Law, Psychology, and Competency to Stand Trial: Problems With and Implications for High-Profile Cases

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Competency to stand trial (CST) determinations require an adherence to legal adjudication standards and psychological assessments methods. However, the forensic decision making on these matters is fraught with complex and enduring dilemmas. Questions persist about the vague and ambiguous nature of the precedent-setting U.S. Supreme Court case law on mental illness and competency as applied to particular defendants. In addition, the clinical evaluation procedures pose sufficient validity and reliability problems that the assessment instruments themselves have been the source of considerable consternation. As a result, the medicolegal system, on occasion, has allowed controversial and profoundly disturbed mental health defendants to pro se *their cases (e.g., Colin Ferguson) and/or has rendered questionable psychological screenings for high-profile CST cases (e.g., Theodore Kaczynski). In this article, the authors revisit the legal and psychological pitfalls attributable to the CST determination. They examine where and how the legal standard and the clinical evaluation procedures manufacture problematic results, particularly in well-publicized cases. They conclude by exploring the policy implications of their analysis for purposes of future criminal justice reform in this forensic mental health area.*

The criminal processing of persons with mental illness presents the court system with complex pretrial adjudication dilemmas (e.g., Coles & Pos, 1985; Grisso, 1996; Winick, 1987). One area of noteworthy concern includes both the legal standards and clinical evaluation methods used for determining competency to stand trial (CST) (Grisso, 1992b; Nicholson & Kugler, 1991). Broadly speaking, the legal system maintains that the defendant must understand the criminal charges leveled against the person and

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must be able to assist, if called upon, in his or her own defense (e.g., *Dusky v. United States*, 1960, p. 402; Perlin, 1994). Complicating this matter are a series of constitutional safeguards (Boch, 1994) afforded the defendant, including inter alia, the right to refuse treatment (Winick, 1993, 1997; for applications to *competency and the law* see, e.g., *Charters v. United States*, 1988; *Khiem v. United States*, 1992; *Riggins v. Nevada*, 1992). The psychological community plays a pivotal role in these matters, as determinations of type and degree of mental illness, if any, inform forensic outcomes (Grisso, 1992a; Grisso, Cocozza, Steadman, Fisher, & Greer, 1994).

Of specific concern with CST outcomes are the legal standards themselves and the psychological evaluation methods employed to arrive at the CST finding (Grisso, 1986). The legal standards define competency in relation to the mental abilities of the defendant (e.g., *Dusky v. United States*, 1960), whereas the assessment procedures measure mental abilities (e.g., Reich & Tookey, 1986). Both of these initial pretrial determinations are key to whether and how persons with psychiatric disorders will be processed through the legal apparatus (Arrigo, 1996b, p. 63; Perlin, 1999).

Several commentators have previously identified a number of unresolved legal problems associated with the CST hearing (e.g., Chernoff & Schaffer, 1972; Cook, Johnson, & Pogany, 1973; Lewin, 1969). As Golding, Roesch, and Schreiber (1984) summarized, "These problems include the inappropriate use of competency evaluations to delay trial... unnecessary confinement for the assessment of competency, and lengthy treatment periods in confinement for those defendants found incompetent" (p. 322). These observations notwithstanding, the legal standard of competency remains largely intact, and the construct itself has yet to be substantially revised (Winick, 1987).

Contrary to competency standards, the psychological assessment techniques employed in CST hearings have undergone a number of significant revisions over the years (Grisso, 1996; Melton, Petrila, Poythress, & Slobogin, 1987). For example, the evolution of standardized procedures to assess competency includes such instruments as the Competency Screening Test (Laboratory of Community Psychiatry, 1973), the Georgia Court Competency Test (Wildman, White, & Brandenburg, 1990), and the Interdisciplinary Fitness Interview (Golding et al., 1984). Each of these instruments has been shown to include several notable strengths (e.g., Borum & Grisso, 1994; Melton et al., 1987) and a number of obvious limitations (e.g., Grisso, 1986, 1992a; Lanyon, 1986; Melton et al., 1987). In the extreme, some have even questioned whether the limits of the psychological assessment methods are not themselves indicative of a more purposeful strategy designed

to ensure the preservation of the criminal trial process (Arrigo, 1996b), endorsing an agenda for sustained institutionalization or even transcarceration of the psychiatrically disordered (Arrigo, 1997).

In this article, we revisit, in some detail, the CST hearing and the problems stemming from both the legal standard used and the psychological procedures employed. In this analysis, we pay particular attention to pretrial outcome difficulties, including problems associated with mental health defendants who *pro se* their cases (e.g., Colin Ferguson), or whose competency screenings are suspect (e.g., Theodore Kaczynski). Examining these issues helps clarify dilemmas trial judges confront when interpreting Supreme Court rulings on competency standards (Bonnie 1995) and further identifies ongoing reliability and validity concerns that psychometricians face related to their assessment procedures (Grisso, 1996). In addition, we link our investigation of the CST hearing in high-profile cases to criminal justice policy. We argue that our treatment of this issue suggests several notable areas of much-needed forensic mental health reform.

THE COMPETENCY STANDARD: LEGAL DEVELOPMENTS

To comprehend the practical problems affiliated with CST outcomes, it is essential to examine the development of the competency construct as formed from legal doctrines. The source for these doctrines includes both state appellate and United States Supreme Court decisions (Boch, 1994), and these rulings appear to remain both enduring and compatible with prior holdings and certain constitutional rights (Bonnie, 1995). The legally defined standards appear to serve dual functions when addressing competency-related issues. The relied-upon standards not only define what constitutes competency, but their language also influences how assessment instruments are configured (Grisso, 1996). Despite the substantial weight the CST standards carry for pretrial decision-making purposes, the social science research exploring the process by which these loosely defined constructs were formed has been minimal. We contend that this absence of scholarship is itself a partial explanation for the real-life dilemmas left in the wake of CST determinations. In what follows, we briefly examine the three leading United States Supreme Court cases on the subject of CST. These cases include (a) *Dusky v. United States*, 1960; (b) *Faretta v. California*, 1975; and (c) *Godinez v. Moran*, 1993.

The *Dusky* Decision

The current competency standard is derived from the U.S. Supreme Court case of *Dusky v. United States* (1960), which provides that "the defendant is oriented to time and place and has some recollection of events," and "the test must be whether [one] has sufficient present ability to consult with [one's] lawyer with a reasonable degree of rational understanding—and whether [one] has a rational as well as factual understanding of the proceedings against [oneself]" (p. 789). The two-pronged and broadly defined *Dusky* standard has been criticized for its range of applicability as well as its confusing and ambiguous language (Golding et al., 1984). For example, the degree to which psychologists or psychiatrists are able to clarify what constitutes "sufficient present ability" as well as a "reasonable degree of rational understanding" presents a formidable task for forensic practitioners (*Dusky v. United States*, 1960, p. 789). Although the *Dusky* requirement addresses the presence of mental illness, subsequent courts further outlined the legal component of the construct (e.g., *Swisher v. U.S.*, 1979; *United States v. Wilson*, 1966). These cases emphasized the effects that mental impairment might have on the functional abilities of a defendant during the course of a trial (Grisso, 1996). In essence, these attempts to explain the competency construct suggest that although a mental illness could be present, it might not necessarily warrant a decision that the defendant was incompetent to stand trial (e.g., Golding et al., 1984).

The *Dusky* standard appears to embody criteria that lack specificity, which can lead to different interpretations by both examiners and lower court judges (e.g., Bonnie, 1995). Emphasis on clinically oriented instruments (Nicholson, Robertson, Johnson, & Jensen, 1988) has produced a shift, focusing on the legally relevant criteria of CST inquiries (e.g., Grisso, 1996). Indeed, in an attempt to canvass both mental and legal abilities, the assessment procedures, regrettably, are inadequately constructed to evaluate either of these components thoroughly (Nicholson, Briggs, & Robertson, 1988, p. 385). For example, in observing the standard the *Dusky* court endorses in relation to legal functioning capacity, the effects a mental disorder has on the causality of behavior may be compromised in order to more accurately assess the primary legal component. This suggests that competency outcomes will continue to be reached by way of quantifying mental illness, making it less burdensome to address legal functioning abilities (e.g., Nicholson & Kugler, 1991). To be sure, however, ethical concerns arise when standards are formulated to meet demands for punishment instead of assessing the degree to which an individual is controlled by a

mental affliction (e.g., Arrigo, 1996c; Perlin, 1999). This is certainly a potential dilemma with the existing CST standard.

The *Faretta* Decision

Critical and equally complex questions surface when defendants are found competent to stand trial. In particular, concerns relate to defense strategy and the degree to which a defendant chooses to participate actively in the proceedings (e.g., Grisso, 1992b, 1996). If a defendant is deemed competent to stand trial, as set forth by the criteria in *Dusky*, that person is entitled to certain constitutional rights. The Sixth Amendment of the Constitution states,

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him [or her]; to have compulsory process for obtaining witnesses in his [or her] favor, and to have the assistance of counsel for this defense. (as cited in *Faretta v. California*, 1975, p. 2532)

The application of this constitutional guarantee was evident in the Supreme Court ruling of *Faretta v. California*, 1975. The *Faretta* Court addressed the question of defendants' rights in relation to declining the assistance of counsel. The court held that it was unconstitutional to force a lawyer upon a defendant when the right to counsel was waived in a voluntary and intelligent manner (p. 2527). The content of the Sixth Amendment does not specifically address the right to proceed *pro se* but hints at this notion. This led several of the *Faretta* justices to interpret the Amendment's implied meaning (e.g., Boch, 1994; *Faretta v. United States*, 1975, pp. 2548-2549).

For example, in his dissenting opinion of *Faretta v. California* (1975), Justice Blackmun stated,

> The Court believes that the silence of the Sixth Amendment as to the latter right [i.e., the right to waive counsel] is evidence of the Framers' belief that the right was so obvious and fundamental that it did not need to be included "in so many words" in order to be protected by the Amendment. I believe it is at least equally plausible to conclude that the Amendment's silence as to the right of self-representation indicates that the Framers simply did not have the subject in mind when they drafted the language. (pp. 2548-2549)

It appears by this statement that the *Faretta* Court, in one instance, reached its decision by looking past the plain language of the Sixth Amendment.

Moreover, the majority attempted to interpret the intent of the Framers, a discretionary tactic considered suspect by recent legal realists (e.g., Segal & Spaeth, 1993). Indeed, this focus on implied meaning produced, in the *Faretta v. United States* (1975) decision, vague judicial language. The court held that a defendant could relinquish the right to counsel but opined "when [the person] voluntarily and intelligently elect[ed] to do so" (p. 2527).

Regrettably, the court did not elaborate further upon its meaning or intent, and it is here that a considerable forensic dilemma becomes evident. Relying on the expert assistance of mental health professionals to inform courts about the elective and knowing decisions of disordered defendants for *pro se* purposes is fraught with as many assessment difficulties as are the psychological evaluations determining competency (Grisso, 1996). We submit that the *Faretta* Court's use of ambiguous and loose language will, by necessity, lead others to seek out interpretations for the implied meaning of "voluntary" and "intelligent" in the future. Thus, it appears that rather than offering greater clarity on the psycholegal matter of CST, the *Faretta* Court's use of imprecise language obfuscated the issue even further (Winick, 1987).

The *Godinez* Decision

The more recent Supreme Court holding in *Godinez v. Moran* (1993) involved defendants deemed competent with a desire to proceed *pro se*. The *Godinez* Court addressed whether the competency standard for pleading guilty or waiving the right to counsel should be higher than the standard for standing trial. The court held that the standard should not be higher (p. 2682). The majority argued that a defendant's "technical legal knowledge" was not the main concern and had no bearing on that person's competence in relation to his or her choice of waiving the right to counsel" (p. 2687). Furthermore, the court opined that although the defendant "may conduct his [or her] own defense ultimately to his [or her] own detriment, [the defendant's] choice must be honored" (p. 2687). This ruling is consistent with the Sixth Amendment of the Constitution as well as with the *Faretta* holding.

Several comments by the *Godinez v. Moran* (1993) bench demonstrate the lack of judicial certainty surrounding controlling, constitutional decision making. Justice Thomas delivered the opinion of the Court with four other justices concurring. Justices Scalia and Kennedy filed opinions concurring in part and concurring in judgment. Justice Blackmun filed a dissenting opinion in which Justice Stevens joined (p. 2682). The fact that

there were only two dissenting opinions is not significant, but the degree to which the various opinions differed raises questions about weighty constitutional outcomes in the absence of fuller agreement. Consider, for example, the different positions entertained in the following two passages. The majority held,

> The decision to plead guilty, though profound, is no more complicated than the sum total of decisions that a defendant may have to make during the course of a trial, such as whether to testify, whether to waive a jury trial, and whether to cross-examine witnesses for the prosecution. Nor does the decision to waive counsel require an appreciably higher level of mental functioning than the decision to waive other constitutional rights. (pp. 2681-2682)

The minority argued,

> A finding that a defendant is competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even the relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist. The question is no longer whether the defendant can proceed with an attorney, but whether s/he can proceed alone and uncounseled. I do not believe we place an excessive burden upon a trial court by requiring it to conduct a specific inquiry into that question at the juncture when a defendant whose competency already has been questioned seeks to waive counsel and represent himself. (pp. 2693-2694)

The conflicting opinions expressed in the preceding statements beg the following question: Is it possible for lower courts to adjudicate adequately matters concerning mentally ill defendants who elect to waive counsel, given the degree of judicial uncertainty on such matters, particularly when a sensationalized case is at issue? This is precisely the kind of question we examine in subsequent sections of this article. Preliminarily, however, we note that when inspecting the jurists' statements more closely, their opinions were not based so much on differences in constitutional logic but were, instead, the result of opposite conclusions. How could this be? We contend that an analysis of relevant, high-profile cases allows us to initiate an assessment of this matter. Indeed, such an investigation may provide important and useful information about where and how criminal justice policy reform can be implemented. Before attending to these matters, however, some comments on competency constructs and assessment procedures are warranted.

THE COMPETENCY STANDARD: PSYCHOLOGICAL ASSESSMENT DEVELOPMENTS

Discussions concerning CST limitations and outcomes focus on competency constructs and various assessment procedures (Grisso, 1996). In some instances, a few commentators have even offered to reformulate conceptually criminal competency (Bonnie, 1992; Winick, 1995). The predominant trend, however, recognizes that standardized procedures evolve from earlier methods (Grisso, 1992b). Notwithstanding the wholesale support for valid and reliable assessment protocols, recent changes do attempt to curtail CST evaluation controversies that stem from clinical judgments. In this section, we examine the competency construct in relation to psychological tests (e.g., Interdisciplinary Fitness Interview). We pay particular attention to the assessment problems stemming from the use of CST instruments. This analysis makes possible our subsequent discussion on the CST finding for controversial defendants who then *pro se* their legal action, and the competency screening process in high-profile cases.

The Competency Construct in Relation to Psychological Tests

Although the competency construct is defined as a legal standard (e.g., Nicholson & Kugler, 1991; Nicholson, Robertson, et al., 1988), "fitness to stand trial" is equated with the absence of severe psychological illness (Roesch & Golding, 1980). Recognizing this, researchers began developing instruments that balanced legal and psychological factors (Golding et al., 1984). For example, the Georgia Court Competency Test (Nicholson, Robertson, et al., 1988; Wildman et al., 1990) and the Interdisciplinary Fitness Interview (Golding et al., 1984) represent some of the psychometric tests that attempt to consider legal and mental criteria (Grisso, 1996).

Although competency constructs vary from state to state, the legal CST standard is typically drafted so that its language is compatible with *Dusky* (Grisso, 1996; Nicholson & Kugler, 1991). The fact that justices rely upon *Dusky* to formulate standards supports the proposition that judges are constrained to adhere to precedent (e.g., Knight & Epstein, 1996). Ultimately, precedent influences judicial decisions, and those decisions determine the controlling competency standards within a given jurisdiction.[1] It follows, then, that psychometricians must also adhere to those controlling standards. For this reason, they are limited to refining assessment techniques (e.g.,

Nicholson, Robertson, et al., 1988; Wildman et al., 1990). For instance, some have conceptually organized the cognitive abilities associated with *Dusky* for CST purposes (Grisso, 1997). In addition, Bonnie's classification system essentially adds to the current standard by including defendants' "decisional competence" (cited in Grisso, 1997, p. 8) as it relates to important trial decisions (e.g., whether to plea bargain or testify) (Bonnie, 1992). Notwithstanding these changes, CST procedures are constrained: Efforts to revamp the older evaluation instruments require compliance with *Dusky* (e.g., Grisso, 1996).

The Interdisciplinary Fitness Interview (IFI) is an instrument that attempts to assess both legal and mental functioning abilities (i.e., Golding et al., 1984; Nicholson, Briggs, et al., 1988). Despite the IFI's desire to balance the two-pronged criteria of *Dusky*, studies repeatedly fail to show if the IFI instrument considers trial participation of defendants (Grisso, 1986, 1992a, 1996). Assessing dual functioning abilities suggests that a defendant could meet one of these prongs of competency but not the other and still be found competent to stand trial (e.g., Golding et al., 1984).

The competency construct itself remains enduring (Grisso, 1996), focusing on the defendant's ability to understand. The competency tests, however, are configured to better assess a defendant's functional abilities as they apply to the trial's complexities (Nicholson, Briggs, et al., 1988). Despite these conceptual distinctions, confounding variables do exist, undermining the accuracy of CST evaluations. For example, current opinion recognizes that certain mental disorders and their effects on behavior will be minimized in order to evaluate legal knowledge consistent with *Dusky*. In describing the rationale behind the creation of the Interdisciplinary Fitness Interview, Golding et al. (1984) stated that "a defendant may be suffering from a reliably diagnosed mental disorder within the psychotic spectrum (e.g., paranoid schizophrenia) . . . and still may be found competent to stand trial" (p. 322).

Critics of such instruments as the IFI contend that its use in CST cases is problematic, especially in relation to witnesses, defendants, and the entire adjudicatory process (Bonnie, 1995). For instance, certain Axis I clinical disorders (including schizophrenia, paranoid type) can present problems in CST evaluations because of the hidden symptoms these disorders entail. Individuals who are diagnosed with this disorder have a preoccupation with one or more delusions or have frequent auditory hallucinations (American Psychiatric Association, 1994). In addition, they may not have severe disorganized speech, disorganized or catatonic behavior, or flat, inappropriate affect. The latter criteria specified in the *DSM-IV* (American Psychiatric

Association, 1994) would seem to be the most problematic in relation to paranoid schizophrenics who undergo CST evaluations. The absence of severe positive psychological symptoms could lead some examiners and trial judges to conclude that these disordered individuals did not suffer from a debilitating mental illness, when, in fact, they did.

The implementation of different instruments compatible with relevant court rulings represents another problematic area concerning CST limitations. Some observers maintain that future strategies regarding CST evaluations should continue to focus on examiners utilizing similar assessment methods (Grisso, 1996). The use of related instruments will serve to standardize the CST evaluation by targeting data collection that addresses the functional abilities of defendants. Ultimately, these formulated data will make it easier for judges to compare the differing opinions between examiners (Grisso, 1996).

The intent behind standardizing CST instruments suggests that data should be presented to the court in the most simplistic manner possible. This is why judges value expert testimony in relation to competency matters (Melton, Weithorn, & Slobogin, 1985) and seldom disagree with expert opinion (Nicholson & Kugler, 1991; Reich & Tookey, 1986). Agreement rates between judges and CST forensic experts have not only been confirmed in the literature (Reich & Tookey, 1986) but have been operative in actual competency cases. Although courts seldom interfere with expert decisions (Appelbaum, 1984; Arrigo, 1996a), the alternative is less attractive: uninformed judges temporarily adopting the role of mental health expert to make their own assessments.

THE CST PROCEEDING IN HIGH-PROFILE CASES: LEGAL AND PSYCHOLOGICAL PROBLEMS

In this section, we present the legal and psychological circumstances surrounding the outcome of two recent cases. The highly publicized Ferguson incident demonstrates the questionable relationship between the CST finding and a combative defendant who then proceeds to *pro se* the matter to trial. The well-documented Kaczynski episode demonstrates the troubling connection between competency screening instruments and prosecutorial decision making with a controversial defendant. We provide a description of events involving the Ferguson and Kaczynski disputes. This is followed by an analysis of where and how the legal and psychological assessment standards for competency produced problematic outcomes in the administration of justice.

The Case of Colin Ferguson

One case that demonstrates the questionable reliance on CST instruments is the trial of Colin Ferguson. Ferguson (a.k.a. the Long Island Railroad gunman) was accused of murdering six train passengers and attempting to murder 19 others on a commuter line in Long Island, New York. After his arraignment on the charges, psychologists were appointed by the court to evaluate whether Ferguson was competent to stand trial. To stand trial in New York, a defendant must understand the charges against oneself, understand the trial proceedings, and assist, if called upon, in one's own defense (e.g., Goldstein, 1995). These criteria are consistent with the holdings in *Dusky v. United States*. (1960) and *Faretta v. California* (1975).

In the pretrial competency hearing, two psychologists testified that although Ferguson possessed psychological deficiencies, he was rational and did not experience delusions (Topping, 1995b). Specifically, "The prosecution's [forensic] witnesses conceded that [the defendant] suffered from 'a personality disorder,' but denied he was incapacitated. Their main evidence of malingering was 'inconsistency.' He could memorize numbers and repeat them back, then couldn't" (Caplan, 1995, p. 29). Ferguson also chose to explain the meaning of some analogies and not others. The psychologists suggested that Ferguson was "purposely trying to mislead, which is also an indicator of an individual who has a plan" (Caplan, 1995, p. 29). A plan in this context means that the defendant was capable of deliberately formulating thoughts for an expressed purpose (i.e., to mislead the psychologists).

In addition, the prosecution's forensic mental health experts testified that Ferguson understood the trial proceedings, the charges against him, the penalties, the role of court officials (i.e., judge and prosecutor), and other features concerning the criminal justice system (Topping, 1995b). Following the 3-day competency hearing, Nassau County Court Judge Donald E. Belfi determined that the defendant was competent to stand trial, claiming that Ferguson "is not an incapacitated person" (Goldstein, 1994, p. A4). Belfi's conclusion was based on a single psychological report and his own questioning of Ferguson (Topping, 1995b). After the defendant was found competent to stand trial, he exercised his constitutional right to waive counsel, as outlined in *Faretta*, and subsequently decided to proceed *pro se*, as set forth in *Godinez*.

Although the consulting psychologists testified that Ferguson was not "delusional" and although the judge insisted that Ferguson was not "incapacitated," his paranoid delusions became appreciable and problematic

from the outset of the trial. For example, during his opening statement, Ferguson alleged,

> There [are] 93 counts to [the] indictment. Ninety-three counts only because it matches the year 1993. Had it been 1925 it would have been 25 counts. This is a case of stereotype victimization of a black man. A subsequent conspiracy to destroy him. Nothing more. (Fan, 1995, p. A28; Blum 1995, p. A11)

Ferguson's ability to assume the role of attorney was somewhat convincing; however, as the trial progressed so, too, did his paranoid thought patterns. Indeed, during the course of the criminal suit the defendant insisted he was the victim of the shooting spree on the Long Island Railroad, despite numerous witnesses to the contrary; tried to subpoena President William Clinton and former governor Mario Cuomo, suggesting he was the casualty of a government conspiracy; and told Judge Belfi that the prosecution was communicating with one of the jurors (Topping, 1995b; Goldstein, 1995). Even with these obvious indicators of mental impairment, the trial continued. Ferguson was eventually found guilty of all criminal charges filed against him.

In 1997, Ferguson presented several arguments to the Appellate Division in the state of New York. Consistent with the unfolding of his criminal case, questions persisted about his CST and his competency to engage in self-representation (Topping, 1998). Ferguson has been unsuccessful in his efforts to overturn the lower court ruling. To date, the highest court in the state of New York has declined to hear Ferguson's appeal. Although he has exhausted all state appellate remedies, questions concerning possible federal civil rights violations remain.

The Case of Theodore Kaczynski

In 1997, Kaczynski, a Harvard graduate and doctor of mathematics, was charged with 16 bomb attacks that killed 3 people and injured 23 others. These crimes allegedly occurred from 1978 to 1995 (Glaberson, 1998c). From the outset, the "unabomber" case was fraught with complex legal and psychological issues. Questions surfaced regarding the defendant's mental status, his right to legal representation, and the presence of law enforcement misconduct (Zitrin, 1998). In addition, in the wake of the defendant's apprehension, the government made clear that it would seek the death penalty, following conviction (Coyle, 1999). These very volatile and contentious matters consumed much of the pretrial phase of the case.

Kaczynski's lawyers immediately addressed the issue of their client's mental status. They requested discovery concerning the defendant's psychological testing; however, the prosecution's litigators stated that they had not thoroughly examined Kaczynski themselves (Glaberson, 1998b). Relatedly, Kaczynski's defense team questioned the use of coercion by federal law enforcement agents in obtaining a confession (CNN.com., 2000). They argued that FBI agents were guilty of misconduct in persuading Kaczynski's brother, David, to locate the suspected unabomber in exchange for his receiving mental health treatment. Despite Kaczynski's strong and clear objection to any form of an insanity defense, the defense team intimated that this would be their strategy in either the trial or penalty phase of the case (Zitrin, 1998).

Federal Judge Garland Burrell, Jr. of Sacramento, California, agreed to allow the defense to evaluate Kaczynski's mental state; however, the government filed a motion objecting to the use of mental illness as a defense and demanded a hearing on the matter (Glaberson, 1998a). A hearing was granted. Kaczynski was found competent to stand trial, yet Burrell denied his request to proceed *pro se* (Zitrin, 1998). Shortly thereafter, a plea agreement was reached: The unabomber pled guilty to 13 criminal counts associated with the bombing, including the 3 fatalities. Kaczynski was sentenced to life in prison, without the possibility of parole.

At the time of this writing, Kaczynski is reasserting that he was coerced into pleading guilty (Coyle, 1999). Specifically, he has requested that the Federal Appeals Court grant him a new trial to assess the merits of this charge. In a 58-page, handwritten brief, Kaczynski expressly asked the Ninth U.S. Circuit Court of Appeals to withdraw his guilty plea, reopen the case, and order a new trial. His legal brief documents why he accepted the initial plea arrangement and further describes why he attempted suicide while awaiting trial. On this latter point, Kaczynski observed that his attorneys told him of their plan to portray him "as a grotesque lunatic . . . [and to] broadcast [the characterization] nationwide. . . . This was a prospect that anyone might have found unendurable. Suicide to avoid public humiliation is by no means unknown" (CNN.com, 2000). The Appellate Court decided to revisit the Kaczynski matter, ruling that he raised a valid constitutional concern when his rights to self-representation were denied (Coyle, 1999). As of March 2000, his request was pending with the Ninth Circuit Court of Appeals. More important, however, is the matter of whether Judge Burrell erred when he found Kaczynski competent to stand trial yet incompetent to proceed *pro se*. These matters have yet to be resolved.

The Ferguson and Kaczynski Cases: Revisiting the Legal and Psychological Assessment Dynamics in the CST Process

The Ferguson and Kaczynski cases highlight the problems stemming from the CST determination and the constitutional standards and clinical instruments used to assess such matters. Precisely because both cases were media-generated, high-visibility spectacles, the limits of law and psychology are that much more apparent. Well-publicized and controversial cases have a profound ability to put not only a particular defendant on trial but also the process by which one's guilt is determined and assigned (e.g., Dershowitz, 1997; Margolin, 1993; Steadman et al., 1993). In what follows, we comment on the problems associated with the CST hearing and process, in light of these two high-profile cases.

Problems With the Ferguson and Kaczynski Cases

Ferguson's initial ability to assume the role of attorney was persuasive; however, prosecutors thought this courtroom behavior was a ruse in order to prove that he was insane (e.g., Caplan, 1995). The case demonstrates that neither psychological impairment nor legal functioning abilities are good predictors for assessing the defendant's CST. In addition, the controversial trial outcome (i.e., guilty) questions the veracity of the common law rule referenced by Justice Kennedy in his concurring opinion in *Godinez*. In brief, Kennedy stated that "trial courts have the obligation of conducting a hearing whenever there is sufficient doubt concerning a defendant's competence" (citing *Drope v. Missouri*, 1975 pp. 162, 180-181). If the delusional antics Ferguson displayed during his trial did not constitute "sufficient doubt," one can only speculate about the conditions that would give rise to the invocation of this common law rule.

The relationship between the Kaczynski case and the CST process is also troubling, though for reasons other than those just identified in the Ferguson dispute. It is clear that the government's willingness to broker a plea arrangement with Kaczynski successfully avoided the likely confusion that would have surfaced had no deal been struck and Kaczynski opted for the path of self-representation. Indeed, Judge Garland Burrell's request for an initial psychological assessment found the defendant competent to stand trial. One can only speculate whether prosecutors in the Kaczynski case, similar to attorneys in the Ferguson trial, feared that the trial would

eventually raise questions about the mental state of the defendant, producing unwanted delays with the proceedings and, perhaps, a judicial finding that sufficient doubts existed as to the competency of the defendant, resulting in a hearing to determine the matter. The decision from such a hearing could have produced a legal finding that Kaczynski was *not* competent to stand trial, subjecting him to sustained civil confinement until such time as he was declared competent by hospital psychiatrists. To be clear, given the contentious and volatile nature of the Kaczynski matter, this outcome was far from acceptable to federal prosecutors concerned with obtaining a clear and unequivocal conviction (Coyle, 1999).

The Ferguson case is an example of a defendant who, following a competency hearing, proceeds to trial *pro se* and, eventually, because of initial undetected psychiatric symptomotology becomes mentally unstable without the benefit of a subsequent CST hearing. Ferguson demonstrates the inadequacy of existing psychological instruments that assess one's mental functioning abilities for purposes of a trial. The Kaczynski case is an example of a defendant who, following a competency hearing, asserts his right to self-representation but agrees to a plea arrangement with the government, obviating the criminal trial proceeding altogether. Kaczynski demonstrates the government's suspicion over the CST screening process when high-profile cases are at issue. Both illustrate the problems posed by the CST legal construct and the psychometric instruments used to evaluate the standard in media-manufactured cases. Whether one is wrongfully found competent (i.e., Ferguson) or found competent but not prosecuted for fear of the defendant's psychologically impaired and, thus, ineffective self-representation (i.e., Kaczynski), the CST proceeding remains flawed for purposes of administering justice. When coupled with the vague and ambiguous language of the legal standard itself, it is not surprising that lower court judges unevenly apply the standard and differentially interpret forensic evaluations. In what follows, we consider the criminal justice policy implications of our analysis. In particular, we comment on where and how law and psychology need to rethink their behavior in regard to CST determinations and suggest several solutions to the forensic mental health pitfalls affiliated with pretrial competency dynamics.

CRIMINAL JUSTICE POLICY AND THE CST PROCESS: A STRATEGY FOR REFORM

Recommending changes to existing crime and justice policies on the basis of selective, high-profile trials is by no means simple. Indeed, it is

difficult to generalize where and how reform is warranted when such revisions are based on limited cases. This nothwithstanding, controversial cases magnify where the legal (and psychological) system is flawed (e.g. Dershowitz, 1997). Media-driven trials draw our attention to the process by which justice is rightly or wrongly administered, prompting, sometimes even demanding, modifications when courtroom results are questionable, bizarre, or tragic. As Caplan (1995) notes in his assessment of the Ferguson appeal, "The Ferguson [matter] is likely to do for the competency question . . . what the John Hinckley trial did for the question of the insanity defense: jump-start reform" (p. 18). Thus, our forensic mental health policy recommendations stem from the knowledge that the Ferguson and Kaczynski outcomes symbolize deep-seated problems with CST legal standards and their corresponding clinical assessment methods.

In what follows, we offer several policy recommendations related to both of these matters. We begin by suggesting modifications with the CST clinical evaluation methods and the overall competency screening process. Questions about this process are informed by established legal standards, and, accordingly, we also describe a series of judicial reforms related to CST determinations.

Psychological Assessment Reforms

A CST determination is a profound conclusion that can dramatically impede or halt the flow of the criminal adjudication process (e.g., Nicholson & Kugler, 1991). When such pretrial decisions are reached, concerns for both the defendant and the victim surface (e.g., Bonnie, 1995). When CST burdens are met, the court takes measures to ensure that the defendant will not be subjected to an unfair trial. This is accomplished by remanding the accused to a mental health facility (Davis, 1985). Incompetent to stand trial detainees undergo protracted psychiatric treatment for various lengths of time to determine when and if they will attain fitness to stand trial (e.g., Arrigo, 1996a; Davis, 1985; Nicholson & Kugler, 1991).

In theory, this procedure is defined as a measure to avoid an unjust or biased trial in the interest of the accused. Ostensibly, however, other system needs or agendas are endorsed through the operation of CST procedures. For example, some critics note that involuntary commitment often involves protracted psychiatric confinement that would exceed criminal sentencing if the defendant were to stand trial and to be found guilty (Arrigo, 1996a; *Jones v. United States*, 1983). In these instances, institutionalization appears to support the interests of the court as opposed to the defendant

(Arrigo & Williams, 1999). Further, CST standard practices enable the court to avoid, temporarily, the controversy surrounding a high-profile criminal trial (e.g., J. Hinckley, Jr.), while removing a defendant from society (Arrigo, 2000).

Circumstances such as those just described raise serious questions about the efficacy and legitimacy of the CST hearing altogether. The Ferguson case and the Kaczynski matter lend support to these observations, although for different reasons. The clinical evaluation issue in the Ferguson case was whether he was, *throughout the duration of the trial*, mentally competent to stand trial. His courtroom behavior and self-representation suggested that he was not. The clinical evaluation issue in the Kaczynski case was whether the competency screening process produced an accurate result. The government's attorneys were not inclined to watch the accused avoid criminal liability by benefitting from a *pro se* defense marred by his own mental impairment, suggesting that Kaczynski's competency determination might indeed be flawed, eventually backfiring on the prosecution. Both defendants were convicted and are presently pursuing the appeals process, suggesting that the clinical assessment of competency did not help give closure to either case. Indeed, a finding of incompetency may have provided the respective defendants adequate time and respite sufficient for them to then move forward with their legal disputes, potentially producing courtroom outcomes absent considerable doubt and suspicion.

Given these circumstances, we contend that the CST process, and the assessment of psychological fitness, need to be reformed. Preliminarily, we note that administration of justice problems stem from inaccurate or questionable determinations that one is mentally fit to stand trial. In other words, although there are fundamental liberty interests at stake if one is wrongfully found incompetent to stand trial (i.e., protracted and unnecessary civil confinement), these concerns address constitutional questions beyond the scope of the present article. Thus, we recommend that the clinical assessment of fitness *not* be given the kind of authoritative and controlling weight judges typically afford it. Instead, we endorse a strategy that acknowledges the informational value clinical forensic assessments offer in CST proceedings. In this regard, evaluators should not feel derelict when misdiagnosing mental impairment, and jurists should not feel responsible when incorrectly finding one fit to stand trial.

The utility of this psychological assessment recommendation takes on greater practical meaning when considering the legal reforms needed to make it work. Indeed, the significance of clinical evaluations as data to consult rather than depend on can only be effectively implemented if certain

courtroom practices are enacted. These judicial changes are discussed below.

Legal Reforms

Controversial and well-documented cases reveal how a CST hearing can produce judicially sanctioned, though flawed, outcomes wherein defendants effectively "shoot themselves in the foot" (Decker, 1996, p. 483). In other words, by exercising one's constitutional right to self-representation, as articulated in *Faretta*, defendants potentially forfeit their ability to argue their case persuasively under the law and, regrettably, succumb to the perils of believing that they "can do it all themselves" (e.g., Schevitz, 1995, p. A4; Topping, 1995a, p. A29). This conviction can be particularly problematic with mentally impaired defendants. The Ferguson trial and verdict substantiates this claim.

Relatedly, even when defendants are able to craft a well-founded courtroom strategy, verbal outbursts, bizarre behavior, incoherent thoughts, unusual logic, and/or physical assaults can be damaging if not devastating to the trial's outcome. The likelihood of an adverse verdict is appreciable when the defendant who proceeds *pro se* is psychiatrically disordered (Decker, 1996). The related case of *United States v. Jennings* (1994) amply illustrates this point.

Edward Jennings entered a motion to waive counsel prior to jury selection. Initially, the motion was denied. Upon learning of this news, the defendant proceeded to strike his "attorney in the side of the head with a closed fist" (*United States v. Jennings*, 1994, p. 1432). Six U.S. marshals were needed to successfully restrain Jennings. The trial judge subsequently determined that Jennings had waived his Sixth Amendment right to counsel. The following morning, the defendant "threatened to physically harm the prosecutor, corrections officers, and former defense counsel, including cutting the throat of former counsel and drinking his blood" (Decker, 1996, p. 488). Because of his unseemly conduct, Jennings was placed in a secure holding cell. While confined in the cell, the defendant continued to engage in unruly and disruptive behavior. He threw water on a speaker in the unit, rejected any communications from the court or from court personnel, and "threatened to throw a cup of urine at the marshal" (*United States v. Jennings*, 1994, p. 1433). Jennings lost his criminal case. Although he appealed claiming inadequate representation, the U.S. District Court affirmed the trial court's decision that the defendant had, indeed, waived his right to counsel (*United States v. Jennings*, 1994, p. 1445).

A similar problem presented itself in the Ferguson matter. Although Ferguson's courtroom antics did not rise to the volatile level displayed by Jennings, the trial judge did *not* insist upon a subsequent hearing to assess defendant Ferguson's CST, despite obvious indicators to the contrary (e.g., incoherent logic, unusual thoughts during the trial). Indeed, although Ferguson's essential strategy was about racial prejudice (Topping, 1995b), his courtroom demeanor as (psychologically impaired) litigator sent a clear message that he *was* to blame for the six murders that occurred in the New York commuter train (Schevitz, 1995).

Finally, when one is found competent to stand trial, *pro se* representation can compromise the rights of a defendant. In short, the absence of a legal background and access to resources can seriously undermine the appropriate handling of a complex criminal case. For example, although a defendant can refuse the assistance of court-appointed counsel, "no constitutional rights exists mandating that the prisoner . . . be provided access to a law library" or any other legal materials (*United States ex rel. George v. Lane*, 1983, p. 227). Conversely, if a defendant accepts the assistance of government-financed counsel, the person "may not reject the method provided and insist on an avenue of his [or her] choosing" (*United States v. Wilson,* 1982, pp. 1270-1273). This issue of compromised legal rights was particularly apparent in the Kaczynski case.

Notwithstanding the plea arrangement in the unabomber trial, Kaczynski originally sought to defend himself following the determination that he was competent to stand trial (Coyle, 1999). Kaczynski was denied this opportunity. He felt considerably constrained to work within the legal parameters identified for him by his defense team. As a result, he is presently pursuing a federal habeas corpus petition to set aside the controversial plea. His contention is that had he been permitted to work outside the limits of court-appointed representation, he would have been acquitted (Coyle, 1999). For now, one can only speculate about how successful Kaczynski might have been (and what legal materials he would have had at his disposal to effect these results) had he been granted a right to *pro se* his case. What is clear, however, is that the unabomber was not allowed to exercise his right to self-representation and he was not allowed to develop a defense strategy beyond the parameters set forth for him by his attorneys.

Each of these legal problems, magnified by the publicity surrounding the Ferguson and Kaczynski disputes, raises significant questions about the efficacy of self-representation. We suggest that there are three legal policy remedies applicable to this area of forensic mental health. As we demonstrate, these reforms make sense and are consistent with our policy position

on how psycho-diagnostic findings are to be used in CST proceedings. Each recommendation is therefore tentatively explored in relation to the CST process.

The Court's Prerogative to Appoint Standby Counsel

One implication of *Faretta* is that the court can exercise its discretion to appoint standby counsel (Decker, 1996). In a rather obscure footnote, the *Faretta v. California* (1975) court declared,

> a State may appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. (p. 834 n. 46)

In the subsequent case of *McKaskle v. Wiggins* (1984), the United States Supreme Court articulated the role and function of standby counsel for defendants who engage in self-representation. Specifically, the Court addressed the conditions wherein standby counsel could offer assistance over the *pro se* defendant's objection. The Court found,

> The pro se defendant is entitled to preserve actual control over the case he [or she] chooses to present to the jury . . . [and standby counsel cannot] make or substantially interfere with any significant tactical decisions. (p. 178)

These rulings are important to CST determinations, particularly with defendants who elect or wish to proceed to trial *pro se* (e.g., Ferguson, Kaczynski). In the Ferguson dispute, substantial weight was given to the psychological fitness evaluation. Indeed, Judge Belfi made his competency ruling based on one forensic assessment and his own questioning of the defendant. At the trial, had the judge allowed standby counsel, many of the courtroom escapades displayed by Ferguson may have been neutralized or minimized. Indeed, "counsel may serve as a resource, consulting with the client outside of the courtroom or seated at the client's side, available for assistance" (Decker, 1996, p. 525). Standby counsel allows judges not to feel compelled to make competency determinations based on the face validity of forensic evaluations. Thus, had the court considered such a legal option, the outcome in the Ferguson case may have been more consistent with the administration of justice, and his recent efforts to appeal on the basis of federal civil rights violations may not have developed.

The Kaczynski matter represents another justification for standby counsel and for limiting the court's reliance on forensic diagnostic evidence. Although found competent to proceed to trial, the unabomber was denied a right to self-representation. Given the problems stemming from his guilty plea and verdict, standby counsel may have produced an entirely different outcome. Indeed, standby counsel "may literally stand by to take over in case the defendant loses the right to self-representation" (Decker, 1996, p. 525). Arguably, the government would have been less suspicious of a mentally impaired, but competent, Kaczynski who wanted to proceed to trial *pro se*, had Judge Burrell granted the defendant his right to self-representation and permitted standby counsel to intervene, consistent with the decision in *McKaskle*. Again, under these circumstances, the administration of justice would likely have produced considerably different trial results. As Decker (1996) notes in relation to standby legal assistance,

> The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial. (p. 528)

This is precisely what Kaczynski wanted. We contend that with the presence of standby counsel, both his personal defense strategy needs and the demands for justice would have been more meaningfully realized.[2]

Defendant's Right to Select Counsel of Choice Following Revocation of the Right to Pro Se

During a criminal proceeding, defendants who engage in self-representation can have this right revoked (*United States v. Romano*, 1988). Revocation is particularly problematic when standby counsel has been appointed and the defendant seeks counsel of choice (Decker, 1996, p. 533). The court has held, however, that a criminal defendant does not

> irrevocably waive all right to select counsel of choice once he or she has decided to proceed *pro se*. . . . The denial of the opportunity to select counsel of choice [following the loss of *pro se* status] violates the defendant's rights under the Sixth Amendment. (*United States v. Romano*, 1988, pp. 818-819)

The issue of counsel of choice, following the loss of self-representation, is significant in cases where there is some question about the defendant's CST. Although neither Ferguson nor Kaczynski were presented with this particu-

lar scenario, standby counsel, in and of itself, may not be sufficient to advance the administration of justice. Indeed, assuming that Judge Belfi permitted standby counsel in the Ferguson case and assuming that Judge Burrell allowed Kaczynski to *pro se* his case providing, as well, standby legal assistance, the question of mental impairment would have plagued both legal disputes. Thus, the court would have to instruct standby counsel to assume the Ferguson and Kaczynski defenses.

We note, though, that following *Romano*, the defendant still retains the right to choose counsel. Thus, in the Ferguson case, the accused would have retained some control over the defense strategy, without the questionable and unnecessary reliance on additional CST screenings. In the Kaczynski matter, the accused would have retained some control over the defense strategy, and federal prosecutors would not have been so quick to secure a conviction through the plea bargaining process, fearful of a defendant proceeding to trial *pro se* in which psychiatric illness manifested itself during the trial, giving rise to a subsequent CST hearing and incompetency determination.

Hybrid Representation

In some jurisdictions, trial courts may exercise their discretion and allow the accused to assume some of the defense attorney functions (*United States v. Kimmel* 1982, p. 721). This is known as "hybrid" or "mixed" representation (Decker, 1996, p. 538). Although it is not constitutionally guaranteed, hybrid representation is constitutionally permissible (*McKaskle v. Wiggins*, 1984, p. 183). Admittedly, there are problems stemming from the use of mixed representation (e.g., it is not particularly efficient, attorneys have to deal with the vicissitudes of under- and non–legally trained defendants) (Berger, 1986); however, the doctrine is suggestive for cases wherein questions persist about the accused's CST.

Although Ferguson passionately wanted to present his case to the jurors personally, his obvious mental impairment contributed to his own courtroom demise. Given the flawed predictive capability of diagnostic instruments assessing fitness to stand trial, and given the potential problems stemming from standby counsel (i.e., how much assistance can a standby attorney really offer a *pro se* defendant), a more meaningful solution may be hybrid representation. Had Ferguson been allowed to invoke this legal option, he and his "co-counsel" might have been able to develop a more cogent (race-based) defense, and the verdict may have been more consistent with what Ferguson anticipated.

Kaczynski also insisted that he represent himself in his own criminal matter. Although he was found competent to stand trial, the unabomber was not permitted to *pro se* the case. The subsequent plea and verdict have now prompted him to seek an appeal. Had Kaczynski been authorized to participate in his own defense through hybrid representation, the government's suspicion about a possible CST hearing (resulting in a finding that the accused was not mentally fit to stand trial) could have been minimized. A plea arrangement and verdict, leaving the defendant unsatisfied, could have been avoided. A true adversarial trial, without substantial reliance on less than accurate forensic psycho-diagnostic evidence, could have occurred.

SUMMARY AND CONCLUSIONS

Although clearly provisional and tentative, the preceding analysis was designed to suggestively but meaningfully link the CST dilemma with high-profile cases. Our essential thesis was that the CST legal construct and the diagnostic instruments utilized to assess mental ability have failed, in large part, to assist lower court judges in rendering appropriate determinations. This failure is quite apparent, particularly when analyzing media-driven and controversial cases. Not only have some defendants wrongfully been found competent, resulting in psychologically impaired and ineffective self-representation (i.e., Ferguson), other defendants have not proceeded to trial for fear that the CST ruling would eventually undermine the government's otherwise evidence-filled case (i.e., Kaczynski).

To remedy these matters, we examined where and how forensic evaluations and the legal standards for competency could be modified. Clearly, the courts' reliance on clinical judgments concerning fitness to stand trial is not productive. Trial judges must come to regard forensic psychological assessments as informational in nature and not dispositive for the CST finding. Indeed, in the absence of greater accuracy in predictive capability, we submit that it is far better for judges to err on the side of a finding of competency, notwithstanding fitness evaluations suggesting the contrary.

To implement successfully this policy recommendation, several corresponding legal reforms are necessary. The right to standby counsel, the right counsel of choice following *pro se* revocation, and the right to hybrid representation are three policy recommendations that would considerably recast the manner in which the CST process occurred. Each of these policy changes is consistent with and related to our recommendation to consult with rather than to rely on forensic evaluations for CST determinations.

The Ferguson and Kaczynski cases make strikingly clear just how much the legal and clinical communities need to rethink the relationship between CST dynamics and the administration of justice. Precisely because competency determinations affect the criminal and/or civil adjudication process, future research in the area must carefully consider whether psychological fitness to stand trial, as currently assessed, is an adequate and effective indicator of competency for lower court judges. In addition, future investigators need to examine how *pro se* findings, when psychiatric impairment is at issue, can nonetheless result in meaningful courtroom outcomes for all participants. We submit that our criminal justice policy analysis moves us in this necessary, important, and timely direction.

NOTES

1. The contention that justices manipulate precedent to meet their ideological preferences (Segal & Spaeth, 1993), although worthy of exploration in its own right, is a matter beyond the scope of the present article. For a law and society analysis of this point, starting with sociological jurisprudence and legal realism and extending to critical legal semiotics, see Milovanovic (1994, pp. 85-184).

2. We recognize that some courts have more recently argued that "standby counsel is more akin to that of an observer, an attorney who attends the trial or other proceeding and who may offer advice but who does not speak for the defendant or bear responsibility for his defense" (*United States v. Taylor*, 1991, p. 313). Our essential point is that the potential buffer such legal assistance creates may have been significant in the Ferguson and Kaczynski verdicts, particularly given the role of the CST proceeding in both outcomes.

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