

**The “What” and the “Why” of Adjudicative Competence Evaluations:  
Conceptualizing Court-Related Abilities in a Manner Accessible to Legal Professionals**

Jaymes Fairfax-Columbo, JD, PhD  
Department of Psychological & Brain Sciences  
Drexel University  
Philadelphia, PA

Alexander George Kuhl, PsyD  
Kuhl Clinical & Forensic Psychological Services, LLC  
Las Vegas, NV

*A special thanks goes to David DeMatteo, JD, PhD, ABPP (Forensic) for feedback on drafts of  
this article.*

## Adjudicative Competence Evaluations: Rationale and Legal Standard

Adjudicative competence represents the most common referral question for forensic mental health evaluators (Packer & Grisso, 2011). At its core, determining a defendant’s adjudicative competence promotes three key goals: (1) ensuring criminal defendants can navigate adversarial proceedings in a fair manner, (2) ensuring accuracy of information presented at trial, and (3) upholding the integrity of the criminal legal system (Grisso, 2014). The baseline American legal standard for determining a defendant’s adjudicative competence was established by the Supreme Court of the United States’ (SCOTUS) opinion in *Dusky v. United States* (1960). *Dusky* elucidated that to determine a defendant’s adjudicative competence, courts must consider whether “he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him” (p. 402).

*Dusky* is typically conceptualized as containing three prongs: (1) a defendant having a factual understanding of the proceedings against them (2) a defendant having a rational understanding of the proceedings against them, and (3) the defendant having sufficient present ability to consult with their attorney with a reasonable degree of rational understanding.<sup>1</sup> A *Dusky* progeny case, *Godinez v. Moran* (1993), clarified that the standard pertains to multiple referral questions regarding adjudicative competence, including competence to plead guilty and competence to waive the right to counsel. Notably, the question of competence to represent oneself is also *informed* by the *Dusky* standard, though SCOTUS declined to provide a formal rule for assessing this specific capacity (*Indiana v. Edwards*, 2008).

---

<sup>1</sup> Note that gender neutral language is used throughout this article.

The *Dusky* standard for determining adjudicative competence has long faced criticism for being amorphous and “ill-defined” (see, e.g., Bonnie, 1992, p. 292). Early attempts to operationalize assessment of adjudicative competence focused on creating “checklists” of behaviors expected of defendants in court; Bonnie critiqued this approach as reflecting a “dist[illation of expected behaviors] from appellate opinions and interviews with judges” as opposed to being “derived either from a theory of competence or from empirical studies of the difficulties encountered by attorneys representing defendants with mental disabilities” (Bonnie, 1992, pp. 292-293). Resultantly, Bonnie recommended taking an evolved approach to conceptualizing the *Dusky* standard, suggesting that it focused on two related, but distinct, concepts: “competence to assist counsel” and “decisional competence” (Bonnie, 1992, p. 294).

### **Assessing Adjudicative Competence: Functional Legal Capacities**

Bonnie’s reconceptualization of the *Dusky* standard paved the way for identification and operationalization of *functional legal capacities*, alternatively referred to as *psycholegal abilities*, relevant to adjudicative competence. Assessing functional legal capacities represents an integral aspect of forensic mental health assessment (Heilbrun et al., 2009). “Functional legal capacities” refer to the relevant functional demands expected of a defendant in a particular legal context. These capacities necessarily vary according to the legal question for which a defendant is referred for evaluation, and they also refer to particular timeframes for different legal questions (e.g., the present for an adjudicative competence evaluation versus the past for a criminal responsibility evaluation). These functional legal capacities may be impacted by a defendant’s clinical presentation, namely mental status deficits caused by neurodevelopmental conditions, neuropsychological conditions, and/or mental illness (Heilbrun et al., 2003).

For purposes of this article, the functional legal capacities relevant to adjudicative competence offered by Zapf and Roesch (2009) will be reviewed. Zapf and Roesch (2009) suggested forensic mental health evaluators assess the following five functional legal capacities in adjudicative competence evaluations: (1) Understanding; (2) Appreciation; (3) Reasoning; (4) Assisting Counsel; and (5) Decision-Making.

The Understanding domain comprises the “factual understanding” prong of *Dusky*. In this domain, the evaluator considers a defendant’s general knowledge of the court system. Evaluators should ask the defendant about the roles of key players in the legal process; the current charges they face and their elements; possible consequences of a conviction, in a global sense (e.g., incarceration, probation, fines); and the constitutional rights they would forego if they choose to plead guilty. The Appreciation domain comprises the “rational understanding” prong of *Dusky* and measures a defendant’s ability to apply factual information about the court process to their case in a reality-based manner. Evaluators should ask the defendant about the probability they will be found guilty; the nature, extent, and personal impact of the specific consequences they might face if convicted; potential legal defenses available to them and their possible outcomes; their valuation of whether to testify; and their ability to make logical and reality-based decisions regarding their case.

The Reasoning domain also comprises the “rational understanding” prong of *Dusky* and gauges a defendant’s ability to “consider and weigh relevant pieces of information in a rational manner in arriving at a decision or a conclusion” (Zapf & Roesch, 2009, p. 39). Evaluators should assess a defendant’s ability to identify and seek information pertinent to their case; determine the absolute and relative relevancy of this information; appraise various legal options available to them and consider their potential consequences; compare information (such as prospective evidence for

both sides) and legal options; and provide reality-based and logical rationales for why they would make specific case decisions.<sup>2</sup> Evaluators should also assess the defendant's ability to express themselves in a clear and coherent fashion.

The Assisting Counsel domain comprises the “consult with counsel” prong of *Dusky*, as well as measures the defendant's ability to assist counsel in preparing their defense a la *Drope v. Missouri* (1975). Evaluators should assess whether the defendant can consult with and relate to their attorney in a productive manner; can work collaboratively with their attorney to identify and formulate a reality-based legal strategy; can listen to and appreciate guidance from their attorney, even if they ultimately choose not to follow it; can testify in clear, coherent, and reality-based fashion (should they so choose to), as well as adequately withstand cross examination; can aid their attorney in confronting witnesses against them; and can convey and maintain respectable courtroom behavior.

Finally, the Decision-Making domain measures the defendant's ability to make reasonable and reality-based decisions in the context of their specific case. Grisso (n.d.) suggests that evaluators consider three key questions in assessing a defendant's decision-making capability: (1) Is the defendant truly considering all choices, or merely focusing on one choice at the exclusion of alternative choices?; (2) Is the defendant actually comparing consequences of all alternatives, or are they merely discussing choices without actually being able to elucidate the absolute and relative pros and cons of these choices?; and (3) Do a defendant's various decisions reflect logical reasoning processes? (see FN2).

---

<sup>2</sup> Note that a reality-based and logical decision does not need to be an intelligent or optimal decision. Rather, it refers to the process by which a defendant arrives at a decision—namely, that they were able to do so via a process that reflects reasoning that is not distorted by deficits caused by symptoms of neurodevelopmental conditions, neurocognitive conditions, or mental illness (Zapf & Roesch, 2009).

## **Approaching Adjudicative Competence Cases: Conceptualizing via a Functional Approach**

Zapf and Roesch (2009) stress the importance of conducting a *functional assessment* of adjudicative competence. This entails mapping the above functional legal capacities onto a defendant's clinical presentation *in the context of his specific case*. Specifically, Zapf and Roesch recommend taking a four-step approach in conceptualizing a defendant's competence-related abilities: (1) learning what is expected of the defendant during their specific legal proceedings; (2) gauging their abilities in the context of those specific expectations; (3) examining any functional deficits caused by their neurodevelopmental condition, neurocognitive condition, or mental illness symptoms (if they exist); and (4) explaining how these symptoms and functional deficits do or do not impair the five functional legal capacities mentioned above.

## **Conceptualizing Adjudicative Competence for Legal Professionals: Reformulating Zapf & Roesch's Approach**

From the vantage point of a forensic mental health professional, Zapf and Roesch's (2009) approach makes great sense. However, functional legal capacities *are an invention of forensic mental health professionals* to better conceptualize and operationalize vague legal standards, and *forensic psychologists have the specialized training necessary to grasp functional legal capacities*. In contrast, legal professionals generally do not have the specialized training necessary to make functional legal capacities tangible to them; rather, they are concerned with whether a criminal defendant can fulfill the expectations of the court process and, if they cannot, why they cannot. In this sense, legal professionals *are* concerned with whether a criminal defendant is impaired in the domains that Bonnie (1992) and Zapf and Roesch (2009) identified, *but generally will find a report easier to digest and comprehend if it describes the specific court-related behaviors that a defendant is and/or is unable to engage in*. Accordingly, the rest of this article offers a reformulated

version of Zapf and Roesch's (2009) functional approach to conceptualization in adjudicative competence evaluations, but in a manner likely to prove more comprehensible to legal professionals. Example conceptualizations will be included to demonstrate this reformulated approach. Finally, a flowchart showing this reformulated conceptualization process is included at the end of this article.

*Step 1. Gather your data.* The first step in crafting any forensic conceptualization is to obtain necessary data, normally via a clinical interview of the defendant, conducting any needed psychological testing, obtaining necessary third-party information (records, collateral interviews), and assessing specific functional legal capacities. An in-depth review of all the components of an adjudicative competence evaluation is beyond the scope of this article, but can be found in numerous texts (see, e.g., Grisso, 2014; Melton et al., 2018; Zapf & Roesch, 2009). Rather, we stress Step 1 of Zapf and Roesch's (2009) functional approach—that forensic evaluators educate themselves on both the *generalized* expectations of criminal defendants in court, as well as the likely expectations for a defendant's *specific case*.

Concerning the former, there are numerous forensic assessment instruments—the Evaluation of Competence to Stand Trial – Revised (ECST-R; Rogers et al., 2004), the Fitness Interview Test-Revised (Roesch et al., 2006), and the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA; Poythress et al., 1999), to name a few—that assess various components of Zapf and Roesch's (2009) five functional legal capacities and outline general behaviors expected of defendants throughout the criminal court process. Understanding which of these expected behaviors are implicated/hold the most weight in the defendant's particular case is more challenging; however, it can typically be accomplished by evaluators familiarizing themselves with the defendant's specific legal circumstances (e.g., reviewing criminal complaints;

reviewing police reports; reviewing the defendant's criminal history; reviewing other relevant discovery; and consulting with the defendant's attorney (if needed and acceptable within a jurisdiction or referral pathway).

*Step 2. Broadly assess the main purpose of an adjudicative competence evaluation.* After all relevant data are gathered, the next step for forensic evaluators is to begin crafting a conceptualization of the defendant's competence-related abilities. Best practices in forensic mental health report writing dictate eliminating jargon and presenting findings in a manner that allows a factfinder to follow the evaluator's reasoning (Heilbrun et al., 2009). Therefore, we recommend that in conceptualizing a defendant's adjudicative competence, forensic mental health evaluators ask themselves questions that translate well to paper and that proliferate in the mind of legal professionals. Instead of first asking oneself whether a defendant has a factual and rational understanding of the proceedings against them, as well as ability to assist counsel in their defense (conceptualizing via a legal standard)—or whether the defendant is impaired regarding understanding, appreciation, reasoning, assisting counsel, and/or decision-making (conceptualizing via functional legal capacities)—we recommend asking oneself this general question that cuts to the heart of adjudicative competence evaluations: *Can I see this person getting through the court process in a fair manner?*

Answering this question necessarily entails exploration of what a defendant could and could not do during the assessment of specific functional legal capacities. However, rather than thinking in terms of functional legal capacity domains, we suggest first thinking in terms of behaviors. *What specific court-related behaviors was the defendant able and ostensibly unable to do?* For example, in answering this question, the evaluator may determine that the defendant knew who the various players in the criminal court process were, knew what they were charged with and



the elements of those charges, knew generally how the court process worked, could identify typical forms of evidence offered in court, and understood in a general sense that freedom follows acquittal while some type of sanction follows a conviction (either by trial or via plea). This suggests that the defendant has a “factual understanding” of the proceedings against them, or that they are intact in the “understanding” domain. The evaluator might also determine that when presented with hypothetical case examples unrelated to their specific case, the defendant was able to do things such as identify and weigh evidence and possible defense strategies, as well as reasonably discuss whether pleading guilty or proceeding to trial was a better option for a hypothetical defendant. This suggests that the defendant *might* be intact regarding aspects of rational understanding and ability to assist counsel, or in the other four Zapf and Roesch (2009) domains.

However, due to ostensible delusional beliefs regarding the circumstances of their specific case, the evaluator also observed that the defendant was unable to identify reality-based evidence they could use to defend themselves, had an unrealistic appraisal of the strength of the prosecution’s case against them, was adamant about proceeding to trial even though the alleged events were captured on video and they provided a confession to police, and wished to testify about delusional thought content they thought would curry favor with a jury. This would suggest that the defendant *may* be impaired regarding rational understanding of the proceedings against them and in their ability to assist counsel, or impaired in the appreciation, reasoning, assisting counsel, and decision-making domains.

*Step 3. Determining the clinical etiology of potential competence-related deficits.* After determining what the defendant possibly *cannot* do, we next recommend evaluators ask themselves the following question: *Why can’t the defendant do X, Y, or Z behavior?* In other words, what clinical impairment is impeding the defendant’s ability to engage in X, Y, or Z behavior? In the

example above, ostensible delusional beliefs seem to drive the defendant's inability to help their attorney craft a reality-based defense, as well as to appreciate the true nature of their legal situation (that a conviction is likely based on the strength of the evidence against them, and that their testimony is likely not to have the effect on the jury that they think it might). The *veracity* of this symptom is extremely important. Should the delusional beliefs about their case prove genuine, an opinion that the defendant suffers from psycholegal impairment in adjudicative competence abilities and a finding by the Court that they are incompetent to proceed appears indicated.

If, however, those delusional beliefs are not genuine it casts doubt as to whether the *defendant is truly incapacitated or merely attempting to portray themselves as incapacitated*. Past diagnoses of a psychotic disorder according to collateral sources, visible observation of the defendant plausibly exhibiting other psychotic symptoms during the evaluation (such as disorganized speech, appearing disheveled, being malodorous, responding to internal stimuli, thought blocking), and/or providing below-cutoff scores on measures screening for feigned psychotic symptoms and psychopathology would promote confidence that the ostensible clinical impairments—and, resultantly, the observed functional legal capacity impairments—are genuine. A lack of these things, on the other hand, might suggest that though the defendant *demonstrated* impairment in functional legal capacities, that impairment is not backed or explained by true clinical impairment (suggesting that the defendant is misrepresenting their presentation in some form or fashion). Depending on the nature and magnitude of the information gathered regarding misrepresentation, this may lead to the evaluator being unable to form an opinion or reaching an opinion that the defendant is malingering and is not truly impaired in their competence related-abilities.

*Step 4. Tying it all together.* Once an evaluator has identified potential deficits in competence-related abilities and determined that these deficits are anchored to true clinical impairment, the final step in the process is to present these findings in language that is accessible for legal professionals. For sake of organization and demonstrating knowledge of legal standards, we recommend presenting opinions in a manner consistent with the legal standard for an evaluator’s jurisdiction. Most often, this will be via organization consistent with the *Dusky* standard, though some jurisdictional standards do vary slightly. In demonstrating that a defendant may not meet an aspect of the *Dusky* standard, it is helpful to discuss impairment in functional legal capacities, which is demonstrated via discussion of what a defendant can and cannot do in terms of expected behaviors encompassed by that capacity and the clinical impairment underlying that deficit in functional legal capacity (recognizing that some behaviors span functional multiple legal capacities). To demonstrate this concept, several hypothetical examples are provided below, pertaining to each of the three prongs of the *Dusky* standard.

*Prong 1. Factual Understanding of the Proceedings Against the Defendant*

*It is this evaluator’s clinical opinion that Mx. Doe does not have a factual understanding of the proceedings against them. [legal language] Mx. Doe struggled mightily to provide spontaneous answers when asked basic questions about the court process. For example, aside from their defense attorney, they were largely unable to satisfactorily describe the roles of other key courtroom personnel. As another notable example, in terms of case resolution, they were aware a defendant could plead guilty, but were not able to adequately explain the concept of a trial. In a third salient example, despite being aware that a defendant could plead guilty, they did not know what rights a defendant would give up if they chose to plead guilty, and, concerning potential penalties defendants can face if convicted via guilty plea, they were only able to discuss probation. Additionally, when provided education about the concepts they did not know (which were many), they struggled to retain the education provided to them even despite multiple education attempts and the use of teaching aids (e.g., visual aids, metaphors). [functional legal capacity language/court-related expectations language] Markedly, Mx. Doe’s impairment regarding factual understanding appears to stem from gross cognitive impairment consistent with their historical diagnosis of Intellectual Disability, Mild. Further, during the current evaluation, they exhibited gross impairment across all four domains measured by the Wechsler Adult Intelligence Scale, Fourth Edition, corresponding to an overall FSIQ score of 66. Markedly, three of these domains are highly relevant to competence-related abilities, as navigating the court process generally involves needing to be able to attend to, remember, and process/manipulate/reason through verbally presented information. [clinical presentation language/etiology of impairment in functional legal capacity]*

*Prong 2. Rational Understanding of the Proceedings Against the Defendant*

*It is this evaluator's clinical opinion that Mx. Doe does not presently possess a rational understanding of the proceedings against them.* [legal language] Mx. Doe's perception of the circumstances surrounding their alleged offenses appeared to be delusional in nature. Furthermore, their ability to make rational and relevant reality-based decisions appeared impaired, as they believe that their case will play out solely according to "The Creator's" will for them and that they have no entity in any outcome. In fact, they were unwilling to even discuss potential outcomes for their case, as they maintained adamantly that they were putting all their trust in "The Creator" and that they were the "The Creator's chosen and an archangel." Additionally, they harbor delusional and hyper-religious beliefs regarding right and wrong, which suggest they do not appreciate the role of the trial process in determining objective culpability for criminal offenses both generally and in their specific case. [functional legal capacity/court-related expectations language] Of note, their delusional and hyper-religious beliefs—as well as their grandiosity, perseveration, and inflexibility of thought—are consistent with their historical diagnoses of combination mood and psychotic disorders, as well as their current diagnosis of Schizoaffective Disorder, Bipolar Type at Correctional Facility. [clinical presentation language/etiology of impairment in functional legal capacity]

### *Prong 3. Ability to Consult with Counsel*

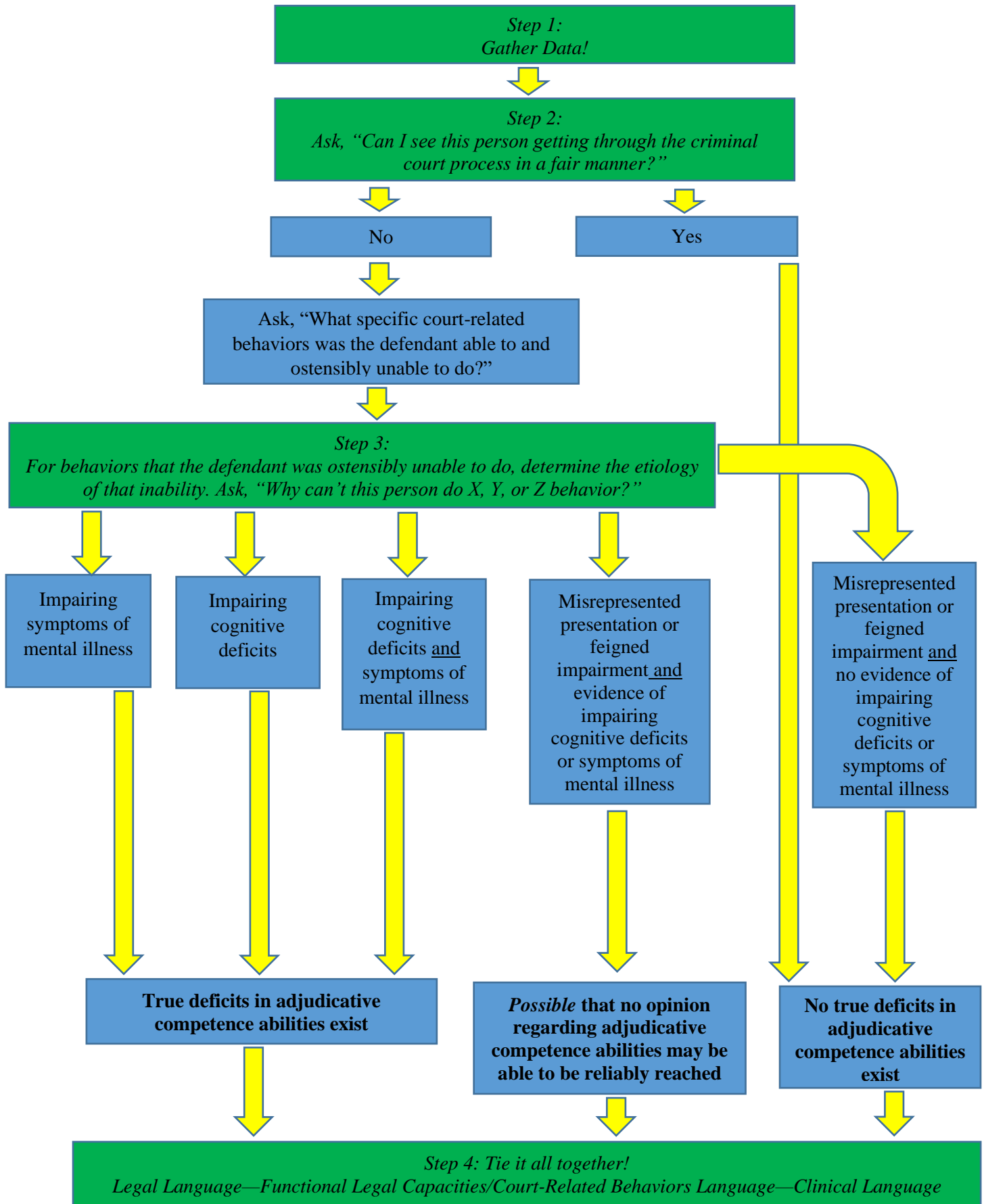
*It is this evaluator's clinical opinion that Mx. Doe currently possesses sufficient present ability to consult with their lawyer with a reasonable degree of rational understanding.* [legal language] They felt positively about their lawyer and suggested they would entertain any advice and guidance provided them. They were able to communicate their version of the events pertaining to their charges in a fashion that was coherent, easy to understand, and appeared based in reality. They were able to identify evidence that might aid in their defense, as well as evidence the prosecution might offer against them; their appraisal of the strength of this evidence appeared reasonable. They offered two defense strategies that appeared plausible given their circumstances and provided logical reasoning to undergird their favored strategy. They appeared able to conform their behavior to courtroom standards, evidenced by engaging respectfully and without incident during multiple clinical interviews, including one that was several hours in duration. Additionally, they were able to speak about what appropriate courtroom behavior looks like. Further, while detained, they have not been involved in any behavioral issues and have been cooperative with both staff and peers. [functional legal capacity/court-related expectations language] Of note, though Mx. Doe evidences some low-level psychiatric symptoms, these symptoms appear well-controlled secondary to medication compliance and do not appear to currently impair their abilities to communicate appropriately as regards their case or to conform their behavior to courtroom expectations. [clinical language/basis for lack of impairment in functional legal capacities]

## **Conclusion**

Though forensic psychologists are adept at understanding and deciphering functional legal capacities, many legal professionals may not be. Instead, they are chiefly concerned with two questions: (1) Can the defendant navigate the court process in a fair manner? and (2) If not, why not? Adopting a functional approach to conceptualizing adjudicative competence—as recommended by Bonnie (1992) and Zapf and Roesch (2009)—is indicated. However, a slight

reformulation of Zapf and Roesch's (2009) framework may prove beneficial. This reformulation focuses on (1) gathering relevant data and (2) broadly considering the question of, "Can I see this defendant navigating the criminal court process in a fair manner?" If the answer is no, the evaluator should identify specific behaviors expected in the courtroom that the defendant could not ostensibly perform, and identify the clinical etiology of these ostensible deficits. Last, the evaluator should tie it all together in a report by addressing legal standards, functional legal capacities/court-related behavior, and clinical presentation in tandem. This approach may prove more palatable to legal professionals (and help evaluators avoid unnecessary testimony!).

# Competency Conceptualization Flowchart



## References

- Bonnie, R. J. (1992). The competence of criminal defendants: A theoretical reformulation. *Behavioral Sciences & the Law*, *10*(3), 291-316. doi: 10.1002/bsl.2370100303
- Drope v. Missouri, 420 U.S. 162 (1975).
- Dusky v. United States, 362 U.S. 402 (1960).
- Godinez v. Moran, 509 U.S. 389 (1993).
- Grisso, T. (n.d.). *The ability to make relevant decisions: Implications for competence to stand trial evaluations*. University of Massachusetts Chan medical School Designated Forensic Professional Training and Certification. <https://www.umassmed.edu/forensictraining/original-articles/>
- Grisso, T. (2014). *Competence to stand trial evaluations: Just the basics*. Professional Resource Press.
- Heilbrun, K., Grisso, T., & Goldstein, A. M. (2009). *Foundations of forensic mental health assessment*. Oxford University Press.
- Heilbrun, K., Marczyk, G. R., DeMatteo, D., Zilmer, E. A., Harris, J., & Jennings, T. (2003). Principles of forensic mental health assessment: Implications for neuropsychological assessment in forensic contexts. *Assessment*, *10*(4), 329-343. doi: 10.1177/1073191103258591
- Indiana v. Edwards, 554 U.S. 164 (2008).
- Melton, G. B., Petrila, J., Poythress, N. G., Slobogin, C., Otto, R. K., Mossman, D. & Condie, L. O. (2018). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers* (4th ed.). Guilford.
- Packer, I., & Grisso, T. (2011). *Specialty competencies in forensic psychology*. Oxford University Press.

- Poythress, N. G., Nicholson, R., Otto, R. K., Edens, J. F., Bonnie, R. J. Monahan, J., & Hoge, S. K. (1999). *The MacArthur Competence Assessment Tool: Criminal Adjudication: MacCAT-CA*. Psychological Assessment Resources.
- Roesch, R., Zapf, P. A., & Eaves, D. (2006). *FIT-R: Fitness Interview Test-Revised. A structured interview for assessing competency to stand trial*. Professional Resource Press/Professional Resource Exchange.
- Rogers, R., Tillbrook, C., & Sewell, K. (2004). *Evaluation of Competency to Stand Trial-Revised (ESCT-R)*: Professional manual. Psychological Assessment Resources.
- Zapf, P. A., & Roesch, R. (2009). *Evaluation of competence to stand trial*. Oxford University Press.