Commentary: Training for Competence—Form or Substance?

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In this issue of the Journal, Wall *et al.*[1] describe a program designed to restore to competency mentally retarded defendants who have been found incompetent to stand trial (IST). Clearly, individuals with mental retardation vary in their ability to engage in life activities and cognitive processes. For the sake of this discussion, however, I will refer to mentally retarded individuals as if they were fairly uniform in their level of ability. Wall *et al*. describe a detailed training program that uses a variety of strategies to improve the organizational and cognitive skills of mentally retarded defendants in order that the latter may return to the criminal justice process and have their charges adjudicated. With this population of IST defendants, the issue usually is less often "restoration" of competency and more commonly creation of competency where none existed before because of cognitive and behavioral deficits. Wall *et al.* clearly describe theirs as a training, rather than an education or restoration, program.

I am concerned that competency training for individuals with mental retardation, even with attention to specific elements of competency as described by Wall *et al.*,[1] may lead to apparent attainment of the technical standard for competency to stand trial (CST) without developing the level of understanding necessary to be an informed participant in the trial process. As a result, there is a risk that the competency attained may be more form than substance, and the goal of ensuring that criminal defendants can meaningfully participate in their own defense will not be attained.

The principle that trial of an incompetent individual violates the constitutional guarantee of due process is well established.[2] Requiring that a criminal defendant be competent to stand trial serves several purposes.[3,4] First, the dignity of the criminal justice system is preserved by trying only those individuals who are fit for prosecution and punishment by virtue of being morally accountable. Second, the reliability of the proceedings is enhanced when the defendant can participate in a meaningful manner, such as by recalling critical facts and events. Finally, our legal system is premised on the notion that the defendant will play a key role in making specific decisions regarding the proceedings. Thus, there is an expectation that the defendant will possess some decision-making capacity rather than being entirely passive.

Like many legal concepts, CST is reasonably clear in its definition but more vague in its application. At times, it bears a resemblance to Justice Stewart's definition of pornography: ". . .I know it when I see it. . . ."[5] This remains the case despite efforts by many researchers to objectify the assessment of CST through various instruments and rating scales.[6–8]

In the United States, the standard for competency to stand trial was established in *Dusky v. U.S.*[9] Whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings against him." The standard of proof for establishing incompetence is "preponderance of the evidence."[10]

In *Godinez v. Moran*, the Supreme Court described some of the complex decisions that a criminal defendant is asked to make during the course of a trial:

> A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his "privilege against compulsory self-incrimination," *Boykin v. Alabama*, 395 U.S. 238, 243, 23 L.Ed. 2d 274, 89 S. Ct. 1709 (1969), by taking the

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> witness stand; if the option is available, he may have to decide whether to waive his "right to trial by jury," *ibid*; and, in consultation with counsel, he may have to decide whether to waive his "right to confront [his] accusers," *ibid*., by declining [***332] to cross-examine witnesses for the prosecution. . . . In sum, *all* criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated [Ref. 11, p 331–2].

Despite the potentially complex nature of the decisions to be made by the defendant, the threshold for competency is quite low. For example, in *Wieter v. Settle*[12] the court listed the following minimal criteria for competency under *Dusky*:

> 1. [that the defendant has] the mental capacity to appreciate his presence in relation to time, place, and things;
> 2. that his elementary mental processes are such that he apprehends (i.e., seizes and grasps with what mind he has) that he is in a Court of Justice, charged with a criminal offense;
> 3. that there is a Judge on the Bench;
> 4. [that the defendant understands that] a prosecutor is present who will try to convict him of a criminal charge;
> 5. that he has a lawyer (self-employed or court-appointed) who will undertake to defend him against that charge;
> 6. that he will be expected to tell his lawyer the circumstances, to the best of his mental ability (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed;
> 7. that there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge; [and]
> 8. [that] he has memory sufficient to relate those things in his own personal manner [Ref. 12, p 321–2].

Factors such as those laid out in *Wieter* represent the criminal justice equivalent of the bedside assessment that a patient is "alert and oriented times three." A patient with dementia may be able to repeat his or her name, location, and the date after repeated questioning and rehearsal by nurses, medical students, interns, and residents. Yet the assessment of that patient as alert and oriented times three says nothing meaningful about the individual's decision-making capacity. Similarly, it seems doubtful that individuals who, at best, are trained to the level of function outlined in *Wieter* can participate meaningfully in such complex decisions as waiving the rights against self-incrimination or confronting his or her accusers.

The focus on concrete aspects of the trial process and minimal cognitive awareness seems to neglect the operative concept of *Dusky*, that of understanding. *Dusky* calls for "sufficient present ability to consult with his lawyer with a reasonable degree of rational *understanding*" and "a rational as well as a factual *understanding* of the proceedings against him" (emphasis added). The common definitions of "understanding" indicate that it is a mental state that involves more than minimal awareness and allows for meaningful interaction with concepts and events.[1]

Nevertheless, the Supreme Court has made clear that the standard is the minimal and straightforward criteria of *Dusky*:

> Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements [Ref. 13, p 402].

Wall *et al.*[1] describe a CST program, "the Slater Method," that involves techniques used in clinical settings to improve the functional capacity of people with developmental disabilities. Through similar intensive training programs, even individuals with significant cognitive deficits can be trained to perform many activities of daily living, such as using public transportation. Riding public transportation, however, is very different from planning a new journey, dealing with schedule changes, or managing other disruptions, such as oppositional drivers and fellow passengers.

The typical criminal prosecution, even for minor crimes, is far more challenging than using public transportation. The defendant often faces an aggressive prosecutor whose goal is maximal deprivation of the defendant's liberty interests and the defendant, with assistance of counsel, must make numerous decisions. Can training such as the Slater Method adequately prepare the mentally retarded defendant to meet these rigorous challenges? Wall *et al.*[1] described extensive efforts within the program to prepare mentally retarded defendants to withstand these pressures. Even so, the result of such training may be a level of function just sufficient to make the remainder of the participants in the process comfortable in allowing the defendant to be a passive player as others act in what is perceived to be the defendant's best interests. The result is that individuals who go through such a training program and are endorsed as CST by forensic mental health professionals may be launched with minimal understanding into a criminal justice system where their fates will be decided without any meaningful participation by them.

The competency training method described in this article is a careful, detailed, and effective approach to helping mentally retarded criminal defendants meet the minimal *Dusky* standard. Meaningful defense of oneself against criminal charges requires more than memorization of concepts and behavior through repetition, memory aids, and organizational strategies. Prosecutors, judges, prosecution witnesses, and even defense counsel are not likely "to use simple language, to speak slowly and clearly, and to use concrete terms and ideas" as trainers are encouraged to do during Slater Method training. Courtroom encounters can be lengthy, unlike the short sessions used in the training. It is one thing to be able to state that opposing counsel may try to "trip up" the defendant, and quite another for the defendant to know what that means. Wall *et al.* appropriately emphasize the role of decision-making capacity. Yet, as they point out:

> In general, as long as the IST-MR defendant makes decisions on advice of counsel, including entering a guilty plea, the test for decisional competence for the Slater Method was decided to be no more demanding than having an IST-MR defendant demonstrate an "expression of choice" and demonstrate a "basic understanding" regarding decision-making [Ref. 1, p 193].

Perhaps we can be confident that such minimally competent defendants can get a fair trial, if we rely on the good intentions of devoted defense counsel, reasonable prosecutors, and enlightened judges to ensure that fair proceedings are held and tactical decisions made in the best interests of the defendant. However, we live in the real world, and our legal system is built on the notion that justice is best accomplished through adversarial proceedings. Defense counsel are not always as devoted, prosecutors are not always as reasonable, and judges are not always as enlightened as would be necessary for us to make this assumption.

Wall *et al.*[1] present a system that helps address the difficult problem encountered when individuals with cognitive and behavioral disabilities enter the criminal justice system. As these defendants are certified as competent to stand trial, it behooves both forensic evaluators and the judges who make these decisions to scrutinize closely whether such training results in technical fulfillment of a legal definition but a failure of justice.

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