Competence to be sentenced
Juan José Carrasco Gómez and Julio Arboleda-Flórez

Purpose of review
Competence to be sentenced, or lack thereof, is not frequently claimed in legal proceedings. This paper reviews the concept and possible forensic psychiatric applications.

Recent findings
This topic has achieved prominence because of recent rulings imposed by the US Supreme Court that prohibit execution of mentally impaired and under-age individuals. The most recent contributions focus on standards for evaluating competence to be sentenced and on analyzing the need for involuntary treatment of those who for psychiatric reasons have lost the capacity to stand trial.

Summary
Competence to be sentenced may be defined as a component of a general capacity to undergo legal proceedings, beyond just fitness to stand trial. It applies specifically to the time between the moment the process ends and the moment a sentence is rendered. This paper reviews general capacity to participate in legal proceedings as a concept that allows a person to intervene fully in his or her defence in a trial that is just and fair, and the different moments at which mental capacity to proceed may be limited or absent. There are no specific guidelines for evaluating competence to be sentenced, so instead we review the basic criteria for general capacity to participate in legal proceedings, including the capacity to mount a defence, to be sentenced and to serve a sentence. Because forensic evaluations are needed for assessment of capacity, the paper provides guidelines on how to organize the assessment and the report.

Keywords
competence to be sentenced, death penalty, fitness to stand trial, general capacity to participate in legal proceedings

Introduction
In order to be able to participate fully and competently in a trial, a person must have a series of capacities that, when taken together, are known as the ‘capacity to participate in legal proceedings’, including the ‘capacity to mount or to organize a defence’ [1] and the ‘competence to be sentenced’. The latter concept can be defined as the capacity to understand the sentencing procedure and to appreciate the diversity and nature of all possible sentences once guilt has been established. Further to the concept of the competence to be sentenced is the competence to serve the sentence and, specifically, the competence to be executed, if death has been determined to be the appropriate sentence.

Definition and dimensions of competence to be sentenced
Competence to be sentenced refers to a number of cognitive and affective elements that are expected to be present in any accused person of legal age but that may be absent temporarily or permanently because of mental conditions, in the same way that these elements could be altered and affect fitness to stand trial. Legally, the accused is placed in a situation of inferiority vis à vis the prosecution when the elements that constitute this capacity are absent. However, in most countries, the nature of these elements is not specified in law. In Spain, for example, Section 381 of the Criminal Code stipulates that, “On observing that the accused may be suffering from a mental disorder, the Magistrate must request an evaluation by a forensic specialist.” [2]. The nature of the disorder or what impacts it will have on the capacity to continue with the proceedings are not specified.

Loss of such capacity may be experienced at different times during a judicial event: at the time of commission of the act; after committing a crime and during the trial; from the end of the trial to sentencing; or from sentencing to the end of the sentence.

Loss of capacity at the time of commission of the act
If the accused committed the offence in a state of mind that could lead to a finding of insanity, then this state could continue during the trial and afterward. This could preclude any further court proceedings, especially if there is no possibility of improvement.

Loss of capacity after committing a crime and during the trial
Cases in which capacity is lost after committing a crime and during the trial fall within the time covered by the
concept of fitness to stand trial in Anglo-Saxon countries, and include those accused persons who may be affected by a mental disorder temporarily or permanently once the trial starts. Legislation exists in many countries to manage these cases that are similar to Section 383 in Spain [3], which permits postponement of the trial until the accused person recovers from the mental disorder.

Most persons who are found unfit to stand trial are suffering from major psychotic syndromes that are known for their negative impact on capacity to form reasonable decisions. Hence, these persons are in need of treatment, usually with medications, in order to re-establish their competence to proceed with the trial, even in the face of refusal by the accused person [4]. This situation manifested in the case of Sell versus US [5**, in which the US Supreme Court ruled that under certain circumstances, such as in a trial being postponed because of unfitness, involuntary administration of medication would be appropriate.

**Loss of capacity from the end of the trial to sentencing**
Capacity may be lost between the end of the trial and sentencing. An accused person, once found guilty, could experience a mental breakdown leading to unusual behaviours including suicide. In such situations, sentencing would need to be postponed.

**Loss of capacity from sentencing to end of the sentence**
A much more frequent scenario is a deterioration in mental condition while the person is in prison. It is well established that prisons have become a repository for many mental patients in practically every country in Europe and North America. Many of these persons are marginalized and do not fit either in prison or outside. Although estimates vary from study to study, at least 5% of the prison population at any given time is considered seriously mentally ill [6].

In this particular group, an issue causing much ethical distress is the plight of those prisoners who are sentenced to death. Just recently the public press has reported that the US Supreme Court has ruled that juveniles under 18 years of age at the time that the crime was committed could not be sentenced to death. However, this welcome development is negated by the fact that a large proportion of the 3500 prisoners in Death Row in the USA suffers from serious mental problems. A physician is required to certify that the person is ’competent’ to be executed, in the sense that they are able to understand the ’meaning of the punishment’. Two alternatives are possible, neither of which is pleasant. Either the physician treats the prisoner so that he can get better and be executed, or the prisoner is kept in some kind of institution in a lifelong sentence of waiting to be executed [7,8].

The worst scenario is where a person’s mental illness or infirmity was not taken into account at the time of the trial, but which, if it had been considered, could have led to a different outcome. Many of these persons may be developmentally disabled, thus compounding the ethical dilemmas facing the physician. Alternatively, a psychologist may be in charge of determining whether a prisoner’s IQ is over a specified cutoff point; if this is determined to be so, then this would be tantamount to sentencing the person to death.

In many countries that do not have the death penalty, these persons are usually referred to a health facility, as are those who may be suffering from organic illness such as HIV [9].

**Psychiatric evaluations**
In the case of Dusky versus the USA in 1960 [10] it was determined that during the proceedings the accused would have sufficient capacity to consult with counsel with a certain degree of rationality and to understand the proceedings against him. Whereas this and similar stipulations are found in many countries in relation to fitness to stand trial, guidelines for competency to be sentenced have not been issued, and so evaluators must use the guidelines for fitness, or pre-sentence reports that could bring the presence of mental disabilities or disorders to the attention of the court [11].

There are multiple scales and guidelines in use to make evaluation for fitness easier and more standardized [12**,13,14*], including tools to identify those who may be malingering, such as the Miller Forensic Assessment of Symptoms Test [15*]. Similar instruments have been developed in other countries, including China [16*]. In other countries, such as Canada, the Criminal Code provides definitions or parameters regarding the capacities the accused should have if they are to be found fit to stand trial; these are the ability to understand the nature or object of the proceedings, the ability to understand the possible consequences of the proceedings, and the ability to communicate with counsel [17]. The recent Canadian case decided by McWatt J [18], in which the court concluded that an ‘unfit’ person cannot be sentenced, has brought a sense of immediacy to achieving a better understanding of what parameters should be applied by mental health evaluators in order to provide timely and appropriate advice to the courts on these cases. On the other hand, many other countries do not specify any scales or provide any guides for evaluators, instead leaving the matter entirely in their hands. However, most instruments and guides deal with three basic elements: two are diagnostic elements and pertain to whether there was a pre-existing mental condition or whether there is a mental abnormality at the time of the trial; and one element is speculative, pertaining to
whether the abnormality impacts negatively on the person’s capacity to proceed with the trial and to what extent. The mental abnormality must affect the specific capacity for the specific crime for which the person is being prosecuted.

Conclusion
It is customary to lump together all mental capacities pertaining to judicial criminal proceedings under the rubric of fitness to stand trial. However, such parsimonious legal and clinical manoeuvres do not do justice to mental elements that are specific to different times during the trial, most specifically the type of capacities required at the time of sentencing or while serving a sentence. This matter is much more important in countries where the death penalty exists. A prisoner may have been competent all along but lose this competency at the end when they face death. The ethical dilemmas facing physicians and mental health professionals are overwhelming; if they treat and the treatment is successful, then the person dies; or if they do not treat, then they condemn the person to suffering from an untreated illness with the death penalty still hanging over them for years. Unfortunately, these dilemmas have not been the subject of much ethical discussion, but the Declaration of Madrid [19] is emphatic in stating that psychiatrists, ethically, should not be part of any evaluations where the death penalty could be the outcome. Is it preferable that physicians refuse to conduct these evaluations on ethical grounds, or that the death penalty be abolished in all countries?

References and recommended reading
Papers of particular interest, published within the annual period of review, have been highlighted as:
• of special interest
•• of outstanding interest
4 Halpern AL. The question of involuntary treatment of nondangerous defendants who are found to be ‘incompetent to stand trial’ [letter]. J Am Acad Psychiatry Law 2004; 32:213.
The Court held that involuntary medication, under certain circumstances, is appropriate. This article includes a review of earlier relevant legal decisions, and an analysis and discussion of the Sell decision.
8 Lehman C. Court bars death penalty for youth under 18. Psychiatry News 2005; April 1:2.
This article reports on a survey of forensic psychiatrists and psychologists who read two case study vignettes and assessed whether each criminal defendant was competent to stand trial, using three differently worded standards of competency: one that focused on whether the defendant’s thinking was rational, a second that focused on whether the defendant’s behaviour was rational, and a third that did not use the word ‘rational’.
This study addressed feigning on the Evaluation of Competency to Stand Trial–Revised, a standardized interview designed for assessing dimensions of competency to stand trial and screening for feigned incompetency to stand trial.
The Miller Forensic Assessment of Symptoms Test was developed to provide evaluators with a brief, reliable and valid screen for malingering mental illness. This study examined the initial validity of the test in a sample of 50 criminal defendants found incompetent to stand trial because of a mental illness.
The authors created an instrument with which to determine the competency of offenders with a mental disorder to stand trial, in accordance with the Chinese legal system.
17 Watt D, Fuertet M. Tremear’s criminal code of Canada, Section 2. Toronto: Carswell; 1998.
18 R v Balliram, 173 CCC (3d) 547 (Ont.S.C.) per McWatt, J (2003).