

# Mental Health and Immigrant Detainees in the United States: Competency and Self-Representation

Caleb Korngold, MD, Kristen Ochoa, MD, Talia Inlender, JD, Dale McNeil, PhD, and Renée Binder, MD

Most immigrant detainees held in U.S. Immigration and Customs Enforcement (ICE) facilities do not have legal representation, because immigration proceedings are a matter of civil, not criminal, law. In 2005, Mr. Franco, an immigrant from Mexico with an IQ between 35 and 55, was found incompetent to stand trial, but was not appointed an attorney for his immigration proceedings. This failure led to a class action lawsuit, known as the *Franco* litigation, and in April 2013, a federal judge ordered the U. S. government to provide legal representation for immigrant detainees in California, Arizona, and Washington who are incompetent to represent themselves due to a mental disorder or defect. This development has implications for forensic evaluators, because there is likely to be an increase in the number of competency examinations requested by courts for immigrant detainees. Furthermore, forensic evaluators must understand that an evaluation for competency of an immigrant detainee includes both the *Dusky* criteria and capacity for self-representation. In this article, we explore the legal context and ethics concerns related to the *Franco* litigation.

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From 2000 through 2010, the number of removal (formally known as deportation) proceedings initiated per year in U.S. immigration courts increased almost 50 percent, totaling more than 300,000 in 2010 (Ref. 1, p C3; Ref. 2). People detained while awaiting removal proceedings are generally held in the custody of the U.S. Immigration and Customs Enforcement (referred to herein by the commonly used acronym ICE). ICE is the principal enforcement arm of the U.S. Department of Homeland

Security (DHS). It was created in 2003 through a merger of parts of the U.S. Customs Service and the Immigration and Naturalization Service (INS). ICE's primary mission "is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration."<sup>3</sup> ICE and the U.S. Department of Justice have contracted thousands of beds to accommodate the increasing number of detainees,<sup>4</sup> and bed space acquisition is the largest single ICE expenditure.<sup>5</sup> When a person is taken into custody (i.e., the local jail) for a criminal matter, ICE may initiate an immigration detainer (commonly referred to as an ICE hold)<sup>6</sup> that often obligates the local jail to notify ICE in advance if the person is to be released.<sup>7</sup> Individual states vary with regard to implementation of this ICE obligation. For example, under California's Trust Act, a detainer is honored only when the individual has been convicted of certain types of serious crimes. An ICE hold also allows a person to be detained for an additional 48 hours beyond the expected release date, so that

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Dr. Korngold is Psychiatry Section Chief, Beijing United Family Hospital, Beijing, China. Dr. Ochoa is Assistant Clinical Professor, David Geffen School of Medicine at UCLA, Department of Psychiatry and Biobehavioral Sciences, Olive View-UCLA Medical Center, Los Angeles, CA. Ms. Inlender is also a staff attorney, Immigrants' Rights Project, Los Angeles, CA. Dr. McNeil is Professor of Clinical Psychology, Department of Psychiatry, University of California, San Francisco, CA. Dr. Binder is Professor and Director of Psychiatry and Law Program, Department of Psychiatry, Associate Dean for Academic Affairs, UCSF School of Medicine, San Francisco, CA. Address correspondence to: Caleb Korngold, MD, Psychiatry Section Chief, Beijing United Family Hospital and Clinics New Hope Clinical Center, 9–11 Fangyuan Xi Lu, Chaoyang District, Beijing, China 100015. E-mail: Caleb.Korngold@ufh.com.cn.

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ICE has an opportunity to take custody of the person. An ICE hold is not a removal order.<sup>8</sup> Rather, it is often the start of a potential deportation process. ICE facilities offer limited mental health treatment.<sup>9</sup> However, screening procedures are still being developed to identify ICE detainees who need a psychiatric evaluation to assess their competency to represent themselves in legal proceedings.<sup>10</sup>

### Legal Framework: Civil Versus Criminal Protections

The Sixth Amendment to the United States Constitution guarantees a person accused of a crime the right to the assistance of counsel.<sup>11</sup> In matters of criminal proceedings, the right to counsel exists whether or not a person is a U.S. citizen. The same right to counsel does not exist in civil proceedings. Immigration hearings are matters of civil law. Therefore, various protections that apply in the context of a criminal trial do not apply to deportation hearings.<sup>12</sup> When a person faces deportation, there is no general constitutional right to an attorney. The Supreme Court has held only that noncitizens cannot be removed without an opportunity to be heard.<sup>13</sup> Immigration hearings are handled according to civil procedure, even when deportation is brought about as a consequence of a criminal conviction. The Immigration and Nationality Act requires that people facing deportation “shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government.”<sup>14</sup> However, this “reasonable opportunity” is often based on one’s ability to represent oneself without an attorney. In 2010, federal government data showed that 57 percent of individuals in removal proceedings did not have a lawyer (Ref. 1, section G). This statistic is consistent with 2011 data collected by New York City that showed that 60 percent of detained immigrants did not have counsel by the time their cases were completed.<sup>15</sup> Across all immigration courts in Texas in 2009, 86 percent of detained immigrants were not represented by legal counsel.<sup>16</sup>

### Evaluations of Competency to Stand Trial

Competency to stand trial has been called “the most significant mental health inquiry pursued in the system of criminal law.”<sup>17</sup> In *Dusky v. United*

*States*,<sup>18</sup> the United States Supreme Court affirmed a defendant’s right to have a competency evaluation before proceeding to trial. *Dusky* set the U.S. standard for determining competence. The Supreme Court ruled that to be competent to stand trial, a defendant must demonstrate two abilities: a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,” and a “rational as well as factual understanding of the proceedings against him.” In another Supreme Court case, *Godinez v. Moran*,<sup>19</sup> the court ruled that if a defendant was competent to stand trial, then that person would automatically be deemed competent to waive other rights, including the right to counsel. However, the Supreme Court has also determined that the Constitution does not preclude states from adopting a higher standard for competency to waive counsel.<sup>20</sup> The Sixth Circuit Court of Appeals held that a person involved in a deportation proceeding has a right to a competency hearing only to determine whether the person requires representation by either an attorney or guardian.<sup>21</sup> The court further ruled that a determination of mental incompetence does not preclude deportation.<sup>22</sup>

### Franco Class Action Lawsuit

“No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.”<sup>23</sup>

These words from the Supreme Court in 1954 emphasize that fairness in the justice system is predicated upon the availability of legal representation to incompetent individuals. At this intersection between mental health and immigration law is the *Franco-Gonzalez v. Holder* class action lawsuit (*Franco* litigation).<sup>24</sup> Congress has mandated under the Immigration and Nationality Act<sup>25</sup> that the Attorney General provide safeguards for detainees who are not competent to represent themselves. The *Franco* litigation called into question the failure of these safeguards. Jose Antonio Franco-Gonzalez was an immigrant from Mexico found incompetent to stand trial in 2005 because of mental retardation. Mr. Franco did not know his age, could not tell time, and could not remember phone numbers.<sup>26</sup> His IQ was estimated at between 35 and 55.<sup>27</sup> However, despite being found incompetent, he was not appointed an attorney for his immigration proceedings. He was incarcerated for four and a half years in an ICE facility while awaiting possible deportation. The

*Franco* litigation sought procedural safeguards to help people in immigration proceedings who are mentally incompetent and without legal representation. Specifically, the litigation sought to require adequate psychiatric evaluations of people in immigration proceedings to determine competence. For those individuals determined by a court to be incompetent to represent themselves due to a mental disease or defect, the *Franco* litigation sought to require the appointment of legal counsel. Also sought were safeguards to prevent indefinite detention of immigrants such as Mr. Franco without a hearing.

### Federal Court Order Requiring Legal Representation

On April 23, 2013, Federal Judge Gee in the Central District of California issued a landmark ruling in the *Franco* litigation, ruling that people determined to be incompetent in Arizona, California, and Washington “due to a mental disorder or defect” must be provided qualified representatives in “all aspects of their removal and detention proceedings.”<sup>28</sup> The scope of the ruling affected the 3 states of Arizona, California, and Washington, because the class action complaint had been brought on behalf of immigrant detainees in these states.<sup>29</sup> Under Judge Gee’s order, qualified representatives are not necessarily an attorney. They can be a law student or a law graduate directly supervised by an attorney or an accredited representative, as defined in 8 C.F.R. § 1291.1.<sup>30</sup> The *New York Times* described Judge Gee’s decision as, “The first time a court has required the government to provide legal assistance for any group of people before the nation’s immigration courts.”<sup>26</sup> Judge Gee also ordered immigration courts in the three states to offer bail hearings for immigrants with mental disorders who had been detained for more than 180 days. In anticipation of Judge Gee’s ruling, the federal government announced that it will develop nationwide policies to provide qualified representatives and bond hearings for immigrant detainees with “serious mental disorders or conditions.”<sup>31</sup>

### Implications for Forensic Evaluators: Expanded Competency Evaluations

The *Franco* litigation has practical implications for forensic evaluators. There is likely to be an increase in the number of competency examinations requested by courts for immigrant detainees. Also, the standard

forensic evaluation for competency of immigrant detainees will have to include the *Dusky* criteria in addition to an evaluation of competency for self-representation. In *People v. Johnson*, the California Supreme Court found that a higher level of competency is required for self-representation (sometimes called *pro se* or *pro per*) rather than competency to be represented by an attorney.<sup>32</sup> However, the exact standard forensic psychiatrists should use to evaluate *pro se* competency remains open. (The question of the exact standard forensic psychiatrists should use to evaluate *pro se* competency is likely to be answered, in part, by the *Franco* litigation. A court order is expected in the case that will set forth a *pro se* competency standard to be applied, at the very least, in the three states subject to the *Franco* court’s injunction: California, Arizona, and Washington.) It is likely that courts will use some variation of the guidelines outlined by the U.S. Supreme Court in *McKaskle v. Wiggins*.<sup>33</sup> According to the *McKaskle* decision, “functional legal ability” includes competency to control the organization and conduct of one’s defense, to make motions, to argue points of law, to question witnesses, and to address the court at appropriate points in the trial.

It should be noted that in 2011, the U.S. Department of Justice Board of Immigration Appeals had a somewhat broader interpretation *In the Matter of M-A-M*. The Board stated that the test for determining *pro se* competency in immigration proceedings is the “reasonable opportunity to examine and present evidence and cross-examine witnesses.”<sup>34</sup> In August 2013, the Executive Office for Immigration Review (EOIR) sent more specific instructions to judges that define *pro se* competency evaluations in a way that is consistent with the “functional legal ability” described in *McKaskle*.<sup>35</sup> According to these instructions, a respondent is competent to represent himself in a removal hearing if he has a rational and factual understanding of the nature and object of the proceeding, understands the nature of representation including the ability to consult with a representative, and knows that he has the right to present, examine, and object to evidence; to cross-examine witnesses; and to appeal. In addition, the respondent must have a reasonable ability to make decisions about asserting and waiving rights; to respond to the allegations in the proceeding; and to present information and respond to relevant questions. A respondent is incompetent to represent himself if he is unable

because of a mental disorder to perform any of the above functions. Mental disorder, including intellectual disability, is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person that substantially interferes with the ability to meet the ordinary demands of living.<sup>35</sup> Whichever criteria are ultimately adopted, forensic evaluators must understand these legal concepts to assess an immigrant detainee's competency for self-representation.

### Language Barriers in Competency Evaluations

Of the 276 different languages that were spoken in immigration proceedings during 2012, federal government data showed that Spanish was the most frequent, at 68 percent.<sup>36</sup> There is evidence to suggest that defense attorneys perceive Spanish-speaking defendants as less mentally ill than similar English-speaking defendants and are less likely to refer Spanish-speaking defendants for a competency-to-stand-trial evaluation.<sup>37</sup> Forensic evaluators may also experience some of the problems faced by attorneys. If a forensic evaluator is not fluent in the primary language of the evaluatee, an interpreter should be obtained. Family members or interpreters not authorized by the court should generally not be used for forensic evaluations. Both research and clinical experience support the conclusion that miscommunications occur, even with professional interpreters<sup>38,39</sup>; however, some of this risk can be mitigated if forensic evaluators are properly trained to use court-appointed interpreters in forensic evaluations.<sup>40</sup>

### An Ethics-Related Concern for Forensic Evaluators: Maintaining Neutrality

As discussed earlier, most immigrant detainees are currently not represented by legal counsel for their immigration proceedings. If a qualified representative is provided, as required by Judge Gee's April 2013 order, it is not unreasonable to assume that such a representative could improve an immigrant detainee's chances of success in immigration proceedings. In this context, it is ethically essential that the forensic evaluator conducting competency evaluations maintain neutrality with regard to the competency evaluation in question. This neutrality will require the forensic evaluator to refrain from becoming an advocate for an immigrant detainee, regardless

of the likely outcome of the case or the evaluator's personal beliefs about the problem of immigrant detainees held without legal representation. Similarly, an evaluator's knowledge that the government will pay the bill for legal representation of immigrant detainees found incompetent to represent themselves may also bias his professional opinion. For those forensic evaluators who believe that they cannot maintain neutrality in *pro se* competency evaluations, recusing themselves from conducting these evaluations would be appropriate. This recommendation is consistent with the ethics guidelines of the American Academy of Psychiatry and the Law, which has said that psychiatrists should strive to reach objective opinions.<sup>41</sup>

### Conclusion

Many forensic evaluators may not be aware that most immigrant detainees held in U.S. Immigration and Customs Enforcement (ICE) facilities do not have legal representation and that immigration courts are increasingly interested in competency evaluations for detainees. This is an important problem facing the United States' justice system. The *Franco* litigation was the driving force behind a federal judge's ordering the United States government to provide legal representation for immigrant detainees in California, Arizona, and Washington who are incompetent to represent themselves because of a mental disorder or defect. This development has implications for forensic evaluators, because there is likely to be an increase in the number of competency examinations requested by courts for immigrant detainees. Furthermore, forensic evaluators must understand that the evaluation for competency of an immigrant detainee includes both the *Dusky* criteria and an evaluation of competency for self-representation.

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