

Book section:

ESSAYS AND REVIEWS

Fitness Interview Test – Revised (FIT-R): A Structured Interview for Assessing Competency to Stand Trial, by Ronald Roesch, Patricia A. Zapf, and Derek Eaves, (Sarasota, FL: Professional Resource Press, 2006), 76 pp. + CD-rom, \$45.00.

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Brief summaries of the United States Supreme Court case of *Godinez v. Moran* (1993) describe the Court's ruling as saying that the standard for various criminal competencies (competency to plead guilty, to waive counsel, to stand trial) are the same (see, e.g., Hobson, 1999; Perlin, 2002). Not so. Justice Thomas, writing for the majority, wrote, "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" (509 U.S. 389, 400, emphasis added).

In practice, since *Godinez*, even without new legislation, some state courts have ruled that what David Shapiro has called "competency shmocompetency" (if you've got one competency, you've got them all) does not apply. For example, in Florida the state supreme court held that a person can be competent to stand trial but not competent to decide to proceed *pro se*:

The district court of appeal certified the following question to be of great public importance: MAY A DEFENDANT BE MENTALLY COMPETENT TO STAND TRIAL YET STILL LACK THE ABILITY TO

MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(D)(3)? Both parties concede that it is well settled that a defendant may be competent to stand trial yet lack the ability to knowingly and intelligently waive counsel. We agree and therefore discharge jurisdiction. It is so ordered” (*Visage v. State*, 1996, citations omitted).

It is that simple to fix the apparent competency-shmocompetency problem raised by *Godinez*, state by state, and competency by competency. It is a pet peeve of mine that commentators summarize *Godinez* as saying that competencies are unitary, rather than writing that the U.S. Supreme Court has held that the U.S. Constitution does not require finer distinctions but states are free to do so. The former description promotes fatalism, and the latter description promotes curative action. One type of curative action involves attorneys, trial judges, and appeals-court judges working through the normal appeals process, post-*Godinez*, as in the *Visage* case just cited. That process establishes case law allowing for separate criteria for various competencies. Another type of curative action involves citizens contacting legislatures to encourage them to “adopt competency standards that are more elaborate than the *Dusky* formulation.”

Meanwhile, back at the county jails, psychiatrists and psychologists are conducting competency evaluations. This review addresses whether the FIT-R can contribute to those assessments. Five points emerge (see DeClue, 2003, for additional discussion of the first three):

1. Evaluators should routinely use a forensic assessment instrument (FAI) in assessments of adjudicative competence.
2. There is a great need for a good screening procedure.
3. The FIT-R shows great promise for screening.
4. The FAI should facilitate a nuanced assessment of criminal competencies, including competence to waive rights, and should facilitate collection of preliminary data regarding confession issues.

5. The FIT-R provides a solid, structured foundation for comprehensive assessment of criminal competencies.

The FIT-R

The FIT-R is a semi-structured clinical interview, with 16 brief sections, designed to assist in the assessment of adjudicative competence (also known as competence to proceed, fitness to stand trial, etc.). Administration takes approximately 30 to 45 minutes. The first section, Understanding the Nature or Object of the Proceedings: *Factual Knowledge of Criminal Procedure*, examines a defendant's understanding of the arrest process, current charges, role of key participants, legal process, pleas, and court procedures. The second section, Understanding the Possible Consequences of the Proceedings: *Appreciation of Personal Involvement in and Importance of the Proceedings*, examines a defendant's appreciation of the possible penalties, available legal defenses, and likely outcome. The third section, Communication with Counsel: *Ability to Participate in Defense*, examines a defendant's ability to communicate facts, relate to lawyers, plan legal strategy, engage in the defense, challenge witnesses, testify relevantly, and manage courtroom behavior (Viljoen & Roesch, 2005).

Administering the FIT-R involves talking to the defendant, using ordinary language, in a conversational way. The interview is semi-structured, requiring inquiry into specific content areas, but allowing some flexibility so that the conversation can flow naturally. My experience is that once rapport has been built between the evaluator and the defendant, the fluid FIT-R interview does not disrupt that peaceful, easy feeling. The FIT-R questions take the interview where I want it to go, eliciting valuable information in a format that is comfortable for both the evaluator and the defendant.

The FIT-R has adequate inter-rater reliability and construct validity in adolescent samples (Viljoen, Vincent, & Roesch,

2006). Among juvenile defendants, lower scores were obtained on the FIT-R for those with lower cognitive abilities, particularly verbal ability; those with evidence of attention deficits or hyperactivity; those who had spent less time with their attorneys, and those from lower socio-economic backgrounds (Viljoen, Vincent, & Roesch, 2006). In adult samples, the FIT-R shows good inter-rater reliability and is correlated with the MacArthur Competence Assessment Tool – Criminal Adjudication (MacCAT-CA) (Poythress, Bonnie, Monahan, Otto, & Hoge, 2002; Zapf & Roesch, 2001), and brief screenings with the FIT-R show high agreement with independent clinical judgments of competency based on more comprehensive data (Zapf, Roesch, & Viljoen, 2001).

Five Points Favoring Use of the FIT-R

1. Evaluators should routinely use a FAI in assessments of adjudicative competence

Forensic assessment instruments (FAIs) are structured tools designed to assist a forensic evaluator in gathering data useful for addressing psycho-legal issues in forensic psychological evaluations.

These instruments . . . standardize the collection of information across defendants and across examiners. They provide some assurance that the data obtained will have legal relevance to the court in making a competence decision. Further, there is evidence that trained interviewers/raters can quantify their data reliably with these interview methods. . . . The advantages of standardization, therefore, strongly recommend the use of one of the instruments within the context of any assessment related to the question of competence to stand trial (Grisso, 2003, p. 146).

In reviewing FAIs for adjudicative competence a few years ago, Grisso (2003, p. 146) found favor with two, the MacCAT-CA and the FIT-R: “The MacCAT-CA and the FIT-R come closer than earlier instruments to providing information that goes beyond ‘factual understanding’ to begin to address questions of defendants’ decision making capacities. This is an important advance.”

2. There is a great need for a good screening procedure
- Grisso (2003) reports the following:
- Attorneys have concerns about their clients' competence in 10% to 15% of their criminal cases and formally raise the issue in about half of those cases.
 - Most defendants referred for competence assessments are eventually judicially determined to be competent, with incompetence rates ranging from 10% to 30%.
 - Many defendants who clearly meet criteria for competence are nevertheless referred for competence evaluations for a variety of reasons (e.g., to facilitate treatment or to delay legal proceedings).

Because there is a high volume of people referred and some appear to easily meet criteria for being competent, an effective screening procedure would be welcomed. But because courts recognize the great cost of trying an incompetent defendant (*Pate v. Robinson*, 1966) it is essential that any screening procedure should classify no incompetent defendants as being competent.

3. The FIT-R continues to show great promise for screening
- When researchers compared decisions about fitness made by the FIT-R with decisions made after an institution-based evaluation of fitness for 57 males, the FIT-R reliably screened out many of those fit to stand trial, without erroneously classifying any who were not fit. "It is important that a screening instrument not lead the evaluator to make false negative errors (i.e., evaluate someone as fit who is truly unfit) as these individuals would then be inappropriately sent to trial. The FIT-R made no false negative errors in this study" (Grisso, 2003, p. 19). Two additional studies, of 100 subjects each, each showed a 2% false negative rate, and the authors suggest that even those errors could be avoided (Zapf, Roesch, & Viljoen, 2001).

Recent studies of the FIT-R with juveniles have provide support for the inter-rater reliability and construct validity of the FIT-R with juveniles (Viljoen, Klaver, & Roesch, 2005; Viljoen & Roesch, 2005; Viljoen, Vincent, & Roesch, 2006).

However, research has not yet examined rates of agreement between judgments made with the FIT-R and court judgments regarding a juvenile's competency. The authors recommend use of the FIT-R as part of a more comprehensive evaluation that includes "assessing ... for cognitive limitations, psychopathology, and developmental immaturity" (p. 31).

4. The FAI should facilitate a nuanced assessment of criminal competencies including competence to waive rights, and should facilitate collection of preliminary data regarding confession issues
- At least in some jurisdictions, perhaps especially post-*Godinez*, in practice there may be just one opportunity to assess adjudicative competence. In *Godinez*, the defendant's competency was questioned. He "passed" a competency evaluation that did not address his ability to decide whether to waive some legal rights, including his right to attorney. Later, when the defendant expressed a wish to represent himself, the trial judge did not require a subsequent competency assessment regarding his competence to make that decision. The U.S. Supreme Court upheld the trial court's decision (*Godinez v. Moran*, 1993). Now, evaluators who assess competence to proceed should routinely gather some data relevant to a defendant's competence to waive rights, including the right to counsel.
- Although the most common type of pretrial evaluation is competence to stand trial, very few defendants actually stand trial. Most cases that result in a conviction are resolved via a guilty or no-contest plea, often after a process of plea bargaining (Melton, Pettila, Poythress, & Slobogin, 1997; Viljoen, Roesch, & Zapf, 2002). Therefore, evaluators who assess adjudicative competence should routinely gather information relevant to a defendant's understanding of pleas and plea bargains.

There is increasing recognition of confession issues in criminal cases (DeClue, 2005a, 2005b; Gudjonsson, 2003; Leo & Ofshe, 2001; Viljoen, Roesch, & Zapf, 2002) and increasing acceptance of psychological testimony in cases where confessions are disputed (Fulero, 2004). In the last two years the lead journals of both the American Psychological

Association and the American Psychological Society featured major articles on confession issues (Kassin & Gudjonsson, 2004; Kassin, 2005). The psychology of confessions has sufficiently matured that

In any case that includes a so-called confession by the defendant, an evaluator who conducts an assessment relevant to adjudicative competence should collect, at a minimum, preliminary data regarding the mental state of the person at the time of the confession and the circumstances surrounding the confession.

5. The FIT-R provides a solid, structured foundation for comprehensive assessment of criminal competencies
- The FIT-R includes questions that focus on the defendant's understanding of pleas, waiver of rights, and available legal defenses; and the defendant's capacity to relate to his or her lawyer, to plan legal strategy, and to engage in his or her own defense. The FIT-R also includes some preliminary questions about the defendant's contacts with police, including whether he or she made statements to the police. In addition to being a fine instrument for screening evaluations, the FIT-R provides a solid, structured foundation for comprehensive assessment of criminal competencies. The manual provides guidance for utilizing the FIT-R within a comprehensive evaluation.

Bonus

The CD-rom included in the package provides all necessary forms, so there is no per-use fee. The CD-rom does not include the training video that was used to enhance standardization in some of the studies of the FIT-R. I recommend inclusion of that training video in subsequent printings and/or as a separate-purchase accessory item for users of the FIT-R.

Summary

Use of FAls enhance forensic assessments, and the FIT-R is a fine choice among currently available FAls to assess adjudicative competence. The FIT-R formalizes an interview using the types of questions that evaluators routinely ask

defendants in competency examinations. The FIT-R can effectively anchor both relatively brief screening evaluations for competency and more comprehensive evaluations that include assessment of the source of suspected incompetence (e.g., mental illness, mental retardation) and response style (e.g., malingering). I have been happily using the Canadian version in my U.S. practice for several years, and this new edition should be even more accessible for fellow U.S. practitioners. Sound research shows that the FIT-R is ready for prime time. The publisher's package of manual and CD-ROM is extremely user-friendly, with no per-use costs.

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