

# Low-threshold Fitness Test in South Africa and the USA: Consequences for the Fit but Mentally Ill Accused

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## Abstract

An accused, who is unable to follow the criminal proceedings against him/her on account of mental illness or intellectual disability, could be found unfit to stand trial. Whether the individual is indeed unfit is determined by the fitness test employed in the particular jurisdiction. This article considers the fitness tests employed in South Africa and the United States of America and points out the similarities and differences between them. The threshold for fitness in both these jurisdictions is low, resulting in the majority of accused persons sent for fitness assessments being found fit to stand trial. Amongst these accused are persons with serious mental illness. The article considers the impact of such a low threshold test on the fit but mentally ill accused and considers a therapeutic response to this category of accused persons.

## INTRODUCTION

An accused's mental illness or intellectual disability could potentially render him/her unfit to stand trial. The question as to whether an accused is indeed fit to stand trial is ultimately decided by the court.<sup>1</sup> The court is, however, guided in its finding by reports from mental health professionals who assessed the particular accused for his/her fitness to stand trial.<sup>2</sup> The

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<sup>1</sup> Ronald Louw, 'Principles of Criminal Law: Pathological and Non-pathological Criminal Incapacity' in Sean Kaliski (ed), *Psycholegal Assessment in South Africa* (Oxford University Press 2006) 45. Also see Etienne du Toit, Frederick J de Jager, Andrew Paizes, Andrew St Quinton Skeen and Steph E van der Merwe, *Commentary on the Criminal Procedure Act* (Juta 2012) 13–5.

<sup>2</sup> The court is guided by expert opinion, as it is not an expert in the field of psychiatry itself and will, in most instances, not deviate from the recommendations made by the psychiatrists and psychologists. See in general *S v McBride* 1979 (4) SA 313 (W). See Du Toit (n 1) 13–1, 13–11. Also see *S v Mabena* 2007 (1) SACR 482 (SCA) para 16, where it was stated that “‘Mental illness’ and ‘Mental defect’ are morbid disorders that are not capable of being

purpose of the fitness assessment is to determine whether the accused satisfies the test for fitness as it applies in that particular jurisdiction.<sup>3</sup>

The majority of accused persons sent for fitness assessments in South Africa and the United States of America are found fit to stand trial.<sup>4</sup> Among these are persons with serious mental illnesses. Once the accused is found fit to stand trial, no further consideration is given to the possibility that mental illness may be present, unless the accused raises the insanity defence. This fit but mentally ill accused is often left in the criminal justice system with inadequate mental health support.

This article briefly outlines the core principle of fitness to stand trial. It explores and compares the test for fitness as it applies to South Africa and the United States of America. It focuses on the level of functioning required of the accused to be found fit to stand trial. This contribution suggests that the low threshold for fitness, in terms of the fitness tests, is the reason why large numbers of accused persons, including those with serious mental illnesses, are being found fit to stand trial. The article concludes by promoting a therapeutic response to the fit but mentally ill accused.

### THE PRINCIPLE OF FITNESS TO STAND TRIAL

It is a fundamental principle of South African law that an accused must be present at his/her trial.<sup>5</sup> The same applies to the United States of America.<sup>6</sup>

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diagnosed by a lay court without the guidance of expert psychiatric evidence. An inquiry into the mental state of an accused person that is embarked upon without such guidance is bound to be directionless and futile’.

<sup>3</sup> In South Africa, the court orders an assessment on a J138 form that explains that the particular accused must be assessed by the appointed mental health professionals to determine whether the accused lacks the ability – due to mental illness or mental defect – to follow the criminal proceedings against him/her so as to conduct a proper defence. This is in line with the test for fitness as set out in s 77 of the Criminal Procedure Act 51 of 1977.

<sup>4</sup> See Tiaan Schutte, ‘“Single” versus “Panel” Appointed Forensic Mental Observations: Is the Referral Process Ethically Justifiable?’ (2013) 6 South African Journal of Bioethics and Law 64 at 67, for the position in South Africa. See Christopher Slobogin, Arti Rai and Ralph Reisner, *Law and the Mental Health System, Civil and Criminal Aspects* (5 edn, Thomson West 2009) 1020, who explain that most of the accused sent for fitness assessments in the USA are found fit to stand trial. Also see William Governsmith and Kevin Robinson, ‘Fitness to Stand Trial Evaluation Challenges in the United States: Some Comparisons with South Africa’ 2017 (47) South African Journal of Psychology 148 at 150, where this is confirmed.

<sup>5</sup> Section 35(3)(e) of the Constitution of the Republic of South Africa, 1996 gives every arrested person the right to be present when he is tried. Section 158 of the Criminal Procedure Act 51 of 1977. Also see Geert Stevens, ‘Re-establishing Triability by Means of Psychotropic Medication: An Analysis’ (2013) 76 THRHR 252 at 252. See further Albert Kruger *Heimstra Suid-Afrikaanse Straffproes* (7 edn, LexisNexis 2010) 227. Also see Du Toit (n 1) 13–1. Also see Johan Snyman ‘The Declaration of a Patient as a State President’s Patient’ (1988) *Acta Juridica* 128 at 128.

<sup>6</sup> See the position in New York as explained by LK Marks, Robert Dean, Mark Dwyer, Anthony Girese and James Yates, *New York Pretrial Criminal Procedure* (2 edn, Thomson West 2007) 540.

This presence infers both physical and psychological/mental presence.<sup>7</sup> The psychological/mental presence refers to the accused's ability to follow the proceedings and give instructions to his/her legal representative.

Fitness to stand trial refers to the current mental capacity or the ability of an accused to understand the proceedings at the time when the trial is underway<sup>8</sup> and is not concerned with the mental state of the accused retrospectively.<sup>9</sup> The inquiry into a person's fitness to stand trial has no bearing on the inquiry into whether or not the accused should be held accountable for the act committed.<sup>10</sup> The capacities that are relevant within the assessment for triability (on the one hand), and criminal responsibility (on the other), are vastly different.<sup>11</sup> It follows that non-triability does not presuppose non-responsibility and *vice versa*.<sup>12</sup>

<sup>7</sup> For the South African position see Kruger (n 5) 225. Also see in general Snyman (n 5) 128–168. See further *Pachcourie v Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N) 991A–H. Also see Fawzia Cassim, 'The Accused Person's Competency to Stand Trial – A Comparative Perspective' (2004) 45 *Codicillus* 17 at 19, 22. See Stevens (n 5) 262, who confirms this. For the position in the USA see Ralph Slovenko, *Psychiatry in Law / Law in Psychiatry* (2 edn, Routledge 2009) 171. Also see Slobogin (n 4) 1005, 1006, where it is emphasised that the moral aspect of the fitness requirements underlies many of the substantive and procedural aspects pertaining to mentally ill accused persons and assists in preserving the dignity and integrity of the criminal justice system.

<sup>8</sup> Sean Kaliski, M Borchers and F Williams, 'Defendants are Clueless – The 30-day Psychiatric Observation' (1997) 87 *SAMJ* 1351 at 1354. Also see Adelene Africa, 'Psychological Evaluation of Mental State in Criminal Cases' in Colin Tredoux, Don Foster, Alfred Allan, Andrea Cohen and Doug Wassenaar (eds), *Psychology and Law* (Juta 2005) 387. See Albert Kruger, *Mental Health Law in South Africa* (Butterworths 1980) 164, and *S v Mabena* 2007 (1) SACR 482 (SCA) para 12, as well as *De Vos v Minister of Justice and Constitutional Development* 2015 (1) SACR 18 (WCC) para 7, where it is stated that 'The accused is suffering from a mental illness the effect of which is that he or she cannot be put on trial: section 77 – the "now" question. In the adjudication of this question, the condition of the accused when the conduct in question was committed is not considered'. Also see Anthony Pillay, 'Could *S v Pistorius* Influence Reform in the Traditional Forensic Mental Health Evaluation Format?' (2014) 44 *South African Journal of Psychology* 377 at 378.

<sup>9</sup> Kruger (n 5) 221. This is in contrast with the test for criminal capacity, which does not test the current state of mind of the accused but is a retrospective test, looking at the state of mind of the accused at the time of commission of the alleged offence. Also see Anthony Pillay, 'Competency to Stand Trial and Criminal Responsibility Examinations: Are there Solutions to the Extensive Waiting List?' (2014) 44 *South African Journal of Psychology* 48 at 50, where it is confirmed that the assessment for criminal capacity is a retrospective one.

<sup>10</sup> Fitness thus stands separately from the inquiry into guilt. See A Africa, 'Insanity and Diminished Capacity Before the Courts' at 3 <<https://www.yumpu.com/en/document/view/17210882/insanitypdf#>> accessed on 10 July 2018.

<sup>11</sup> Snyman (n 5) 153.

<sup>12</sup> See, however, the findings of Kaliski (n 8) 1354, where all those in the study that were found unfit to stand trial, was also found to lack criminal capacity. Kruger (n 5) 222, states that the assessment for criminal capacity, which looks at the accused's state of mind retrospectively, will in many instances, however, also answer the question pertaining to whether the accused is fit to stand trial. Note, however, that lack of criminal capacity does not presuppose lack of fitness to stand trial. Also see Pillay (n 9) 50.

It is possible for an accused to suffer from a serious mental illness and still have the ability and capacity to understand court proceedings and give coherent instructions to his/her legal representative.<sup>13</sup> Since the mere presence of mental illness does not presuppose unfitness,<sup>14</sup> determining the current level of functioning of the particular accused is crucial to truly determine fitness to stand trial. The test employed to determine fitness to stand trial evaluates such level of functioning for purposes of fitness to stand trial.

An accused that is, due to mental illness or intellectual disability, unfit to stand trial may not be tried for as long as he/she is deemed unfit.<sup>15</sup> Due to the possibility of detention in a psychiatric facility (that could follow upon a finding of unfitness),<sup>16</sup> and the inevitable impact that such detention may have on the accused's liberty, it is essential for the fitness assessment to accurately identify those accused persons who are indeed unfit to stand trial. Ensuring that only those that are truly fit to stand trial face the trial proceedings contributes to the integrity of the criminal justice system and the delivery of justice to the accused and the community.

The test used to determine fitness to stand trial in South Africa is discussed below, followed by a discussion of the test employed in the USA. The requirements of the fitness test as it stands in these two jurisdictions will be compared later on in the article.

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<sup>13</sup> Africa (n 8) 389. Persons found fit to stand trial include those with serious mental illnesses, such as schizophrenia and major depression, who do not always meet the criteria to be found unfit to stand trial. Also see Arthur Lurigio and Jessica Snowden, 'Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Courts' (2009) 2 *The Justice System Journal* 196 at 198, who specifically mention that persons with serious mental illness do not always meet the incompetence to stand trial criteria and are, consequently, found fit to stand trial, found guilty and sent to prison. See also Slobogin (n 4) 1020, where various studies revealed that in approximately 30% of matters, those with serious mental illnesses sent for observation are found fit to stand trial.

<sup>14</sup> Africa (n 8) 389. Also see Kaliski (n 8) 1352. Also see Kruger (n 5) 220, who points out that the court may take the fact that a person is receiving treatment in a psychiatric institution (in terms of the Mental Health Care Act 17 of 2002) into consideration when judging an accused's fitness to stand trial. The author points out that it is indeed possible for a court to find that an accused is fit to stand trial, despite the fact that he/she is receiving mental health care treatment and rehabilitation services in terms of the Mental Health Care Act 17 of 2002. Also see Kruger (n 8) 168, for the position prior to the Mental Health Care Act and where he indicates that an abnormality does not necessarily affect triability.

<sup>15</sup> *S v Mabena and Another* 2007 (1) SACR 482 (SCA). Also see Du Toit (n 1) 13–3. Also see Kruger (n 8) 164, who confirms the principle that a person who cannot follow the proceedings cannot be tried.

<sup>16</sup> Section 77(6) of the Criminal Procedure Act 51 of 1977 (as amended) provides for an accused who is found unfit to stand trial to be detained as a state patient in terms of the Mental Health Care Act 17 of 2002 until a judge in chambers orders his release. Such periods of detention could be for prolonged periods of time. The Criminal Procedure Act was recently amended by the Criminal Procedure Amendment Act 4 of 2017 to allow the court to release an unfit accused conditionally and even unconditionally in certain circumstances.

## THE TEST FOR FITNESS TO STAND TRIAL IN SOUTH AFRICA

### Introduction

The South African test for fitness to stand trial is set out in section 77(1) of the Criminal Procedure Act 51 of 1977. The criteria for fitness is inferred from the description of unfitness as set out in section 77(1), where it is stated that an accused will be unfit to stand trial if he/she, by reason of mental illness or intellectual disability,<sup>17</sup> is not able to understand the proceedings in order to make a proper defence.<sup>18</sup>

An accused will only be deemed unfit to stand trial if it is established that the symptoms of the mental illness impair the functioning of the individual to such an extent that he/she is unable to understand the court proceedings and/or, the symptoms severely impair his/her capability to give proper instructions to his/her legal representative.<sup>19</sup> Whether this is indeed the case is established through a court-ordered fitness assessment, during which the test for fitness is applied.<sup>20</sup>

The identified assessment elements are discussed below.<sup>21</sup> Even though the test entails two clearly defined elements, a common-sense approach to the determination of fitness to stand trial is promoted.<sup>22</sup>

### ABILITY TO FOLLOW THE PROCEEDINGS

This first element requires a general understanding of the court proceedings.<sup>23</sup> Exact knowledge and understanding of the technicalities of criminal procedural law are not required.<sup>24</sup> Ignorance of the court procedures will not render an accused unfit to stand trial since ignorance can be supplemented with explanations and further knowledge.<sup>25</sup>

<sup>17</sup> The term 'intellectual disability' was introduced into the Criminal Procedure Act by the Criminal Procedure Amendment Act 4 of 2017. This term replaced the outdated term of 'mental defect' as it appeared in ss 77, 78 and 79 of the Criminal Procedure Act 51 of 1977.

<sup>18</sup> Section 77(1) of the Criminal Procedure Act. Also see Du Toit (n 1) 282.

<sup>19</sup> Africa (n 8) 389. Also see Pillay (n 9) 50.

<sup>20</sup> The order is issued in terms of s 77(1) read with section 79(1) of the Criminal Procedure Act.

<sup>21</sup> If an accused does not fulfil the requirements in terms of either of the elements, he/she will be deemed unfit to stand trial.

<sup>22</sup> Du Toit (n 1) 13–5.

<sup>23</sup> See Snyman (n 5) 133. Snyman points out that this position is in line with the Australian point of view and quotes from an Australian case, which sets out the concept of fitness to stand trial very eloquently: The supreme court in *R v Presser* [1958] VR 45 at 48, summarised it as follows: 'He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He *needs* to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge'.

<sup>24</sup> Du Toit (n 1) 13–5.

<sup>25</sup> Snyman (n 5) 132.

As alluded to earlier, the mere presence of mental illness does not in itself render the person unfit to stand trial.<sup>26</sup> Similarly, the mere fact that a person has an intellectual disability will not automatically render him/her unfit to stand trial.<sup>27</sup> Triability of such an accused also depends on other factors, such as speech and language proficiency, reasoning ability and level of education. Opinion exists that once it is established that an individual's language proficiency is acceptable and that he/she can reason, that person is considered competent to stand trial.<sup>28</sup>

It appears that only a total inability to follow the proceedings will render an accused unfit to stand trial under this leg of the fitness test.

The second part of the test focusses on the ability to conduct a proper defence, which entails being able to instruct one's legal representative properly.

### **ABILITY TO CONDUCT A PROPER DEFENCE**

The ability to conduct a proper defence entails that the accused must be able to answer to the charges against him/her<sup>29</sup> and must be able to convey relevant information to legal representatives in order for them to give advice thereon.<sup>30</sup> The accused must be able to play a constructive role in the trial by giving instructions to the legal representative.<sup>31</sup> The accused must be able to convey the facts upon which the defence relies to prove his/her innocence, and should also be able to evaluate all the evidence given at the trial.<sup>32</sup> The ability to give exact instructions on how the legal representative should conduct the defence is not required.<sup>33</sup> An accused that simply lacks a defence

<sup>26</sup> Africa (n 8) 389. Also see Kaliski, Borcherds and Williams (n 8) 1352 where it is stated that the practice at the time (in the 1990s) was that most psychiatrists would indicate that an accused is unfit to stand trial where a mental illness or defect has been diagnosed as there were no clear guidelines on how the assessment for fitness to stand trial should be assessed. Also see Kruger (n 5) 220. Also see Kruger (n 8) 168, where he points out that an abnormality does not necessarily affect triability. See Pillay (n 9) 50, who explains that the diagnosis is not the most important aspect here but rather the symptoms and the functional implications of the symptoms.

<sup>27</sup> FJW Calitz, PHJJ van Rensburg, PP de Jager, ML Olander, L Thomas, R Venter and GA Wessels, 'Psychiatric Evaluation of Intellectually Disabled Offenders Referred to the Free-State Psychiatric Complex, 1993–2003' (2007) 13 SAJP 147–1520 at 148.

<sup>28</sup> Calitz (n 27) 148. They go even further and argue that the presence or absence of a mental illness or intellectual disability then becomes irrelevant. Also see Pillay (n 9) 50, who points out that the functional implications of the diagnosis of a mental illness is more important in the fitness context than the diagnosis itself. The mere presence of amnesia does not render an accused unfit to stand trial unless the amnesia is a symptom of a mental illness. The person will be unfit to stand trial due to mental illness and not amnesia per se. Snyman (n 5) 135. Also see this source at 128, 135, and the sources listed there, which includes foreign case law that supports this view.

<sup>29</sup> Pillay (n 9) 50.

<sup>30</sup> Snyman (n 5) 134.

<sup>31</sup> Du Toit (n 1) 13–5.

<sup>32</sup> Snyman (n 5) 253.

<sup>33</sup> *ibid* 133.

against a charge or has a bizarre defence, is not automatically unfit to stand trial,<sup>34</sup> as long as the accused can instruct his/her legal representative on such defence.

Where an accused decides to conduct his/her own defence, the court has to be satisfied that the accused is indeed able to do so. The fact that someone might be acting against his/her own interests by conducting his own defence, does not in itself render him/her unfit to stand trial.<sup>35</sup>

Some accused persons might find it difficult to communicate with their legal representatives due to a language barrier. For example, they might be communicating in a second language, which could result in a limited vocabulary. This is especially so if the level of education of the particular accused is low.<sup>36</sup>

The accused's physical condition could also potentially impact his/her ability to communicate with his/her legal representatives. Take, for instance, the position of a deaf-mute accused. Historically, a deaf-mute accused was simply found unfit to stand trial because of his/her inability to communicate,<sup>37</sup> regardless of the presence or absence of a mental illness or intellectual disability. This is fortunately no longer the case<sup>38</sup> and it is accepted that the deaf-mute accused's inability to communicate can be remedied by arranging

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<sup>34</sup> *ibid* 134. Snyman also points out that the fact that someone is unfit to stand trial does not mean that he/she does not have a defence to the charge.

<sup>35</sup> *ibid* 134.

<sup>36</sup> Africa (n 8) 392.

<sup>37</sup> According to older legislation in South African law, a person who was unable to understand criminal proceedings for any reason fell under the jurisdiction of the Mental Disorders Act 38 of 1916. The implication of this was that a person who was not able to follow the proceedings, for any reason whatsoever (including being deaf-mute – see s 28 of the Mental Disorders Act 38 of 1916, regardless of whether a mental illness or defect was present, could be found unfit to stand trial and declared a State President's Patient. Snyman (n 5) 136. Also see Kruger (n 5) at 229. Also see Kruger (n 8) 167, who explains that this result was due to the provisions of section 164 of the 1995 Criminal Procedure Act and section 28 of the Mental Disorders Act that had to be considered in conjunction with each other. The courts interpreted these sections to mean that a person could be declared a State President's Patient merely on the ground that he/she is unable to follow the proceedings rather than a requirement that the relevant person must suffer from a mental illness or defect as a prerequisite for being declared a State President's Patient. The rule that a deaf-mute person should be treated as mentally defective was laid down in the cases of *S v Kansiyu* 1930 SR 127 and *S v Chinzenda* 1945 SAR 175. Also see Kruger (n 8) 167. In Roman-Dutch law, a deaf-mute person was not regarded as mentally ill. See *S v Mamyila* 1913 TPD 464. Also see Kruger (n 8) 166 note 83, where reference is made to some older case law and sources where this position in the Roman-Dutch law is confirmed.

<sup>38</sup> It was later agreed that there is no provision that states that a person that cannot be tried should be treated as *insane*. See *In re Pupu* 1959 (3) SA 480 (SR, B) 481H. Also see Du Toit (n 1) 167

for a translator, which would enable the person to meaningfully participate in conducting his/her defence.<sup>39</sup>

Communication barriers should be considered carefully before it is assumed that an accused is, on account of such barriers, unfit to stand trial.<sup>40</sup> This is especially important since the inability to communicate properly in order to instruct a legal representative is not necessarily an indication of or the result of mental illness.<sup>41</sup>

### Comments on the South African Test for Fitness

The mere fact that an accused is diagnosed with a mental illness or intellectual disability does not automatically render him/her unfit to stand trial under South African law. It has to be clear that the mental illness affects the accused ability to follow the court proceedings or to give instructions to legal representatives. The requirement for both elements of the test is very basic and does not demand a very high level of understanding or functioning.

In essence, if an inability to either understand the proceedings or give proper instructions to one's legal representative can be remedied, such inability shall not render an accused unfit to stand trial.<sup>42</sup> The position of the deaf-mute accused referred to above is an apt example.

Even though an understanding of the court proceedings is required, there is no requirement for such understanding to be rational. The instructions to the legal representative need not be rational either, as it is clearly stated that a bizarre defence is not an indication of unfitness.

It appears that an accused has to be severely affected by mental illness or intellectual disability to be found unfit to stand trial. A relatively low threshold is set for fitness to stand trial in South Africa.

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<sup>39</sup> Kruger (n 8) 166. If all efforts are not made to interpret the proceedings for the deaf-mute person, this could constitute a violation of his right to a fair trial and could constitute unfair discrimination on the ground of disability in accordance with section 9 of the Constitution. In *Pachcourie v Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N) 991H, it was stated that a deaf-mute person is not fit to stand trial if he is unassisted. Current legislation does not allow referral for a fitness assessment merely because someone is deaf-mute. It is only when the deaf-mute person suffers from a mental illness or mental defect that the deaf-mute person may be detained under the mental health care legislation as was the case in *S v Matjhesa* 1981 (3) SA 854 (O). A deaf-mute accused or witness may make use of an interpreter who can convert sign language used by the deaf-mute person into audible language. Such testimony will be regarded as *viva voce* evidence for purposes of section 161 of the Criminal Procedure Act. Also see Du Toit (n 1) 13–5.

<sup>40</sup> Africa (n 8) 392.

<sup>41</sup> Psychological knowledge about an accused's current intellectual and emotional functioning is therefore relevant in order to accurately determine the accused's fitness to stand trial. See Africa (n 19) 3.

<sup>42</sup> Snyman (n 5) 132. He adds that incapacity for purposes of fitness to stand trial refers to a 'total incapacity' which cannot be supplemented by, for example, an explanation by the legal representative of what the court proceedings entail. Ignorance of the court proceedings can be supplemented by an explanation of the proceedings and is therefore in itself not incapacity to render a person unfit to stand trial.

The low threshold is also a concern in other jurisdictions such as the USA. The fitness test employed in the USA is discussed below.

## THE TEST FOR FITNESS IN THE USA

### Introduction

The test for fitness to stand trial in the United States of America was established in 1960 in the case of *Dusky v United States*<sup>43</sup> and still applies to this day.<sup>44</sup> The court focussed on the fact that an accused must have a rational and factual understanding of the proceedings against him/her and be able to consult with legal representatives with a reasonable degree of rational understanding.<sup>45</sup> The Dusky standard is based on functional abilities and the impact that the mental disorder has on the accused's competency related capacities.<sup>46</sup> The test established in the *Dusky* case represents a minimal constitutional standard on competency that generally applies in all states.<sup>47</sup> Failure by the accused to meet any part of the test will render him/her unfit to stand trial.<sup>48</sup>

Even though the test has two defined elements, as discussed in more detail below, a common-sense approach is still advocated.<sup>49</sup>

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<sup>43</sup> *Dusky v. United States*, 362 U.S. 402 (1960) (hereafter referred to as the 'Dusky case'). Also see Jay Albanese, *Criminal Justice* (5 edn, Pearson 2013) 98. Also see Risdon Slate, Jacqueline Buffington-Vollum and Wesley Johnson, *The Criminalization of Mental Illness: Crisis and Opportunity for the Justice System* (2 edn, Carolina Academic Press 2013) 303, where it is confirmed that the test for fitness was established in the case even though it was incorporated into American law much earlier through the English common law. Also see Slobogin (n 4) 1006. See further Marks (n 6) 509, 510.

<sup>44</sup> Richard Rogers and Daniel Shuman, *Fundamentals of Forensic Practice: Mental Health and Criminal Law* (Springer 2005) 151, point out that the court has not deviated from the standard set in this case. Also see Slovenko (n 7) 172.

<sup>45</sup> See in general the *Dusky* case (n 43). Also see Slate (n 45) 303. See further Slovenko (n 7) 172, who points out that the requirement that the accused must be able to put forward a rational defence stems from the 17th century. See further John Parry, *Criminal Mental Health and Disability Law, Evidence and Testimony* (American Bar Association 2009) 91. Slovenko (n 7) 173. He stresses that the court must acquaint itself with the mental condition of the accused and not merely establish that the accused is orientated to time and place. Slovenko labels the two requirements for purposes of fitness, as per the fitness test set out in *Dusky*, as the communicative and cognitive ability of the accused.

<sup>46</sup> See Rogers (n 44) 155, 161, 162, where different models are discussed that can be used by forensic mental health professionals to operationalise the *Dusky* test. The discrete abilities model that divides the *Dusky* standard into three separate but related prongs seems preferable.

<sup>47</sup> Slovenko (n 7) 172. Also see Parry (n 45) 98. See further Slobogin (n 4) 1006.

<sup>48</sup> Rogers (n 44) 152.

<sup>49</sup> Slovenko (n 7) 181. The initial goal of the test for triability in the USA was to identify only those with serious cases of mental illnesses and to excuse only those from trial. Slovenko (n 7) 181. The opinion of a mental health practitioner was not required, and a common sense approach was used instead.

### Factual and Rational Understanding of the Proceedings

This part of the test, as laid down in the *Dusky* case, examines the extent to which the accused has a factual and rational understanding of the proceedings, including the charges against him/her.<sup>50</sup> The factual understanding requirement refers to the accused's basic knowledge of proceedings and the various role players in the courts.<sup>51</sup> The accused has to understand the circumstances of the trial and the consequences of a possible conviction.<sup>52</sup> Factual understanding alone is insufficient and must be supplemented by rational understanding.<sup>53</sup> The assessment of a rational understanding of the proceedings centres on whether the accused has 'reality-based' perceptions about the legal system and whether he/she can make decisions based on reality.<sup>54</sup>

The *Dusky* standard for a lack of rational understanding requires a serious impairment of cognitive abilities due to mental disorder for an individual to be considered unfit to stand trial.<sup>55</sup> Put differently, the level of understanding of the proceedings required, to be found fit to stand trial, is not very high.<sup>56</sup>

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<sup>50</sup> Slobogin (n 4) 1006, 1008, where it is explained that the accused's understanding of the charges against him/her forms part of the assessment of the accused's ability to function within the criminal process. Also see Rogers (n 44) at 154.

<sup>51</sup> Also see Rogers (n 44) at 163, where it is indicated that the accused's lack of understanding regarding the role of the judge or defence counsel, or the charges against him/her, will indicate a lack of factual understanding of the proceedings. An unawareness of the seriousness of the charges against him/her and the possible penalties will also be an indication of lack of factual knowledge of the proceedings. See Slobogin (n 4) 1007, where it is pointed out that an accused's refusal to be informed of the functions of the role players in order to gain an understanding thereof is not sufficient for a finding of unfitness.

<sup>52</sup> Rogers (n 44) 154.

<sup>53</sup> Slobogin (n 4) 1007. Also see SE Shea, 'Representing Clients with Mental Disabilities' (2013) Public Defence Backup Centre Report 8 at 9. The court emphasised in the *Dusky* case that, when determining if an accused is fit to stand trial or not, it is insufficient to ask if the accused is orientated as to time and place, and if he/she at least has some recollection of events. The court stated at 788 that the test rather seeks to determine '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 a factual understanding of the proceedings against him.'

<sup>54</sup> See Rogers (n 44) 154, 164, where it is indicated that the lack of awareness of the accused's involvement in the proceedings is an indication that the accused lacks rational understanding of the proceedings. This might be evident if the accused denies the possibility of being found guilty or if the accused appears uninterested in the verdict and its possible impact.

<sup>55</sup> Rogers (n 44) 155. Also see Slobogin (n 4) 935, 1007, where other competency tests are discussed and where it is pointed out that most of them focus on the cognitive ability of the decision-maker.

<sup>56</sup> Slobogin (n 4) 1007, points out that the accused need not understand everything perfectly in order to be fit to stand trial. The threshold to be found fit to stand trial, however, is not very high.

### Ability to Consult with Counsel

This part of the test focuses on the accused's ability to rationally consult with counsel.<sup>57</sup> The basic capacity of the accused to communicate coherently is under investigation here.<sup>58</sup> The accused must be able to identify tangible evidence and provide information about viable defences such as an alibi.<sup>59</sup> This prong of the test does not require a certain ideal level of intellectual capacity, but only a *reasonable* degree of rational understanding.<sup>60</sup> A higher level of rational understanding is required, however, when the alleged offence is more complex (such as securities fraud), as opposed to a less complex crime (such as assault).<sup>61</sup>

The focus with this part of the test falls on the capacity to consult, rather than the choice to consult, since an accused can delay his trial by refusing to co-operate with a lawyer, regardless of his capacity to do so.<sup>62</sup> For this reason, courts are hesitant to find that an accused is unfit to stand trial merely because of disruptive courtroom behaviour.<sup>63</sup>

It was argued that a higher degree of fitness is required when an accused intends to represent himself/herself, which implies that the accused is waiving the right to legal representation.<sup>64</sup> It was, however, held that the constitutional standard of fitness as set out in the *Dusky* case applies regardless of whether an accused intends to represent himself/herself or

<sup>57</sup> Rogers (n 44) 152, 153. Also see this source at 178, where it is pointed out that this part of the test is particularly challenging for forensic mental health practitioners, because they never get the opportunity to observe the interaction between the accused and the legal representative. Also see Slobogin (n 4) 1006, who is of the view that this part of the tests assesses the accused's ability to function within the criminal process, consulting with counsel is only part of such assessment.

<sup>58</sup> Rogers (n 44) 164. This question investigates the accused's ability to communicate understandably, whether he functions as an autonomous person motivated by self-interest, and whether the accused has a 'reality-based working relationship' with his legal representative.

<sup>59</sup> Slobogin (n 4) at 1009, where it is stated that the accused must, for instance, be able to explain their side of the story to their legal representative. The accused must be able to, for example, assist his/her lawyer in handling the case through considering settlement options. Also see Rogers (n 44) 153. Also see this source at 163, where the prototypical items that would indicate an inability to consult with counsel are discussed. These include inability to convey one's thoughts coherently, incapacity to make decisions, and irrational perceptions about the case or defence counsel. These incapacities could be caused by an array of reasons, *inter alia*, thought disorders and psychosis.

<sup>60</sup> Rogers (n 44) 153.

<sup>61</sup> Slobogin (n 4) 1007. Also see Rogers (n 44) 153.

<sup>62</sup> Rogers (n 44) 153. Also see Slobogin (n 4) 1007, where it is explained that the choice not to consult a legal representative is a rational choice and unless such choice is influenced by irrational thoughts, such refusal does not stand as a reason for a finding of unfitness.

<sup>63</sup> Marks (n 6) 516. See further Rogers (n 44) 153. Also see *United States v Holmes* (1987).

<sup>64</sup> Parry (n 45) at 91 where reference is made to circuit court decisions where the constitutional standard for fitness was interpreted in a way that supports a higher degree of fitness requirement where accused persons intend to represent themselves. See also Slobogin (n 4) 1034, where case law is discussed that supports the view that the standard is the same for fitness as for competency to take the decision to waive the right to counsel or to plead guilty. See in general the case of *Godinez v Moran* 509 U. S 389 (1993).

not.<sup>65</sup> States are, however, free to impose additional due process standards to protect the rights of such an accused.<sup>66</sup>

### **Comments on the Fitness Test Employed in the USA**

The legal standard for fitness in the USA is regarded as clear, consistent and uniform, which in turn gives professionals conducting these assessments certainty regarding exactly what it is that should be measured for purposes of fitness.<sup>67</sup> Slovenko<sup>68</sup> opines that the minimum standard for fitness, as set out by the *Dusky* case, allows the judge to exercise discretion in each case, guided by the particular circumstances of each mentally ill accused.

The rationality of the accused features prominently in the test for fitness in the USA. The focus of the investigation into fitness in the USA falls on the impact of the mental illness on the accused's ability to act rationally, both in terms of the individual's understanding of the proceedings and in terms of instructing legal representatives.

An accused has to be severely affected by mental illness or intellectual disability to be found unfit to stand trial. The required fitness standard in the USA is not very high. As a result, the majority of those sent for fitness assessments in the United States of America are found fit to stand trial.

### **SOUTH AFRICAN POSITION VERSUS POSITION IN THE USA**

The fitness test in South Africa and the USA are comprised of two similar elements namely: the ability to follow the court proceedings; and the ability to conduct a proper defence. Notwithstanding these two specific elements of the fitness test, both jurisdictions promote a common-sense approach to the question of fitness to stand trial.

A relatively low level of functioning is required to be found fit to stand trial in both South Africa and the USA. However, it appears that the threshold for fitness is indeed higher in the USA than in South Africa, since the test for fitness employed in the USA requires a rational understanding

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<sup>65</sup> See Parry (n 45) 91. Also see Roger (n 44) 160, 161, where the *Godinez* case (n 64) is discussed, and where the argument was raised that a higher standard of competency is required to plead guilty or to waive counsel than for fitness to stand trial. This argument was ultimately rejected by the court, although the court acknowledged that there are differences in the assessments for these various types of competencies. Also see Slobogin (n 4) 1056, 1057.

<sup>66</sup> Parry (n 45) 91. Resultantly, differences apply across a jurisdiction with regard to the due process that are to be followed when establishing fitness to stand trial on the one hand, and fitness to waive legal representation or to plead guilty on the other. See this source at 95–97 for a discussion of the position in the various states within the USA.

<sup>67</sup> Rogers (n 44) 151.

<sup>68</sup> Slovenko (n 7) 172, opines that the test is actually vague but also points out the benefit of the practice, as stated above. Some states, such as New Jersey and Florida, refined the meaning of competency for purposes of fitness hearings in their particular state, but such refined meaning or definition of competency is still subject to and in line with the Constitutional principle of competency laid down in the *Dusky* case.

of the proceedings. In simple terms, a factual understanding alone does not suffice. By comparison, no particular requirement for a rational understanding of the proceedings is prescribed in the South African test for fitness. It could be argued that such a rational understanding is implied, but not solidified, into South African law through legislation or case law specifically.

The test for fitness in the USA further requires the accused to be able to consult with his/her legal representative rationally and provide information on a viable defence. No such requirement of rationality is stipulated within the South African test for fitness. In fact, the literature emphasizes the fact that an accused shall not be deemed unfit if he has a bizarre defence to the charges against him/her.

Where an accused chooses to represent himself, the same level of fitness is required from such an accused as from an accused who is represented by a legal representative. This is the case in both jurisdictions. This is undesirable since self-representation involves the waiver of the right to legal representation. Ideally, a higher level of fitness should be required from accused persons who chose to represent themselves, alternatively, additional measures should be put in place to ensure that a self-represented accused is indeed fit to stand trial. Neither jurisdiction requires a higher level of fitness, nor did they implement additional measures to ensure that the self-represented accused is indeed fit to stand trial. The states in the USA do, however, have the option to impose additional due process standards to protect the rights of self-represented accused persons. No such discretion appears to exist in South Africa.

The fitness tests discussed above seem to be designed to identify those who are 'seriously unfit' to stand trial. By 'seriously unfit' is not meant those with serious mental illness, but rather those whose mental illness, regardless of the severity thereof, has a serious and definite impact on his/her ability to follow the proceedings and/or instruct his/her legal representative. The threshold for fitness is therefore relatively low. Consequences of such low threshold are explored below.

### **CONSEQUENCE OF A LOW-THRESHOLD FITNESS TEST**

The consequence of a low threshold fitness test, as employed in South Africa and the USA, is that the majority of persons sent for fitness assessments meet the very low requirements for fitness – in respect of the two identified elements discussed above – and are resultantly found fit to stand trial.

It is important to note, however, that a finding of fitness (in either of these jurisdictions), is not tantamount to finding that the accused does not suffer from a mental illness at all. On the other hand, the diagnosis of a mental illness will inevitably be present where an accused is found unfit to stand trial. However, the diagnosis of mental illness alone may not necessarily result in the accused being classified an unfit, as the impact of

the condition on the accused's triability needs to be considered. For example, an accused suffering from a serious mental illness may very well be found fit to stand trial as long as it is clear that his mental illness does not impact on his functioning in as far as it pertains to his ability to follow the proceedings and instruct his/her legal representative. As a result, accused persons with serious mental illness are often found fit to stand trial.

Although the tests succeed in identifying those who are seriously unfit to stand trial, the large number of persons with mental illnesses that are eventually found fit to stand trial raises concerns. These 'fit' accused persons are often kept in prison awaiting their trial and may require mental health services during this time. Unfortunately, mental health services are not readily available in prison, especially in South Africa.<sup>69</sup> As a result, the mental health condition/s of these accused persons are likely to deteriorate while they are incarcerated.<sup>70</sup> Presently, a fit but mentally ill accused persons' exposure to the correctional setting is not limited to their time in prison after a finding of fitness while awaiting trial. Accused persons who have to undergo a fitness assessment, are also kept in prison awaiting the fitness assessment. Such accused persons spend prolonged periods in prison awaiting the availability of a bed in a psychiatric facility licenced to conduct the fitness assessment. In South Africa, this period ranges between three and fourteen months.<sup>71</sup> The long waiting period can be attributed to the fact that there are only 10 facilities across South Africa that are licenced to conduct court-ordered forensic assessments.<sup>72</sup> As indicated, the mental health services that are available in prison to those awaiting available beds in a psychiatric facility (for purposes of assessment), is scarce. These circumstances often lead to the deterioration of the accused's overall mental health.<sup>73</sup>

One could argue that the threshold for fitness could simply be raised to reduce the number of persons with mental illness currently found fit to stand trial. Concerns have been raised in other jurisdictions that a very high threshold for fitness will have a negative impact on the principle of fundamental justice in terms whereof an accused has a right to have his trial

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<sup>69</sup> The inadequacies of mental health care services in prisons are pointed out by the Constitutional Court in *De Vos v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC) at 43. This fact was accepted by the Minister of Health in the court *a quo*.

<sup>70</sup> Andrea Odegaard, 'Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System' 2007 (83) North Dakota Law Review 225 at 234, who points out that the mental condition of the accused often deteriorates during incarceration. Also see Governsmith (n 4) 149.

<sup>71</sup> In one instance, a man has been waiting for transfer to the Valkenberg hospital for an assessment for 14 months. Bateman 2005 SAMJ 208 at 2010.

<sup>72</sup> Pillay (n 9) 51. This number was as at 2012.

<sup>73</sup> The inadequate mental healthcare services in prisons are pointed out by the Constitutional court in *De Vos v Minister of Justice and Constitutional Development* (n 69) 43. A fact that was accepted by the Minister of Health in the court *a quo*.

finalised without undue delay.<sup>74</sup> This concern is raised as an accused that is sent for assessment inevitably spend more time in the criminal justice system (before trial at least) than an accused who need not be so assessed.

Linked to the concern of undue delays due to fitness assessments, is the fact that a finding of unfitness suspends the criminal proceedings against an accused and may only continue once he/she regains acceptable levels of fitness as determined by the relevant fitness test in the particular jurisdiction. Potentially long periods could lapse before the trial continues, resulting in substantial delays in the criminal proceedings.

The increased number of persons that could be found unfit to stand trial by employing a higher threshold, will put further pressure on the mental healthcare system to provide care for all those found unfit to stand trial.<sup>75</sup>

Since a higher threshold for fitness does not seem to be the ideal solution to reduce the number of persons with mental illnesses found fit to stand trial, alternatives to traditional prosecution should be considered for accused persons who are mentally ill but deemed fit to stand trial. Their exposure to the criminal justice system should be limited where possible.

#### **THERAPEUTIC RESPONSE TO ACCUSED PERSONS WHO ARE FIT TO STAND TRIAL BUT MENTALLY ILL**

In response to the unique challenges that mental illness brings to the criminal justice system, the USA, amongst other jurisdictions, introduced mental health courts into their criminal justice system as a therapeutic response to the fit but mentally ill accused. Mental health courts provide an alternative to traditional prosecution in the form of diversion for those found fit to stand trial but who are mentally ill. These accused persons are diverted away from the criminal justice system into appropriate treatment programs.

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<sup>74</sup> This concern was raised by Canadian courts as highlighted by Stephen Coughlan, *Criminal Procedure* (Irwin Law 2012) 293. See Richard Schneider, Hy Bloom and Mark Heerema, *Mental Health Courts – Decriminalizing the Mentally Ill* (Irwin Law 2007) 144. Also see Joan Barrett and Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Carswell 2006) 3–8, where it is pointed out that a delay in processing the case of the accused also translates in delayed justice for the victim of the crime. Also see Richard Schneider, *Annotated Ontario Mental Health Statutes* (4 edn, Irwin Law 2007) 438, where it is pointed out that autonomy of the accused in the criminal justice system implies an ability to choose the defence that he/she wants to put forward and that the accused should be allowed to do so. The accused should then also assume the risks involved in such a decision including the delays that will be brought about if the fitness issue is raised. It should be pointed out that this argument is more applicable to the scenario where the accused raises the insanity defence, and not so much where the issue of fitness to stand trial is raised. This is true, since the fitness issue can be raised by any party and where the prosecution raises the issue. In this instance, there is little that the accused can do about the situation and has to wait for the result of the fitness assessment. The accused has a wider range of choice when it comes to the defence that he/she wants to present when he/she is found fit to stand trial. It should also be noted that unfitness to stand trial is not a defence per se, as a trial will not follow if the accused is indeed found not fit to stand trial.

<sup>75</sup> Barrett (n 74) 3–8.

Such diversion thus limits the exposure of an accused with a mental illness to the criminal justice system.

Diversion programmes, such as the mental health courts employed in the USA assist in reducing case backlogs in criminal courts and alleviating overcrowding in prisons.<sup>76</sup> These courts have further proved to reduce recidivism amongst the fit but mentally ill accused.<sup>77</sup>

A similar solution should be considered for South Africa where diversion programs for accused persons with mental illness are currently lacking. Case backlogs are rife and prison overcrowding has reached concerning levels in South Africa.<sup>78</sup> These are both issues that were successfully addressed by introducing mental health courts in the USA. These courts

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<sup>76</sup> William Burnham *Introduction to the Law and Legal System of the United States* (5 edn, West 2006) 282. Also see Albanese (n 43) 254. Some diversion programmes have been very successful and have reported a decrease in the number of arrests following the completion thereof. See further Steven Lamberti and Robert Weisman, 'Persons with Severe Mental Disorders in the Criminal Justice System: Challenges and Opportunities' (2004) 75 *Psychiatric Quarterly* 151–164 at 151, 161.

<sup>77</sup> Research indicates that Mental Health Court participants are less likely to re-offend after completion of the Mental Health Court programme than those whose cases were processed through the traditional criminal justice process. Kelly Frailing, 'Issues Affecting Outcomes for Mental Health Court Participants' (2009) C.S.L.R 145–157 at 149. Also see Annette Christy, Nornam Poythress, Roger Boothroyd, John Petrila and Shabnam Mehra, 'Evaluating the Efficiency and Community Safety Goals of the Broward County Mental Health Court' (2005) 23 *Behav. Sci Law* 227–243 at 242, and in general Eric Trupin and Henry Richards, 'Seattle's Mental Health Courts: Early Indicators of Effectiveness' (2003) 26 *International Journal of Law and Psychiatry* 33–53. Also see Celia Fisher, 'Towards a New Understanding of Mental Health Courts' (2015) 54 *The Judge's Journal* 8–13 at 10. See further Kelly O'Keefe, *The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes* (Centre for Court Innovation 2006) 3. Also see Shelli Rossman, Janeen Willison, Kamala Mallik-Kane, KiDeuk Kim, Sara Debus-Sherrill and Mitchell Downey, *Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York* (USA National Institute of Justice 2012) 18, where it is further explained that those who went through the Mental Health Court programme and who do offend again, take longer to re-offend than those who did not go through the programme. Also see Arthur Lurigio and Jessica Snowden, 'Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Courts' (2009) 2 *The Justice System Journal* 196–218 at 208, where it is confirmed that most Mental Health Court participants recidivate less. However, in another study, conducted by the Broward County Mental Health Court, it was found that the recidivism rate amongst Mental Health Court participants and those whose cases were processed through the traditional criminal court, were the same. See further Odegaard (n 70) 251, where it is highlighted that research indicates that those participating in Mental Health Court programmes recidivate less. Reference is particularly made to the Broward County Mental Health Court. More recent research confirms that recidivism is indeed reduced through involvement with a Mental Health Court.

<sup>78</sup> In 2012 there were 152 981 prisoners in South African prisons. In 2013 this number grew slightly to 155 708. The specific figures of overcrowding per province are set out in Department of Correctional Services <<http://www.dcs.gov.za/docs/landing/White%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf>> accessed 22 November 2017 at 53. For more detail on the figures of overcrowding in South

offer a solution to at least some of the challenges that mental illness brings to the criminal justice system.

## CONCLUSION

The fitness tests employed in South Africa and the USA focus on the same two main elements of functioning, namely, the ability to follow the proceedings and to instruct one's legal representative. Even though these two elements are measured specifically, a common-sense approach is promoted in both jurisdictions. While the threshold for fitness in both jurisdictions is relatively low, the test employed in the USA places more emphasis on rational understanding. This express requirement is lacking in the South African test for fitness.

The same level of fitness is required from an accused who is representing him/herself than from an accused who is represented by a legal representative. Since self-representation implies the waiver of the right to legal representation, which arguably leaves the accused person more vulnerable in the legal process, the fitness of the self-representing accused should be established beyond a doubt. It is submitted that a higher level of functioning should be required for accused persons representing themselves, alternatively, that additional measures should be put in place to ensure that such self-representing accused persons are undoubtedly fit to stand trial.

The use of these low threshold fitness tests leads to the majority of accused persons assessed for fitness being found fit to stand trial, among who are those with serious mental illness. Raising the threshold for fitness to stand trial does not appear to be an ideal solution to lower the number of accused persons with mental illness being found fit to stand trial. It is strongly suggested that an alternative to traditional prosecution should be considered for these accused persons. To this end, South Africa should consider introducing mental health courts into the criminal justice system. This will channel fit but mentally ill accused persons away from the criminal justice system into appropriate treatment programs, reducing overcrowding in prisons and lowering criminal caseloads in the process. More research is needed on the viability of these specialised courts in South Africa and the procedure that would best serve the objectives of such courts.

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African prisons, see Department of Correctional Services <[http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention\\_1.pdf](http://www.dcs.gov.za/docs/landing/Discussion%20Document%20preceding%20Draft%20White%20Paper%20on%20Remand%20Detention_1.pdf)> accessed 17 November 2017 at 16 where the number of prisoners in 2009 is indicated as 163 892.