, *e.g.*, questions relate more to defendants in trials than to defendants considering guilty pleas.
- 4) The multiple-choice format of Parts I and II was intended to compensate for the less developed linguistic abilities of many MR defendants, but in a criminal case unprompted linguistic abilities may be critical to the defendant's ability to understand and assist.

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

- a. The MacCAT-CA is a normed test of the criminal defendant's abilities in three areas related to the legal proceeding: (1) *understanding* of the legal process; (2) *reasoning* ability as to case relevant information, general legal information, and choices in the case; and (3) *appreciation* of factors relevant to defendant's own case.
- b. It is important to note that the MacCAT-CA was *not* normed on mentally retarded subjects. In fact, persons with a primary diagnosis of mental retardation were excluded from the developmental sample.
- c. *Understanding* is assessed as comprehension of: (1) basic legal terms; (2) roles of primary legal actors in criminal court; and (3) elements of a hypothetical offense and lesser, included offenses; and (4) consequences of guilty plea and conviction. This factor is assessed via examinee's responses to a hypothetical case. If examinee responds incorrectly, examiner "teaches" the correct response and re-evaluates.
- d. *Reasoning ability* is assessed by: (1) giving 2 facts about hypothetical case and asking which is more important to tell lawyer; (2) giving 2 plea options and assessing defendant's ability to compare pros and cons of each and to seek further information.
- e. *Appreciation* is measured as the defendant's rational understanding of the proceedings against him/her. In contrast to the *Understanding* and *Reasoning* measures, in which conclusions about defendants' abilities are inferred from responses to a hypothetical case, the *Appreciation* measure examines defendant's understanding of his/her own case. This third criterion is more subjective than the other two, because it

requires the examiner to judge the “plausibility” of the defendant’s opinions regarding how s/he is being treated in the legal system.

f. Strengths of the MacCAT-CA include:

- 1) Assessment of *decisional competence*, i.e., the ability to make decisions about one’s case in an informed and rational manner.
- 2) Large developmental sample. Good inter-evaluator reliability.
- 3) Use of hypothetical case avoids having examiner discuss defendant’s case in a way that might confuse defendant.

g. Potential criticisms of the MacCAT-CA include:

- 1) Because the MacCAT-CA was not normed using mentally retarded subjects, its use with mentally retarded defendants is questionable, if not unacceptable.
- 2) The legal relevance of *decisional competence* is not clearly established in all jurisdictions.
- 3) The hypothetical case in the MacCAT-CA is confusing for many defendants, particularly ones with lower IQ’s. Inability to attend to facts of a hypothetical case may not represent inability to attend to facts of one’s own case, because reflection on personal experience is easier than attending to an abstract set of facts.
- 4) The “teaching” component carries the potential of the evaluator giving the defendant inaccurate legal information.
- 5) The *Appreciation* section allows for evaluator subjectivity as to the “plausibility” of the defendant’s reasons for feeling that s/he is treated unfairly, not liking his/her lawyer, etc. Defendants who do not give reasons for their answers get scores of 0, which penalizes those with poor linguistic ability, such as MR defendants.
- 6) Few test items assess how well the defendant will assist in the defense by having good communication with his/her lawyer.

#### 5. Evaluation of Competency to Stand Trial – Revised (ECST-R)

- a. Structured interview format with 18 items to assess factual and rational understanding of court proceeding, and ability to consult with counsel.
  - b. ECST-R closely tracks the *Dusky* standard, so does not assess decisional competency.
  - b. It also includes 28 items designed to screen for feigned incompetency.
  - c. Has impressive data supporting its validity and inter-examiner reliability, but all research of the ECST-R to date has been by its author, so there is a need for independent cross-validation.
- G. All of the foregoing psychological assessment instruments are tests of *cognitive* abilities, *e.g.*, knowledge, intelligence, memory, reasoning, etc., because the assessment of abilities to understand legal proceedings and assist in defense is primarily cognitive in nature. *Personality* assessment instruments, such as the Minnesota Multiphasic Personality Inventory, 2<sup>nd</sup> ed. (MMPI-2) and the Personality Assessment Inventory (PAI) are not particularly useful for this cognitive assessment, particularly when the examinee is MR.
- H. Bear in mind that test results are only one data set in a comprehensive psychological assessment that should include multiple data sets, *e.g.*, IIIA – IIIC, *supra*.

#### IV. Habilitation of MR Criminal Defendants to Attain Competency to Proceed.

- A. Treatment of mentally *ill* defendants found incompetent to proceed primarily relies on administration of psychotropic medications, but also typically involves psychoeducational groups about the court process and how a defendant should behave with his/her lawyer and in court. Habilitation of MR defendants primarily involves such psychoeducational groups and individual instruction, but may also include psychotropic medications if the defendant has a co-occurring mental illness diagnosis.
- B. In Wisconsin, all treatment/habilitation of defendants committed as incompetent to proceed is provided on an inpatient basis at Mendota Mental Health Institute (MMHI) and Winnebago Mental Health Institute (WMHI), even if the defendant was out on bail prior to the commitment. Since the clinical need for *inpatient* (versus *outpatient*) care for most such defendants is nil or brief, the constitutionality of requiring inpatient hospitalization for all such defendants is highly questionable (Miller, 2003).
- C. At MMHI and WMHI, competency habilitation of MR defendants generally involves 30-60 minute psychoeducational groups of varying frequencies. Such groups generally have a curriculum that teaches participants the basics of the criminal court process through lecture, discussion, videotapes, pictures and charts. Emphasis is on

understanding the roles of key actors, purpose and sequence of basic steps in the process, and layout of the courtroom. A competency habilitation curriculum designed for MR defendants was developed by MMHI psychologist Edmund Musholt, Ph.D.

D. Wall, Krupp, & Guilmette (2003) described a model program for competency habilitation of MR defendants in Rhode Island that utilized:

1. *Individual* (compared to *group*) instruction/training.
2. Interaction with the defendant's defense lawyer to facilitate communication.
3. Placement in the least restrictive alternative, including community placement.

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