VOLUME 50 / NUMBER 1 • NOVEMBER 2017

A PUBLICATION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

The PROSECUTOR

— IN THIS ISSUE —

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ABOUT THE COVER
In 1831, it was decided that the courthouse, originally constructed in 1798, was no longer suitable so the new courthouse (pictured) was built in its place and was completed in 1834. The new courthouse was a simple brick temple styled building with no portico or columns, however a portico was added in the 1920's which gives the building its Greek revival look.

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The PROSECUTOR

Marijuana Behind the Wheel

BY BRIAN THIEDE AND KENNETH STECKER

FEDERAL LAW PROVIDES a system of classifying both prescription and recreational drugs based on their harm to users and harm to society.[1] The ultimate purpose of this drug classification system is public safety. The Controlled Substances Act (CSA) defines a Schedule 1 drug as one that has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks accepted safety for use under medical supervision.[2] Marijuana is a Schedule 1 drug.[3]

In 2015, over 35,000 people were killed in traffic crashes.[4] Nearly a third of those involved an impaired driver.[5] The National Roadside Survey conducted by the National Highway Traffic Safety Administration (NHTSA) demonstrates the increased use of marijuana by our nation's drivers. In the 2013- 2014 roadside survey of weekend nighttime drivers, 8.3 percent had some alcohol in their system and 12.6 tested positive for THC[6] — up 48 percent from the number in 2007.[7] Since a majority of states have legalized marijuana for medical and/or recreational use,[8] marijuana-impaired driving cases will continue to present unique challenges for prosecutors and law enforcement.

Marijuana is the most commonly used illicit substance[9] and has become the most commonly detected non-alcohol substance among drivers in the United States.[10]

Generally, impaired driving statutes allow for prosecution of a person who drives (1) while impaired by alcohol, drugs, or any combination thereof, (2) while having a specified level of alcohol in his or her system, or (3) while having any measurable amount of alcohol or drugs in his or her system (e.g., zero tolerance).

Numerous scientific studies demonstrate the relationship between alcohol and the impairment of driving function supporting these "per se" laws. There are challenges, how "per se" laws.

It is difficult to parse out statistical information about impaired driving prosecutions in which marijuana was the

1 Controlled Substance Act, 21 USC §801 et seq.
2 21 USC §812(b)(1).
3 21 USC §812(c) Schedule I (c)(10).
4 NHTSA press release, "Traffic fatalities up sharply in 2015," https://www.nhtsa.gov/press-releases/traffic-fatalities-sharply-2015, accessed February 23, 2017. See also Traffic Safety Facts: Research Note. 2015 Motor Vehicle Crashes: Overview, DOT HS 812 318, August 2016.
5 Traffic Safety Facts: Research Note. 2015 Motor Vehicle Crashes: Overview, DOT HS 812 318, August 2016.
6 THC is Delta 9 Tetrahydrocannabinol and is the psychoactive substance in marijuana.
7 Traffic Safety Facts: Research Note. Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers, by Amy Berning, Richard Compton, and Kathryn Wochinger, DOT HS 812 118, February 2015.
8 http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx, accessed February 23, 2017.
9 https://www.drugabuse.gov/publications/media-guide/most-commonly-used-addictive-drugs, accessed February 23, 2017
10 "Establishing legal limits for driving under the influence of marijuana," Injury Epidemiology 1:26, Kristin Wong, Joanne E Brady and Guohua Li (2014).

Brian Thiede is the Mecosta County, Michigan Prosecuting Attorney. Kenneth Stecker is a Michigan Traffic Safety Resource Prosecutor. An excerpt of this article is in the National District Attorneys Association April 20, 2017 White Paper captioned "Marijuana Policy: The State and Local Prosecutors' Perspective."

impairing substance or even the broader category of drugs in general. This is largely the result of how impaired driving laws are written. Generally, a prosecutor does not need to "prove" what the impairing substance is, only that it impaired the driver. This can be done with circumstantial evidence as well. For example, a driver who exhibits clues of impairment and is found to have a "bong" in his or her car as well as a bag containing a green leafy substance could be successfully prosecuted for DUI even without any chemical test to prove marijuana in his or her system. To change current laws to add a separate charge for drug-impaired driving generally, or marijuana-impaired driving specifically, for purely statistical reasons would likely complicate prosecutions by requiring proof of the impairing substance. Prosecutors may be able to obtain this information from toxicology labs, but may not collect all data for other reasons (e.g., private laboratory not subject to governmental rules or laws, suspect refusal to submit sample for chemical testing, etc.).

Generally, a prosecutor does not need to "prove" what the impairing substance is, only that it impaired the driver.

As mentioned, a suspect's refusal to submit to chemical testing presents a significant challenge to data collection. Other limitations on data collection include the availability of resources for officer training to detect the signs and symptoms of drug or marijuana impairment, toxicology testing, and the lack of widely available roadside testing mechanisms for drugs or marijuana. Additionally, if an impaired driving suspect submits to a breath test and the results reveal a level of alcohol above the legal limit, there is frequently no further testing performed for drugs and results in the underreporting of drug or marijuana-impaired cases.

While marijuana use has been shown to impair cognitive or executive function, driving performance, and increase crash risk, scientific studies have not yet demonstrated support for marijuana "per se" levels similar to alcohol in impaired driving legislation. Marijuana contains tetrahydrocannabinol (THC), more specifically Delta 9 THC, which is the psychoactive component of marijuana that causes impairment. Delta 9 THC can only be detected in blood. 73-90 percent of this is eliminated in as little as 45 minutes to approximately an hour and a half.[11]

On the other hand, marijuana metabolites, the byproducts in the blood as a result of the body metabolizing the marijuana, remain in the blood for a much longer period of time. Detection of the metabolites may be the result of marijuana consumption several days or weeks prior to the sample collection and may not scientifically equate to impairment.

Some of the issues surrounding the challenges to studies that would scientifically support a marijuana "per se" level include:

- **Varying concentrations of THC in marijuana.** Generally, the concentrations used in studies are much lower than what is available in real-life settings. Additionally, concentrations vary depending on the form of marijuana ingested.
- **Differences between users of marijuana.** A chronic, frequent user may develop tolerance to some effects of marijuana but not all effects, including the impairing effect. The effect of THC consumption on impairment of driving performance may be higher for occasional, recreational users than for frequent users.
- **Differences in ingestion of marijuana.** Smoked marijuana leads to a different absorption rate and release rate of the psychoactive ingredient than does eating marijuana edibles.
- **Combined use of marijuana and alcohol or marijuana and other drugs.** Various studies have

[11] "Effect of Blood Collection Time on Measured Delta-9-Tetrahydrocannabinol Concentrations: Implications for Driving Interpretation and Drug Policy," Clinical Chemistry 62:2, Rebecca L. Hartman, Marilyn A. Huestis, et al. (2016).

demonstrated that the combined use is associated with significantly greater cognitive impairment and crash risk than the use of one alone.[12]

In terms of marijuana-impaired driving, legislative change has occurred more quickly than the pace of the scientific research on the issue.[13] This leaves fundamental questions about a standard for determining whether an individual's ability to operate a vehicle safely is impaired by marijuana as well as the means which the individual's present status may be measured.

Some practical items to consider prior to setting a "per se" level for marijuana impairment:

■ **Lack of scientific research.** There is little scientific research supporting marijuana "per se" levels similar to alcohol. Setting a limit for marijuana is strictly based on public policy and in no way means an individual testing below the level is not impaired at the time of driving.

■ **Even a low "per se" level will miss significant numbers of impaired drivers.** Based on the THC concentration distribution in the larger population data set of arrested drivers and similar observations by other groups, indiscriminate selection of a 5 ng/mL threshold for per se laws virtually guarantees that approximately 70 percent of all cannabis using drivers, whose actions led to them being arrested, will escape prosecution under a 5 ng/mL per se standard. [14]

■ **Sample collection and toxicology testing.** Blood testing is the most effective testing method for marijuana, but is the most invasive and costly. Securing a blood sample requires a search warrant that may add a significant delay in specimen collection. This in turn may inhibit the ability to secure information about marijuana in the blood at the time of driving (and the inference of impairment at driving) because of how quickly marijuana transfers from blood to lipid soluble tissues in body. Further, obtaining a search warrant in a routine impaired driving case takes valuable time from the necessary duties of a law enforcement officer.

■ **Standardized protocols needed.** Standardized testing protocols would need to be developed for each type of sample secured.

■ **Required additional resources.** Dedicated resources would likely be needed to train law enforcement officers in the signs and symptoms of marijuana impairment and how to properly document it and train and certify officers as Drug Recognition Experts (DRE). Most police officers that make traffic stops are not trained to become experts in drug recognition due to the costs involved and the requirement that officers respond to numerous types of crimes on any given shift. One-way is to train officers to detect the signs and symptoms of cannabis use in drivers stopped at roadside. Initial suspicion of cannabis use would lead to a field sobriety test (SFST). This process could be coupled with rapid, on-site oral fluid screening for evidence of drug use. The technology to detect certain drugs (including cannabis) in a specimen of oral fluid quickly at roadside is improving and could be used in a manner comparable to preliminary breath testing devices currently used to test for alcohol. The suspect would then be taken for a complete drug evaluation by a DRE. This approach requires enhancing the complement of DRE officers available to conduct assessments for impairment.[15]

Also, additional resources would likely be needed for new laboratory equipment, training, laboratory technicians, and toxicologists since many state laboratories may not be equipped or prepared to conduct THC blood testing. Funding may also be required for other experts to support the prosecution at trial.

■ **"Per se" limit for marijuana when combined with alcohol or other drugs.** If a "per se" limit is to be established, consider legislative change establishing strict liability for an individual found to have any level of marijuana (THC) in his blood at the time of testing when combined with any level of alcohol or the presence of any other drug. Including "time of testing" language may help minimize the problem created by the quick dissipation of THC out of the blood as well as avoid attempts to relate amounts back to the time of driving.

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12 See "Establishing legal limits for driving under the influence of marijuana," Injury Epidemiology 1:26, Kristin Wong, Joanne E Brady and Guohua Li (2014).

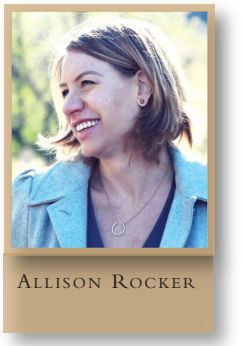
13 "Cognitive and Clinical Neuroimaging Core," Marijuana Investigations for Neuroscientific Discovery, Dr. Staci Gruber, http://drstacigruber.com/mind/,accessed on February 23, 2017.

14 AAA Foundation.org. "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to per se Limits for Cannabis," May 2016, p. 25.

15 *Id.*, at p. 27.

The Prosecutor

The Unknown Known Risk



By Allison Rocker

In 2013, in the wake of a mass shooting at a movie theater the year prior, Colorado passed a collection of gun control measures, including the creation of a Firearm Relinquishment statute. 36 states have similar statutes that require a defendant who is subject to a mandatory protection order stemming from a domestic violence offense against an intimate partner[1] to relinquish any firearm and/or ammunition in his or her possession for the duration of the protection order.[2] Great news, right? No more firearms in the hands of suspected domestic violence offenders? Wonderful. Unfortunately, and not surprisingly, domestic violence defendants in Colorado have been reluctant to volunteer this information or admit on the record that they possess firearms, whether legally or illegally obtained.[3]

We have no effective mechanism with which to contradict a defendant's silence.

In 2017, only six states and the District of Columbia have some form of firearm registration.[4] In Colorado specifically it is forbidden by statute for the state to maintain a "Firearm Database".[5] In addition, while Colorado requires that records be maintained for all private sales (via a dealer) and dealer sales, searching such records is next to impossible unless the identity of the specific dealer who sold or aided in the transaction and the precise timeframe the transaction took place is known.[6] Combing through firearm sales records in this fashion is tantamount to searching for the proverbial needle in a haystack. Meanwhile, Colorado Bureau of Investigation regulations mandate that all information gathered through a background check pertaining to an individual that has been approved for purchase be destroyed within 24 hours.[7] It would appear that the only remaining avenue to determine whether or not a defendant is in possession of a firearm is to ask him or her in open court. Of course, a litany of 5th Amendment issues aside, defen-

1 18 USC sec 921(a)(32) Federal definition of 'Intimate Partner'
2 Giffords Law Center to Prevent Gun Violence *Domestic Violence and Firearms* Retrieved from http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/
3 Under 5% estimated in Denver and Boulder County, Colorado
4 Giffords Law Center to Prevent Gun Violence *Registration* Retrieved from http://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/registration/
5 C.R.S. §29-11.7-102
6 C.R.S. §18-12-112(1)(a)
7 8 Colo. Code Regs. §1507-20

Allison Rocker is the Senior Deputy District Attorney for the Denver District Attorney's Office.

dants are generally — shall we say — hesitant to make this kind of admission. Several states address this issue through the use of immunity language or an injunction process.[8] Yet, even with included immunity language, when a defendant represents that he or she is not in possession of a weapon, the state of Colorado (and many other states) have no state gathered collateral information to contradict that representation. While almost every defendant represents that they are not in possession of a firearm statistically we know that a minimum of 34% of Denver, Colorado households have firearms within the home — and that tally is only for the legally purchased firearms.[9]

Tragically, the weapon used in the majority of intimate partner homicides is a firearm and abusers who possess firearms are 5 to 8 times more likely to kill their victims than those who do not have firearms.[10]

In Denver, officers are trained to ask every DV victim if there are guns in the home, where, and how many. Typically, all of this information is gathered in under an hour.

Without a registry, we have no way of preemptively identifying defendants that are in possession of a firearm and we have no way of contradicting a defendant's statement that he or she is not in possession of a firearm.

Yet, there is another person who knows about the firearms within the home: the victim. The victim knows because he or she likely lives in constant fear of the firearm. The victim knows where the gun is and what it looks like. They know how many guns there are and where the ammunition is kept. They know about these guns regardless of registries, licensed dealers or permits and regardless of whether they are legally or illegally obtained. Collateral information obtained from the victim has the potential to be more reliable than that obtained from state registries or lists.[11] And whether law enforcement realizes it or not, this information is gathered from moment one.

When a 911 call is made, call takers ask, "Are there weapons in the home?" or "Does he have any weapons?" and the victim's answers are documented in dispatch records. In Denver, officers are trained to ask every DV victim if there are guns in the home, where, and how many. Typically, all of this information is gathered in under an hour. Follow up, if needed, is conducted by a detective or a law enforcement victim advocate.

Meanwhile, when the defendant appears at first advisement he/she is put on notice, as required by Colorado statute, that due to the mandatory protection order there will be a hearing at the next court date to determine whether or not he/she will be required to relinquish all firearms and ammunition.[12, 13] For the hearing at the next court date, the prosecutor must prove two elements to qualify the defendant for firearm relinquish-

8 Cal. Fam. Code §6389(d) and Wis. Stat. Ann. §813.1285(2)(a)

9 *Gun ownership and social gun culture*, Kalesan B, Villarreal MD, Keyes KM, et al. Inj Prev Published Online First: June 29, 2015 doi:10.1136/injuryprev-2015-041586

10 Garen J. Wintemute, Shannon Frattaroli, Barbara E. Claire, Katherine A. Vittes, Daniel W. Webster, "Identifying Armed Respondents to Domestic Violence Restraining Orders and Recovering Their Firearms: Process Evaluation of an Initiative in California", *American Journal of Public Health* 104, no. 2 (February 1, 2014): pp. e113-e118. DOI: 10.2105/AJPH.2013.301484 PMID: 24328660

11 *Id.* See Figure 2. Out of 405 recovered firearms in San Mateo County, 164 were identified via Automated Firearms System and 241 were not. Out of 260 recovered firearms in Butte County, 32 were identified via Automated Firearms System and 228 were not.

12 Several state statutes allow for "ex parte" orders. See Cal. Fam. Code §6389(d), 430 Ill. Comp. Stat. 65/2(a)(1), (2), 65/8.2, Mass. Gen. Laws ch. 140, §§ 129B(1)(viii), 129C, 131(d)(vi) and Tex. Crim. Proc. Code Ann. art. 17.292(c)(4).

13 C.R.S. §18-6-1001(6) and 18 U.S. Code § 922(g)(8)(a)

ment.[14] First, that the defendant and victim are intimate partners (which should be included in the probable cause statement used for arrest). Second, that a protection order exists between the victim and defendant prohibiting the use of physical force against the victim (which should also already be in the court file and subject to judicial notice).

Soft Approach

Once the court has issued an order prohibiting possession, control or purchase of firearms or ammunition giving the defendant 24–72 hours to relinquish her/her firearms and turn in a receipt as proof, the prosecutor, based on the gathered information, will inform the court that there is reason to believe there are firearms in the home, including quantity and location. Although the court cannot act on the information at that moment, it puts the defendant on notice that we know — that we are aware that there are firearms. Will this cause the defendant to immediately relinquish his weapons to an approved storage facility? Maybe. But guns are expensive and the defendant likely does not want them taken. The hope is that upon hearing this information the defendant will remove the guns from the home and store them in an alternate location. Although this does not take the firearms out of the defendant's control entirely, it plays a vital role in protecting victims: without ready access to a firearm, without the ability *in the heat of the moment* to grab a firearm — victim safety is already increased.

Hard Approach

If the defendant has not submitted proof of relinquishment within the allotted time (24 to 72 hours) as required by the statute, a policy decision will be made as to the preferred method of follow through.[15] Is the information received from the victim still timely? If not, can it be reconfirmed with the victim?

Many options exist for the next step: a warning at the next court date, a motion for bond revocation, new charges such as violation of restraining order, a search warrant…etc.

Conclusion

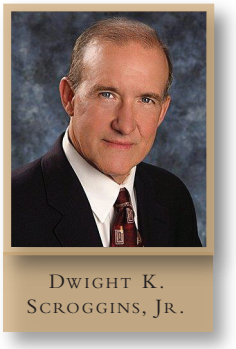
55% of all female homicides are committed by intimate partners.[16] Of those, firearms were the weapon of choice in over half.[17] Domestic Violence is nothing if not complex: victims are not always reliable for continuing communication, resource concerns surround roles and responsibilities for the consolidation of the firearms data and processes must be defined to supply prosecutors with information rapidly. Safety issues with regard to search warrants and other issues obviously must be considered.

It is critical that we acknowledge that despite the absence of a firearms registry or easily searchable transaction records, we *do* have tools to take firearms away from domestic violence perpetrators — we just need to start using them effectively.

14 18 U.S. Code § 922(g)(8)(C)(ii)
15 C.R.S. 18-6-1001(9)(a)(I)(B) and 18 U.S. Code § 922(g)
16 *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence* — United States, 2003–2014 *Weekly* / July 21, 2017 / 66(28);741–746
17 *Id.*

The Prosecutor

Know Your Numbers



Dwight K. Scroggins, Jr.

By Dwight K. Scroggins, Jr.

If you have not seen the movie "Moneyball", you should probably go home and watch it before you read this article. Yes, the article is about using numbers to help run your office more efficiently regardless of size. This is not the end all article that will rock your world as a prosecutor. Everyone has things that work for them in their office in their circumstances. This is not an attempt to dissuade you from continuing those processes. But it is an attempt to get you to consider whether or not any of these ideas can improve where you are. Several years ago, we started tracking all kinds of numbers. With today's software and management programs, deciding what you want to capture is more difficult than deciding how to capture the numbers. This article is today's version of where we are and how it has been helpful.

So, about what numbers are we talking? Most of us can recite submissions by categories, filed and unfiled numbers, attorney caseloads, jury and judge tried cases and numbers from different submitting law enforcement agencies. Those are the numbers about which we are asked by the media and which we cite during budget discussions. They are important but not helpful in running our offices or managing our cases.

What numbers can be helpful in managing our cases, evaluating our processes and people and helping solve some of the problems common to prosecutor offices across the country? Ask yourself the following questions. Do you know the length of time on your different type felony offenses from occurrence to submission to filing to final disposition? Do you know how long it takes on a domestic violence case from time of occurrence to final disposition? Have you ever considered the length of time to disposition being a factor in whether or not you have continuingly cooperative victims in DV cases? Have you ever compared how long it takes different attorneys handling essentially the same type caseloads to dispose of their cases? What attorneys in your office have high caseload numbers because they are slow in disposing of their cases and which ones have high caseloads because they are getting too many cases assigned to them?

Here are some of our useful (to us) 2016 numbers and some of the benefits of knowing these numbers. Our magic number of docket calls for disposition of misdemeanors is three. It doesn't seem to matter how many days between docket calls. It just works out in our jurisdiction that defense attorneys and defendants are ready to dispose of their misdemeanor case on the third docket call. We went from thirty day intervals to two week intervals and it was still three docket calls. We dispose of those cases four weeks earlier than before by simply changing

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the interval. Our magic number for felony cases is seven docket calls. When an attorney disposes of a case, and it is past the magic number of docket calls, their case appears on an end of the month report and they are asked to provide a short response why the case took more time than normal. It helps focus the attorneys on keeping their cases moving without making it a big deal. At the same time, I get a monthly impression of any problem areas that may need closer scrutiny. Your magic number may be different but there will be a number that is simple to track and helpful in several ways.

Child victim cases is an area we all try to move as quickly as possible toward final disposition. We know the victims benefit from getting the case disposed. We track these cases beginning with the original report to law enforcement or hotline call. We track how long to the initial child advocacy center interview, how long for the law enforcement investigation, how long for the prosecutor to decide whether to file or not and how long to final disposition on filed cases. In 2016, our average time from reporting to final disposition, including eight jury tried cases, was 172 days.

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We have allegations in Missouri of the so called "public defender crisis" where they claim too many cases and not enough resources or attorneys to handle them. In our jurisdiction, the public defenders average caseload is under 50 open cases. Our public defenders handle and dispose of just as many cases per public defender as other jurisdictions. Ours just do so in a timely manner and the benefit is not having to deal with all the "crisis" issues.

Many local jurisdictions also have a jail population problem. Since we have been focused on knowing our numbers and working to reduce them, our jail population has been reduced by almost 25%. We have cut by more than half the number of jail days being used to house pre-trial prisoners. This has been both a cost savings to our County and achieved the justice goal of not having prisoners sitting for long periods of time when they are charged but not convicted. All of this has occurred at the same time we are filing more cases than previously and are statistically one of the toughest sentencing jurisdictions in our State.

Finally, please understand these improvements are a product of effort from more than just the prosecutor's office. We are not suggesting anyone's goal should be to imitate what we do. We track lots of things both in-house and for other agencies with whom we work. We provide data and they develop their own responses to issues and in the end, we all are working toward the same goal. Our Judges, for example, were recently recognized by the Missouri Supreme Court for the 12th year in a row on how well they dispose of cases, a fact in which they rightfully take great pride. I am simply suggesting you consider getting to know some of the numbers relevant to your operation.

The Prosecutor

Statistics Collection Tool — Helping Tell Law Enforcement's Story of Going Dark

Nelson O. Bunn, Jr.

By Nelson O. Bunn, Jr.

As members of the law enforcement community, we know what to takes to make a case: evidence.

Going Dark is about law enforcement's lack of access to evidence — whether it is on devices, "evidence at rest" or transmitted across communications networks, "evidence in motion." Complicating law enforcement's ability to collect evidence is that a growing portion of the evidence necessary to prosecute a case exists only in the digital world. In a nutshell, as law enforcement is increasingly hampered in its ability to collect evidence, because of advancing communications services and technologies, it is more difficult to make that case before a judge or to convince a jury.

Law enforcement is often called upon to describe the nature and scope of the impact of advanced communications technologies. However, for policymakers and legislators Going Dark is not a meaningful problem because of their detachment from the issue. The question most often posed by policymakers and legislators is — how does this affect your ability to investigate cases? To provide the answers that will resonate with those policy makers, the law enforcement community must have persuasive answers.

Several individual agencies, prosecutor offices, and law enforcement associations, in conjunction with the National Domestic Communications Assistance Center (NDCAC), have developed a Statistics Collection Tool to better quantify the full impact of Going Dark on investigations and cases. The statistics and examples collected by the tool will be shared with the law enforcement community to be used in discussions with policymakers and legislators about the loss of access to digital evidence. Those discussions are critically important as the crisis law enforcement faces with digital evidence require a legislative solution to address them in their entirety. Put simply, law enforcement must continue the Going Dark conversation and advocate for access to evidence commensurate with the authority it has been granted under law.

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Technological barriers the Statistical Collection Tool was designed to capture include: warrant-proof encrypted communications apps; encrypted smartphones and other devices; and non-compliant providers that either have no technical means to assist law enforcement or whose processes result in significant delays that jeopardize investigations.

The types of information that can be submitted with the Statistical Collection Tool are:

- ***Electronic surveillance*** — information about investigations that involved (or would have involved, had a capability existed) the collection of *evidence in motion* in real time.
- ***Device*** — information pertaining to the collection of *evidence at rest* from devices (e.g., phone, tablets, computers, hard drives) seized during an investigation
- ***Records Request*** — service provider-based records generated and retained in the normal course of business for which law enforcement has gained the lawful authority to access (or would have if law enforcement knew such records were generated and retained).
- ***Case Examples*** — the story behind how the inability to collect either evidence in motion or at rest impacted an investigation. It puts the impact into context and shows real-life implications of the lack of access to evidence.

Often overlooked are examples about the impact of not pursuing an investigative technique because a lack of capability or nonexistent records. For example, when a subject uses an over-the-top communications app with end-to-end encryption for which the investigator knows there is no technical solution — that represents an opportunity that no longer exists and it most definitely impacts a case. Further, many investigations initially rely on basic subscriber or user information and when records do not exist, or are not maintained, valuable information that was once considered foundational to building a case and providing justification for more intrusive methods of surveillance disappears.

To start using the Tool, please contact the NDCAC Technical Resource Group at (855) 306-3222 or via email at AskNDCAC@ic.fbi.gov.

The Prosecutor

How Competency Examiners Should (and often don't) Assess for Malingering and Poor Effort

Steve Rubenzer

By Steve Rubenzer, Ph.D., ABPP

"There may be great fraud in this matter … (the judge) may do well to inquire … whether it (incompetence) be real or counterfeit." (Hale, 1736)[1]

The possibility of faking during legal proceedings has been recognized since ancient times. While forensic psychologists were among the first mental health professionals to investigate malingering, lately, the sister discipline of neuropsychology has been much more active and has produced hundreds of publications in the past 20 years. One influential study concluded that whenever situations provide incentives for faking, roughly 40% of examinees will do so or present with poor effort to the extent that their presentation during the evaluation is not a reliable guide to their actual abilities.[2]

A recent survey of examiners across the US estimated that 24% of defendants referred for competency assessments were feigning, and a further 10% were not presenting validly in other ways.[3] *Feigning* is a general term that means "faking bad" without specifying a motive. *Malingering* is the intentional production or gross exaggeration of symptoms for a tangible benefit. There are a number of other conditions that also imply invalid responding: *Factitious disorder* is a condition in which a person intentionally fakes a disorder for the purpose of gaining attention and special treatment from treatment providers. It *cannot* be diagnosed if there are significant other benefits to the behavior,[4] as there almost always are in a criminal case or in jail. *Somatoform disorders* are conditions in which the patient complains of bodily dysfunction or pains that cannot be medically explained. It is believed that such reports are not deliberately inaccurate. It may simply be that some people are particularly sensitive to minor bodily sensations, over-interpret such experiences, or to complain about them more others. *Conversion disorders* usually involves complaints of paralysis or cognitive dysfunction, such as amnesia, that cannot be medically explained. Such patients were also referred to as displaying *hysterical* paralysis or blindness. Pioneers such as Charcot and Freud interpreted their behavior as unconsciously determined. They noted that such patients often seemed oddly unconcerned about their sudden inability to, for example, use their left arm, and observed that these symptoms often functioned to excuse the patient from distasteful social obligations. This sounds a lot like malingering, and this is how such behavior was interpreted prior to the age of psychoanalysis. Charcot himself wrote, "Malingering is to be found in every phase of hysteria."[5] Recent authors question the existence of unconscious motivation in such presentations.[6]

While many CST examinees appear to malinger, lack of

[1] Hale, M. (1736). *Historia placitorum coronae. The history of the pleas of the crown.* Edited by Sollom Emlyn. 2 vols. London, 1736. Reprint. Classical English Law Texts. London: Professional Books, Ltd., 1971.

[2] Mittenberg, W., Patton, C., Canyock, E. M., & Condit, D. C. (2002). Base rates of malingering and symptom exaggerating. *Journal of Experimental and Clinical Neuropsychology*, 24(8), 1094-1102. http://dx.doi.org/10.1076/jcen.24.8.1094.8379

[3] Rubenzer, S. J. (in press). *Assessing negative response bias in competency to stand trial evaluations*. Oxford University Press.

[4] American Psychiatric Association (2013). *Diagnostic and statistical manual of mental disorders* (5th ed. text rev.). Washington, DC: Author. http://dx.doi.org/10.1176/appi.books.9780890425596

[5] Merksey, H. (1979). *The analysis of hysteria*. London: Bailliere Tindall.

[6] Merten, T., & Merckelbach, H. (2013). Symptom validity testing in somatoform and dissociative disorders: A critical review. *Psychological Injury and Law,* 6(2), 122-137. DOI: 10.1007/s12207-013-9155-x

full cooperation, without a clear motive and deliberate intent to perform badly, is also a major concern. Many of the tests and procedures psychologists use assume full engagement and effort on the part of the test-taker. It is no more difficult to low-ball an IQ test than for someone to do fewer push-ups than their maximum. There is increasing evidence that assuming a test taker will perform to the best of their ability is naive and unfounded: Poor effort has been found in groups of subjects, such as college volunteers[7] and children tested in school,[8] that were not thought to be at risk for underperformance. Such examinees don't have any clear motivation to perform badly, but neither are they especially motivated to do their best.

All of the above response styles potentially spoil the assessment. I refer to them by the broad term *negative response bias,* which make no assumption about the motivation for the behavior. The crucial issue is given any evidence of less than full cooperation and honesty, one cannot put much weight on defendant's presentation during the evaluation. Collateral sources will be required to validly assess the defendant's actual cognitive, psychiatric, and functional status.

As a court-appointed expert, I often encountered defense-obtained evaluations that provided second opinions on defendants I opined had feigned. It was not uncommon for the defense examiners to ignore the data from my investigation and attempt to approach the defendant "with a clean slate." Another examiner would routinely testify that he "saw no evidence of malingering" in cases a previous examiner concluded this was the case, offering no facts or observations in support of his opinion. Prosecutors could reasonably conclude that such examiners simply write down whatever the defendant tells them and testify as if this was a meaningful assessment.

Although it may be hard to tell from such reports, there are professional standards that do guide such practices. Unfortunately, the two most prominent guidelines, the American Psychological Association Code of Ethics (APA, 2002/2010/2016)[9] and the Association for the Advancement of Psychiatry and Law's practice guidelines (2007),[10] do not provide strong recommendations on assessment of feigning. *The Specialty Guidelines for Forensic Psychologists*[11] contains firmer language, although recommendations about the need to assess for feigning are merely implicit.

Several neuropsychology professional societies have issued position statements stating that assessment of an examinee's effort on cognitive testing (which includes assessment of intelligence) is medically necessary in ALL such assessments, not merely those that are conducted for psycholegal purposes.[12] These followed accumulating evidence that an examinee's motivation and effort during testing has a much larger effect on the test scores obtained than brain damage does.[13] As it turns out, mild brain injuries, by far the most common, have no significant effects on cognition three months after injury.[14] A mild traumatic brain injury (mTBI) is one that results in less than 30 minutes of unconsciousness, with no abnormality on CT or MRI brain scans, and no complication in the recovery (such as bleeding into the brain).[15]

Some highly influential and well-known authors have provided very clear directives to assess feigning in forensic

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7 An, K., Zakzanis, K., & Joordens, S. (2012). Conducting research with nonclinical healthy undergraduates: Does effort play a role in neuropsychological test performance? *Archives of Clinical Neuropsychology*, 27, 849–857. http://dx.doi.org/10.1093/arclin/acs085.

8 Kirkwood, M. W., Kirk, J. W., Blaha, R. Z., & Wilson, P. (2010). Noncredible effort during pediatric neuropsychological exam: A case series and literature review. *Child Neuropsychology,* 16(6), 604-18. http://dx.doi.org/10.1080/09297049.2010.495059.

9 American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist*, 57(12), 1060-1073.

10 Mossman, D., Noffsinger, S. G., Ash, P., Frierson, R. L., Gerbasi, J., Hackett, M., ... & Wall, B. W. (2007). AAPL practice guideline for the forensic psychiatric evaluation of competence to stand trial. *Journal of the American Academy of Psychiatry and the Law Online, 35*(Supplement 4), S3-S72

11 American Psychological Association. (2013). Specialty guidelines for forensic psychology. *The American Psychologist*, 68(1), 7-19. http://dx.doi.org/10.1037/a0029889.

12 Bush, S. S., Ruff, R. M., Troster, A., Barth, J., Koffler, S. P., Pliskin, N. H., et al. (2005). NAN position paper: Symptom validity assessment: Practice issues and medical necessity. *Archives of Clinical Neuropsychology*, 20, 419-426. http://dx.doi.org/10.1016/j.acn.2005.02.002. Board of Directors. (2007). American Academy of Clinical Neuropsychology (AACN) practice guidelines for neuropsychological assessment and consultation. *The Clinical Neuropsychologist*, 21(2), 209-231. Heilbronner, R. L., Sweet, J. J., Morgan, J. E., Larrabee, G. J., Millis, S. R., & Conference Participants 1. (2009). American Academy of Clinical Neuropsychology Consensus Conference Statement on the neuropsychological assessment of effort, response bias, and malingering. *The Clinical Neuropsychologist*, 23(7), 1093-1129.

13 Green, P., Rohling, M. L., Lees-Haley, P. R., & Allen, L. M. A. (2001). Effort has a greater effect on test scores than severe brain injury in compensation claimants. *Brain Injury*, 15(12), 1045-1060. *http://dx.doi.org/10.1080/02699050110088254*. Green, P. (2007). The pervasive influence of effort on neuropsychological tests. *Physical Medicine and Rehabilitation Clinics of North America*, 18(1), 43-68. http://dx.doi.org/10.1016/j.pmr.2006.11.002. Fox, D. D. (2011). Symptom validity test failure indicates invalidity of neuropsychological tests. *The Clinical Neuropsychologist*, 25(3), 488-495. http://dx.doi.org/10.1080/13854046.2011.554443.

14 Karr, J. E., Areshenkoff, C. N., & Garcia-Barrera, M. A. (2014). The neuropsychological outcomes of concussion: A systematic review of meta-analyses on the cognitive sequelae of mild traumatic brain injury. *Neuropsychology*, 28(3), 321-336. http://dx.doi.org/10.1037/neu0000037

15 Ruff, R. M., Iverson, G. L., Barth, J. T., Bush, S. S., & Broshek, D. K. (2009). Recommendations for diagnosing a mild traumatic brain injury: a National Academy of Neuropsychology education paper. *Archives of Clinical Neuropsychology*, 24(1), 3-10. http://dx.doi.org/10.1093/arclin/acp006

exams in general and competency to stand trial (CST) exams in particular. In their classic text *Psychological Evaluations for the Court*, Melton et al. (1997, p. 54) wrote, "Given the significant potential for deception and implications for the validity of their findings, mental health professional should develop a low threshold for suspecting deceptive responding."[16] In the Oxford *Best Practices* series book on assessing CST, the authors state, "Malingering must always be considered by any evaluator working within the forensic context" (p. 124).[17] Thomas Grisso, in his 1988 book on competency assessment, wrote: "Malingering must be considered whenever a pre-trial competency evaluation produces signs of psychotic or organic disorders, mental retardation, deficits in competency abilities, or special states like amnesia" (p. 35).[18] This statement remains in force for defendants who have a legitimate mental condition, because even examinees with schizophrenia,[19] serious head injury,[20] and intellectual disability[21] can exaggerate their disabilities. In fact, they are best-situated to do so: Defendants with no such history cannot support their claims and will usually lack knowledge of how to credibly portray the condition.

As demonstrated above, there is explicit endorsement from authoritative authors regarding the need to assess for possible feigning or poor cooperation in CST exams. There is also strong support from statistical surveys to support a high index of suspicion. A recent meta-analysis of 59 studies reported that an average of 27.5% of defendants referred for competency examination were found incompetent.[22] This can be compared with the proportion of defendants estimated to be feigning (24.1%) or uncooperative (8.3%) in a recent survey of competency to stand trial (CST) examiners.[23] From these numbers, it is apparent that a defendant who presents as impaired is about equally likely to be feigning or uncooperative as to be legitimately incompetent. For this reason, I argue that *validity assessment is the primary diagnostic task in CST assessments*, and a primary competency of CST examiners.

There are only a few diagnoses that strongly imply impairment to the point of incompetence, such as delirium or severe dementia or intellectual disability.

Technically, Grisso's recommendation above to assess every defendant that presents with a mental or psychiatric impairment for feigning is overly-inclusive: If a defendant presents with evidence of a mental disorder but without deficits in competence to stand trial, there may be no need to assess for feigning. For example, if a defendant presents as rational but reports hearing voices only at night — who cares? Court hearings are during the day. Mental illness or deficit should very rarely be equated with incompetency: There are only a few diagnoses that strongly imply impairment to the point of incompetence, such as delirium or severe dementia or intellectual disability. A diagnosis of moderate intellectual disability, if accurate, suggests probable incompetency, while schizophrenia and Bipolar disorder do not: About 50% of defendants with such diagnoses are found competent.[24]

For intellectually disabled (ID) defendants, prior IQ scores can provide guidance regarding CST status: ID defendants found competent have an average IQ of 63.7 across studies, whereas those found incompetent have an average IQ of 56.9. Scores of 65 and above suggest competence, absent other issues, while valid IQ scores below 60 increasingly suggest incompetence. As IQ scores dip to 55

16 Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (1997). Psychological evaluations for the courts: *A handbook for mental health professionals and lawyers*. New York, NY: Guilford Press.

17 Pirelli, G., Gottdiener, W. H., & Zapf, P. A. (2011). A meta-analytic review of competency to stand trial research. *Psychology, Public Policy, and Law*, 17, 1-53. http://dx.doi.org/10.1037/a0021713.

18 Grisso T. (1988).

19 Raffard, S., Capdevielle, D., Boulenger, J. P., Gely-Nargeot, M. C., & Bayard, S. (2014). Can individuals with schizophrenia be instructed to deliberately feign memory deficits? *Cognitive Neuropsychiatry*, 19(5), 414-426.

20 Bianchini, K. J., Greve, K. W., & Love, J. M. (2003). Definite malingered neurocognitive dysfunction in moderate/severe traumatic brain injury. *The Clinical Neuropsychologist*, 17(4), 574-580. http://dx.doi.org/10.1076/clin.17.4.574.27946. Sweet, J. & Giuffre Meyer, D. (2011). Well-documented, serious brain dysfunction followed by malingering. In J. E. Morgan, I. S. Baron, J.H. Ricker (Eds.). *Casebook of clinical neuropsychology* (pp 200-212). New York, NY: Oxford University Press.

21 Everington, C., Notario-Smull, H., & Horton, M. L. (2007). Can defendants with mental retardation successfully fake their performance on a test of competence to stand trial? *Behavioral Sciences & the Law*, 25(4), 545-560. DOI: 10.1002/bsl.735

22 Pirelli, Gottdiener, and Zapf (2011).

23 Rubenzer, S. J. (in press).

24 Nicholson, R. A., & Kugler, K. E. (1991). Competent and incompetent criminal defendants: A quantitative review of comparative research. *Psychological Bulletin*, 109(3), 355-370. http://dx.doi.org/10.1037/0033-2909.109.3.355

and below, there is a low likelihood of competence or the capacity of being educated into competence.[25]

Feigning can take many forms, some of which have not been previously emphasized in the professional literature.[26] These are shown in Table 1.

Table 1

Types of Invalid Responding in CST Evaluations

Feigned Presentation	*Mean*
Feigned ignorance of the court system	17.2%
Feigned amnesia for offense	14.6%
Feigned or exaggerated intellectual limitations	14.5%
Feigned memory problems (NOT amnesia for offense)	12.8%
Feigned hallucinations	10.5%
Feigned depression	10.2%
Feigned anxiety or PTSD	8.2%
Feigned demeanor[a]	7.5%
Feigned paranoia	6.7%
Feigned/exaggerated medical issues[b]	4.3%
Feigned agitation/mania	2.3%
Feigned disorganized speech	1.7%
Other feigned presentation (not listed above)	1.6%
ANY kind of feigning (all previous styles)	24.1%
Factitious disorder	1.2%
Somatoform or conversion disorder	1.9%
Lack of cooperation WITHOUT malingering, factitious or somatoform d/o	8.7%

Notes. [a]E.g., helplessness, vulnerability, child-like demeanor, speech impediment. [b]E.g., unneeded cane, wheelchair, oxygen tank, etc.

These various presentations can present in multiple combinations. Unsophisticated defendants often fake multiple issues and conditions, including psychosis, amnesia for the crime, intellectual limitations, and ignorance of the court system. More sophisticated malingerers will often portray a more specific condition, such as dementia or severe depression. One such defendant passed two validity tests and had a credible treatment history of depression, but was shown to have defended himself in another legal matter during the time he was allegedly incompetent.

There is a myth among less sophisticated examiners that malingers are a pretty dull lot and easy to catch. This may be true of the feigners they have caught, but this may be a small fraction of those they encountered. As in most endeavors, it is a mistake to underestimate one's opponent.

Means of Assessing Negative Response Bias

Some examinees will give such dramatic or implausible answers in the interview that one should immediately question their motivation. For example, a few defendants will claim not to know their age, birthdate, the colors in the American flag, or the role of their lawyer. They may report hearing voices all the time and that they have done so all their lives. Such answers are red flags, absent a compelling explanation (e.g., a defendant is an immigrant from a country in which birth records were lost). However, most examinees will be more subtle. There are a few behavioral clues to feigning that have been supported in multiple studies, as shown in Table 2.

Table 2

Behavioral Indicators of Feigning

- Endorses bogus/unusual symptoms
- Positive but no negative symptoms[a]
- Unusual combinations of symptoms
- Very slow performance
- Inconsistent performance on similar tasks[b]
- Exaggerated behavior[c]
- Fails very easy items
- Gives improbable answers

Notes. [a]"Positive symptoms" include hearing voices and delusions, while negative symptoms are problems with initiative and emotional reactivity. [b]For example, an examinee may perform poorly on a formal test of attention or memory, but not show such deficits during the interview. [c]Some malingerers grossly over-act, such as ducking and cowering from alleged hallucinations.

Validity Testing

Validity testing refers to instruments and procedures designed to assess whether the examinee is presenting in a reliable, valid manner. There are two basic types of validity tests: Those that rely on the examinee's answers when asked about symptoms and problems, and those that rely on

[25] Rubenzer, S. J. (in press).
[26] Rubenzer, S. J. (in press).

examinee's *performance* on motor, cognitive or knowledge tasks.

Symptom Report Tests

Many readers may already be familiar with the *Minnesota Multiphasic Personality Inventory-2* (MMPI-2),[27] which is a 567-item true-false questionnaire about psychiatric symptoms. There is also a newer version, the *MMPI-2-Restructured Form* (MMPI-2-RF),[28] which is over 200 items shorter and contains other changes from the prior version. Both MMPI-2 editions are bristling with response style scales that detect inconsistent responding, over-reporting, exaggeration, and defensiveness.

On both tests, the first order of business is to determine if the examinee responded consistently and meaningfully. This is assessed through the consistency scales. Most scores on the MMPI and other similar tests are expressed as T scores, which have an average of 50 in the general population. A score of 70 is quite high, typically at about the 98th percentile, while 80 is >99th percentile. Scores above 80 on the consistency scales invalidate the rest of the test.

On the MMPI-2, the primary "fake bad" scales of interest are the *Infrequency* scale, often labeled simply "F," and the *Infrequency Psychopathology* scale. The F scale is composed of items that are rarely answered in the scored direction by people without psychiatric problems. They include reporting odd beliefs, behaviors, and experiences. Very high scores (T score >120) invalidate the rest of the test.

Lawyers should be aware that all these scores exist and may have been considered by the examiner, even if they do not appear in the written report.

Table 3

MMPI-2-RF Fake Bad Validity Index Cutoff Scores

Index	Domain(s) of Over-Reporting	Interpretive Rule	Interpretation(s)
Infrequency (F-r)	Unusual experiences	≥120	Invalid
		79-119	Possible over-reporting
Infrequency Psychopathology (Fp-r)	Symptoms rare among psychiatric patients	≥100	Invalid
		70-99	Possible over-reporting
Infrequency Somatic (Fs)	Unusual bodily and neurological symptoms	≥100	Scores on somatic scales may be invalid
		80-99	Possible over-reporting on somatic scales
Symptom Validity Scale (SVS/FBS-r)	Unusual bodily, neurological, and cognitive symptoms	≥100	Some scales may be invalid
		80-99	Possible over-reporting on some scales
Response Bias Scale (RBS)	Unusual cognitive symptoms	≥100	

Note. All scores listed are T scores, which have an popluation average of 50.

[27] Butcher, J. N., Graham, J. R., Ben-Porath, Y. S., Tellegen, A., & Dahlstrom, W. G. (2001). *Minnesota Multiphasic Personality Inventory–2 (MMPI-2): Manual for administration and scoring* (Rev. ed.). Minneapolis: University of Minnesota Press.

[28] Ben-Porath, Y. S., & Tellegen, A. (2008). *Minnesota Multiphasic Personality Inventory–2 Restructured Form: Manual for administration, scoring, and interpretation*. Minneapolis, MN: University of Minnesota Press. http://dx.doi.org/10.1002/9780470479216.corpsy0573

Table 4

Validity Scales on the Personality Assessment Inventory

Scale	Content	Cut off Score	Interpretation
Negative Impression Management (PIM)	Unusual symptoms	≥77	Probable exaggeration
		≥100	Definite exaggeration
Malingering Index (MI)	Unusual combinations of symptoms	≥3	Probable exaggeration
		≥4	Definite exaggeration
Negative Distortion Scale (NDS)	Symptoms rarely endorsed by psychiatric patients	≥19	Very likely exaggeration

Note. All scores listed are T scores, which have an popluation average of 50.

Because psychiatric patients tend to endorse more of these items than "normals," another scale was subsequently developed to better distinguish true from exaggerated psychiatric symptoms. It is referred to as the *Psychopathology Infrequency* scale, often denoted as "Fp." It is not much elevated by any known mental illness, and scores > 100 are strong evidence of feigning or exaggeration. The MMPI-2 has a half dozen more response style scales, although they are not all scored by the primary vender.

On the MMPI-2-RF, there are five scales devoted to over-reporting in three distinct domains: Psychiatric symptoms, bodily and neurological complaints (e.g., pains, feelings of weakness, dizziness, blackouts), and cognitive complaints (reports of poor concentration and memory; see Table 3). The Infrequency and Psychopathology Infrequency scales were refined and carried over to the MMPI-2-RF, and are distinguished from their MMPI-2 counterparts by appending "-r" to their labels (e.g.: F-r). All the scales in Table 3 are scored by the official vendor, so the MMPI-2-RF assesses a broader range of exaggerated presentations.

Lawyers should be aware that all these scores exist and *may have been considered by the examiner*, even if they do not appear in the written report. Psychologists may be reluctant to include them for various reasons, and even if contacted by an attorney, may decline to release them without a release from the examinee. They may be more agreeable to releasing them to a psychologist designated by the prosecutor. This can lead to discovery of scores that were not interpreted in the standard manner or over-interpreted. For example, although cutoff scores are given for validity scales to indicate probable exaggeration, they are quite conservative. Suppose an examinee obtained high scores on multiple validity scales, but none quite exceeded the cutoff score? While a conscientious examiner might be cautious in describing the meaning of this data, a conclusion of "no evidence of feigning or exaggeration" would not be accurate.

A competitor of the MMPI-2/RF is the *Personality Assessment Inventory*,[29] which is 344 items long but its items are answered on a four-point scale, from *False, not at all true to Very True*. The PAI also has three strong validity indices shown in Table 4.

The Negative Distortion Scale is new and has been shown to be superior to the two more established indices in three recent studies,[30] but is not scored by the publisher/vendor.

A final self-report validity test is the *Structured Inventory of Malingered Symptoms*,[31] a 75-item self-report inventory. Billed and researched primarily as a screening test, very high scores (e.g. > 40) can nonetheless serve as evidence of

[29] Morey, L. C. (1991). *Personality Assessment Inventory* (PAI). Lutz, FL: Psychological Assessment Resources.

[30] Mogge, N. L., Lepage, J. S., Bell, T., & Ragatz, L. (2010). The Negative Distortion Scale: A new PAI validity scale. *Journal of Forensic Psychiatry & Psychology*, 21(1), 77-90. http://dx.doi.org/10.1080/14789940903174253. Thomas, K. M., Hopwood, C. J., Orlando, M. J., Weathers, F. W., & McDevitt-Murphy, M. E. (2012). Detecting feigned PTSD using the Personality Assessment Inventory. *Psychological Injury and Law*, 5(3-4), 192-201. http://dx.doi.org/10.1007/s12207-011-9111-6. Rogers, R., Gillard, N. D., Wooley, C. N., & Kelsey, K. R. (2013). Cross-validation of the PAI Negative Distortion Scale for feigned mental disorders: A research report. *Assessment*, 20(1), 36-42. http://dx.doi.org/10.1177/1073191112451493.

[31] Widows, M. R., & Smith, G. P. (2005). SIMS: *Structured Inventory of Malingered Symptomatology: Professional Manual*. Lutz, FL: Psychological Assessment Resources.

feigning, both regarding traditional mental illness symptoms and cognitive issues such as memory complaints.

All these inventories are less frequently used by examiners outside of state hospitals, as the examinee must be supervised and the MMPI and PAI require from 45 minutes to over two hours to complete. Self-report tests should NEVER be given to the examinee to take home or to complete without supervision. An examiner that does so violates ethical proscriptions regarding test use and maintaining test security.[32]

Examiners who do not work in a hospital setting will usually employ one of several structured interviews. These resemble tests like the MMPI-2, but the items are read to the examinee and the examiner records and scores each response, and some observations are also recorded and scored. The *Structured Inventory of Reported Symptoms* (SIRS)[33] was introduced in 1992 and quickly became identified as the gold standard of malingering measures after initial, very promising results in forensic samples. Using standardized scoring and interpretive rules, it is able to identify about half of feigners with a fairly low false positive rate (about 5%).[34] It was recently updated and revised[35] after findings that it was prone to false positive errors in some samples, such as examinees with intellectual disabilities or dissociative disorders. Dissociative disorder are conditions that lack the normal continuity of memory and experience, as reported in patients with multiple personality disorder. New interpretive rules and categories were added, which did reduce false positives in problematic groups, but also significantly reduced sensitivity — the ability to successfully detect feigning.[36] Combined with some other problems,[37] the SIRS-2 has not achieved the gold standard status claimed by and often granted its predecessor. Still, it provides solid evidence of feigning and is the recommended instrument for intellectually disabled and dissociative patients suspected of feigning or exaggerating psychiatric symptoms.[38]

The *Miller Forensic Assessment of Symptom Test* (M-FAST)[39] is marketed as a screening test, quite possibly to avoid direct competition with the SIRS, with whom it shares the same publisher. As a screening test, its role would be to identify possible feigners for further evaluation. However, several authors pointed out that by simply using a higher cutoff score (e.g., >11), the M-FAST can provide substantial evi-

Combined with some other problems,[37] the SIRS-2 has not achieved the gold standard status claimed by and often granted its predecessor. Still, it provides solid evidence of feigning and is the recommended instrument for intellectually disabled and dissociative patients suspected of feigning or exaggerating psychiatric symptoms.[38]

32 American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist*, 57(12), 1060-1073.

33 Rogers, R., Bagby, R. M., & Dickens, S. E. (1992). *Structured Interview of Reported Symptoms (SIRS) and professional manual*. Lutz, FL: Psychological Assessment Resources, Inc.

34 Green, D., & Rosenfeld, B. (2011). Evaluating the gold standard: A review and meta-analysis of the Structured Interview of Reported Symptoms. *Psychological Assessment*, 23(1), 95-107. http://dx.doi.org/10.1037/a0021149

35 Rogers, R., Sewell, K. W., & Gilliard, N. (2010). *Structured Interview of Reported Symptoms-2 and professional manual*. Odessa, FL: Psychological Assessment Resources.

36 Brand, B. L., Tursich, M., Tzall, D., Loewenstein, R. J. (2014). Utility of the SIRS-2 in distinguishing genuine from simulated dissociative identity disorder. *Psychological Trauma: Theory, Research, Practice, and Policy*, 6(4), 308-317.http://dx.doi.org/10.1037/a0036064 DeClue, G. (2011). Harry Potter and the Structured Interview of Reported Symptoms? *Open Access Journal of Forensic Psychology*, 3, 1-18. Green, D., Rosenfeld, B., & Belfi, B. (2013). New and improved? A comparison of the original and revised versions of the Structured Interview of Reported Symptoms. *Assessment,* 20(2), 210-218. http://dx.doi.org/10.1177/1073191112464389 Green, D., Rosenfeld, B., & Belfi, B. (2013). New and improved? A comparison of the original and revised versions of the Structured Interview of Reported Symptoms. *Assessment,* 20(2), 210-218. http://dx.doi.org/10.1177/1073191112464389. Tarescavage, A. M., & Glassmire, D. M. (2016, April 14). Differences between Structured Interview of Reported Symptoms (SIRS) and SIRS-2 sensitivity estimates among forensic Inpatients: A criterion groups comparison. *Law and Human Behavior*. Advance online publication. http://dx.doi.org/10.1037/lhb0000191

37 Rubenzer, S. J. (2010). Review of the Structured Inventory of Reported Symptoms-2. *Open Access Journal of Forensic Psychology*, 2, 273-286. DeClue, G. (2011). Harry Potter and the Structured Interview of Reported Symptoms? *Open Access Journal of Forensic Psychology*, 3, 1-18.

38 Rubenzer, S. J. (in press).

39 Miller, H. A. (2001). *M-Fast: Miller Forensic Assessment of Symptoms Test professional manual*. Odessa, FL: Psychological Assessment Resources.

dence of over-reporting/exaggeration.[40] It is roughly one seventh the length of the SIRS/SIRS-2, is much quicker to score (1 minute vs. 20), and thus offers a huge advantage in terms of time efficiency. This is an important consideration, as CST exams are often poorly compensated.

Performance Validity Tests (PVTs)

These tests require the examinee to "do" something, such as remember pictures or words, then provide answers that are objectively right or wrong. Memory testing is a common approach. There is a considerable range of tests available in this domain, so I will discuss the most common, and summarize others in Table 4.

One of the earliest, quickest, and most commonly used performance validity tests (PVT) is the *Rey 15 Item Test*. It takes about one minute and is presented a memory task. It is actually quite easy, so most examinees can correctly recall at least 8 of the 15 items. However, very low functioning examinees, such as with intellectual disabilities, severe head injuries, or dementia may fail.[41] Similarly, because it is quite easy, some examinees may either perceive it as a validity test or pass it even though they exert little effort. The Rey has been cited as a test that could be unethically used as evidence of good effort by biased witnesses:[42] Because of its low sensitivity, passing it is not evidence that the person performed to the best of their ability.

The *Test of Memory Malingering* is probably the most widely used PVT in CST exams at the present.[43] It consists of several booklets of line drawings, all of common objects. The examinee is shown the pictures and then tested for their memory. In the most-researched version of the test, the examinee is shown the pictures twice and then tested for recall immediately after each presentation. The most common criterion is a score below 45 correct on Trial 2. Recent research suggests this is an overly conservative criterion for most examinees, and that a considerably higher cut off score might strike a better balance of sensitivity and specificity.[44] As is, the TOMM is less sensitive (less likely to detect feigning) than several other modern PVTs,[45] and because it is so widely used, there is a risk that it has been compromised through internet articles and frequent exposure to defendants. Some repeat offenders may have seen their competency reports in which TOMM results were

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[40] Boone, K. B. (2013). Clinical practice of forensic neuropsychology: An evidence-based approach. New York, NY: Guilford Press. Frederick, R. I. (2011). *Clinical assessment of malingering and deception*. American Academy of Forensic Psychology workshop, presented July, 2011, Portland, OR. Gaines, M.V. (2009). *An examination of the combined use of the PAI and the M-FAST in detecting malingering among inmates* (Doctoral dissertation, Texas Tech University). http://dx.doi.org/2346/10347. Glassmire, D. M., Tarescavage, A. M., & Gottfried, E. D. (2016). Likelihood of obtaining Structured Interview of Reported Symptoms (SIRS) and SIRS-2 elevations among forensic psychiatric inpatients with screening elevations on the Miller Forensic Assessment of Symptoms Test. *Psychological Assessment*, 28(12), 1586-1596. http://dx.doi.org/10.1037/pas0000289. Tarescavage, A. M., & Glassmire, D. M. (2016, April 14). Differences between Structured Interview of Reported Symptoms (SIRS) and SIRS-2 sensitivity estimates among forensic Inpatients: A criterion groups comparison. *Law and Human Behavior*. Advance online publication. http://dx.doi.org/10.1037/lhb0000191

[41] Reznek, L. (2005). The Rey 15-item memory test for malingering: A meta-analysis. *Brain Injury,* 19(7), 539-543. http://dx.doi.org/10.1080/02699050400005242

[42] Vallabhajosula, B., & Van Gorp, W. G. (2001). Post-Daubert admissibility of scientific evidence on malingering of cognitive deficits. *Journal of the American Academy of Psychiatry and the Law Online*, 29(2), 207-215.

[43] Rubenzer, S. J. (in press)

[44] Greve, K. W., Bianchini, K. J., & Doane, B. M. (2006). Classification accuracy of the Test of Memory Malingering in traumatic brain injury: Results of a known group analysis. *Journal of Clinical and Experimental Neuropsychology*, 28, 1176–1190. Mossman, D., Wygant, D. B., & Gervais, R. O. & Hart, K. J. (2017). Trial 1 vs. Trial 2 of the Test of Memory Malingering: Evaluating accuracy without a "gold standard." (January 3, 2017). *Psychological Assessment*, Forthcoming. Smith, K., Boone, K., Victor, T., Miora, D., Cottingham, M., Ziegler, E., ... & Wright, M. (2014). Comparison of credible patients of very low intelligence and non-credible patients on neurocognitive performance validity indicators. *The Clinical Neuropsychologist,* 28(6), 1048-1070. http://dx.doi.org/10.1080/13854046.2014.931465. Stenclik, J. H., Miele, A. S., Silk-Eglit, G., Lynch, J. K., & McCaffrey, R. J. (2013). Can the sensitivity and specificity of the TOMM be increased with differential cutoff scores?. *Applied Neuropsychology: Adult*, 20(4), 243-248.

[45] Armistead-Jehle, P., & Gervais, R. O. (2011). Sensitivity of the Test of Memory Malingering and the Nonverbal Medical Symptom Validity Test: A replication study. *Applied Neuropsychology*, 18(4), 284-290. http://dx.doi.org/10.1080/09084282.2011.595455. Gervais, R. O., Rohling M. L., Green, P., & Ford, W. (2004). A comparison of WMT, CARB, and TOMM failure rates in non-head injury disability claimants. *Archives of Clinical Neuropsychology*, 19(4), 475-487. http://dx.doi.org/10.1016/j.acn.2003.05.001. Mossman, D., Wygant, D. B., & Gervais, R. O. (2012). Estimating the accuracy of neurocognitive effort measures in the absence of a "gold standard". Psychological Assessment, 24(4), 815-822. http://dx.doi.org/10.1037/a0028195. Green, P. (2011). Comparison between the Test of Memory Malingering (TOMM) and the Nonverbal Medical Symptom Validity Test (NV-MSVT) in adults with disability claims. *Applied Neuropsychology*, 18(1), 18-26. Mossman, D., Wygant, D. B., & Gervais, R. O. (2012). Estimating the accuracy of neurocognitive effort measures in the absence of a "gold standard". *Psychological Assessment*, 24(4), 815-822. http://dx.doi.org/10.1037/a0028195. Mossman, D., Wygant, D. B., & Gervais, R. O. & Hart, K. J. (in press). Trial 1 vs. Trial 2 of the Test of Memory Malingering: Evaluating accuracy without a "gold standard." *Psychological Assessment*. Mossman, D., Wygant, D. B., & Gervais, R. O. & Hart, K. J. (in press). Trial 1 vs. Trial 2 of the Test of Memory Malingering: Evaluating accuracy without a "gold standard." *Psychological Assessment*. Tan, J. E., Slick, D. J., Strauss, E., & Hultsch, D. F. (2002). How'd they do it? Malingering strategies on symptom validity tests. *The Clinical Neuropsychologist*, 16(4), 495-505. http://dx.doi.org/10.1076/clin.16.4.495.13909 Tan, J. E., Slick, D. J., Strauss, E., & Hultsch, D. F. (2002). How'd they do it? Malingering strategies on symptom validity tests. *The Clinical Neuropsychologist*, 16(4), 495-505. http://dx.doi.org/10.1076/clin.16.4.495.13909. Whitney, K. A. (2013). Predicting Test of Memory Malingering and Medical Symptom Validity Test failure within a Veterans Affairs Medical Center: Use of the Response Bias Scale and the Henry–Heilbronner Index. *Archives of Clinical Neuropsychology,* 28(3), 222-235. http://dx.doi.org/10.1093/arclin/act012.

Table 5

Some PVTs That May be Used in CST Exams

Test	Description	Strengths	Weaknesses
Rey 15 Item Test	Subject is shown 15 numbers, letters, and designs; then asked to write them	Very fast, free; Good validity if true cognitive impairment can be ruled out	Too hard for cognitively impaired, limited sensitivity
TOMM	Subject is shown 50 pictures and asked to identify those that were seen	Well-researched, widely accepted	Limited sensitivity, widely exposed; truly impaired may fail
Dot Counting Test	Subject counts groups of dots, either scattered randomly or in orderly groups	Inexpensive, brief	Low sensitivity, too hard for some examinees
Reliable Digit Span	Subject attempts to remember strings of digits, saying them back to the examiner or in reverse order	Free, brief	Low sensitivity, too hard for some examinees
Validity Indicator Profile (Verbal subtest)	Forced choice vocabulary test	Assesses an aspect of intelligence; uses subject's own performance as index of effort	Expensive, too hard for some examinees
Validity Indicator Profile (Nonverbal subtest)	Forced choice puzzle solving test	Same as above	Expensive, too hard for some examinees; mentally demanding
Word Memory Test	Multifaceted memory test (verbal)	Highly sensitive, internal validity checks; suitable for mild ID; yields useful memory scores	Relatively long
Medical Symptom Validity Test	Multifaceted memory test (verbal)	Internal validity checks; suitable for mild ID; yields useful memory scores; brief	May be transparent as a validity test to brighter examinees
Nonverbal Medical Symptoms Validity Test	Multifaceted memory test for pictures	Outstanding internal validity checks; suitable for mild ID; yields useful memory scores; brief	Relatively little data in psychiatric and ID samples; not widely used by CST examiners

used to conclude they were faking, and are not likely to be fooled again. For these reasons, passing a TOMM is often not strong evidence of genuine responding.

Examinees with severe cognitive impairment may legitimately obtain scores below the TOMM cutoff scores. Recommended cutoff scores for examinees with intellectual disabilities have varied widely (from <35 to <45),[46] which is problematic. Unlike some recently developed PVTs, the TOMM does not have any internal validity checks to distinguish very low ability for poor effort: Either can produce failing scores and they cannot be reliably distinguished in most cases.

However, it is possible to score so low on the TOMM, and many other such tests, that deficient ability alone can

[46] Ray, C. L. (2012). Assessment of feigned cognitive impairment: A cautious approach to the use of the Test of Memory Malingering for individuals with intellectual disability. *Open Access Journal of Forensic Psychology*, 4, 24-50.

be ruled out. Many PVTs (although not the Rey 15 Item Test) require the test-taker to choose among two response options. For a 50-item test with two possible answers per question, even someone with no memory or mental capacity of any sort (other than to be able to point to their choice) should get approximately 25 correct just by guessing. Scores that are *significantly* below 25 suggest the person knew the correct answer and intentionally chose the wrong one. This is the strongest evidence of malingering that a test can provide. Unfortunately, few feigners will score below chance.[47]

Most PVTs reach their limits with intellectually disabled defendants or those who are demented. Such test-takers may lack the mental capacity to complete even very easy cognitive tasks, and most PVTs cannot distinguish very poor ability from poor effort. However, several PVTs from the neuropsychological literature can in some cases.[48] These include the Word Memory Test,[49] the Medical Symptom Validity Test,[50] and the Non-Verbal Medical Symptoms Validity Test.[51] They work by comparing the examinee's performance on tasks that vary in difficulty — some that are very easy, and some that appear easy but are actually harder than they look. Examinees with very compromised abilities should score best on the easiest tasks, worse on the harder ones. Malingerers often do not.

The Inventory of Legal Knowledge (ILK)[52]

The ILK is a recently published validity test that attempts to assess if the examinee is falsely portraying ignorance of the court system — a common strategy. Despite its recent arrival, it had already achieved widespread use by December 2012.[53] The ILK consists of 61 true-false question about the court system, and it is reported to correlate substantially with other PVTs such as the TOMM.[54] However, the ILK is vulnerable to high false positives among intellectually disabled examinees[55] and those that are truly incompetent.[56] The manual reported that among a small sample of 17 incompetent defendants, 82% scored below the recommended cutoff score of 46.[57] Thus, the ILK alone cannot adequately distinguish between real and feigned incompetence, unless the score is significantly below chance, which is a major limitation.

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Tests have taken center stage in assessing negative response bias. However, their effectiveness relies largely on two factors: That they are not perceived to be malingering tests, and that their rationale and scoring rules are not known to the examinee. Psychologists are expected to list tests used in their assessment, and there is information available on the internet about validity tests. Further, attorneys may coach clients undergoing CST assessment about valid-

47 Greve, K. W., Binder, L. M., & Bianchini, K. J. (2009). Rates of below-chance performance in forced-choice symptom validity tests. The Clinical Neuropsychologist, 23(3), 534-544. http://dx.doi.org/10.1080/13854040802232690

48 Green, P., & Flaro, L. (2015). Results from three performance validity tests (PVTs) in adults with intellectual deficits. *Applied Neuropsychology: Adult*, 22(4), 293-303. http://dx.doi.org/10.1080/23279095.2014.925903. Green, P., & Flaro, L. (2016). Results from three performance validity tests in children with intellectual disability. *Applied Neuropsychology: Child*, 5(1), 25-34. http://dx.doi.org/10.1080/21622965.2014.935378.

49 Green, P. (2005). *Green's Word Memory Test user's manual*. Edmonton: Green's Publishing, Inc.

50 Green, P. (2004). *Manual for the Medical Symptom Validity Test for Windows*. Edmonton, Alberta, Canada: Green's Publishing.

51 Green, P. (2008). *Manual for the Nonverbal Medical Symptom Validity Test for Windows*. Edmonton, Alberta, Canada: Green's Publishing.

52 Otto, R. K., Musick, J. E., & Sherrod, C. B. (2010). *Inventory of Legal Knowledge professional manual*. Lutz, FL: Psychological Assessment Resources, Inc.

53 Rubenzer, S. J. (in press).

54 Otto, R. K., Musick, J. E., & Sherrod, C. B. (2010).

55 Gottfried, E., & Carbonell, J. (2014). The role of intelligence on performance on the Inventory of Legal Knowledge (ILK). *The Journal of Forensic Psychiatry & Psychology*, 25(4), 380-396. http://dx.doi.org/10.1080/14789949.2014.920900. Watson, M. E. & Kivisto, A. J. (2017). The Inventory of Legal Knowledge (ILK) and adults with intellectual disabilities. *Journal of Intellectual Disabilities and Offending Behaviour,* 8(2),

56 Rubenzer, S. J. (2011). Review of the Inventory of Legal Knowledge. *Open Access Journal of Forensic Psychology*, 3, 70-81.

57 Rubenzer, S. J. (2011).

ity tests and how to respond to them.[58] Because of this, and their ethical obligation to preserve test security, psychologists should resist disclosure of test manuals to non-psychologists. Instead, disclosure to a psychologist retained by the defense attorney is preferable. If a court rules that test materials be turned over to the defense, an order that requires return of the materials at the end of the case, and forbids reproduction or distribution, should be sought.

Collateral Data

CST examiners usually have access to the police report and often, the defendant's criminal history. If the defendant has a psychiatric history, the examiner will want to review at least the most recent records. If the defendant presents as intellectually compromised, school records can be sought, although these are usually not retained by school districts after seven years.

The range of potential sources is very broad, and might include family members, treatment providers, jail staff, the arresting officer, probation or parole officers, and prior evaluations. If a defendant is in custody, it is often desirable to speak to jail security staff, as they observe the defendants over many hours and occasions. In contrast, meetings with a nurse or physician at the jail may be brief, infrequent, and an opportunity for the defendant to falsely present a MH issue. In *US v. Gigante*,[59] observations by a corrections officer and nurse were apparently more credible to the judge than some very respected professionals' opinions.

Prior evaluations, particularly by government agencies like the Social Security Administration and Veterans Administration, may be given substantial credibility. Often, they should not: The Social Security Administration has resisted the use of validity measures, usually does not pay for examiners to administer them, and has described their use "not programmatically useful,"[60] despite evidence of frequent feigning in their clients.[61] Even administrative law judges have reported feeling pressured to approve claims.[63] Veterans Administration evaluations are "uniquely pro-claimant" and pressures discouraging validity assessment among disability claimants have been published,[64] despite high failure rates on validity tests and evidence of malingering.[65] While many VA disability examiners do use response style measures, congress recently allocated $5.8 billion to private evaluation companies that rarely if ever address the possibility of malingering. Thus, representation or even

Most mental health treatment providers cannot be relied on to distinguish real from exaggerated presentations. This is simply not their role and most lack adequate training or motivation to do so.

58 Wetter, M. &. Corrigan, S.. (1995) Providing information to clients about psychological tests: A survey of attorneys' and law students' attitudes. *Professional Psychology: Research and Practice*, 26 (1995), 474-477. Youngjohn, J. R. (1995). Confirmed attorney coaching prior to neuropsychological evaluation. *Assessment*, 2(3), 279-283.

59 *United States v. Gigante*, 982 F. Supp. 140 (E.D.N.Y. 1997).

60 Chafetz, M. D. (2008). Malingering on the social security disability consultative examination: Predictors and base rates. *The Clinical* Neuropsychologist, 22(3), 529-546. http://dx.doi.org/10.1080/13854040701346104. Dunlop, T. (2005). Malingering. [Speech to Administrative Law Judges]. Disability Determination Service, Louisiana, USA. Social Security Administration Program Operations Manual System (2013). DI 22510.006 When not to purchase a consultative examination (CE). Retrieved from https://secure.ssa.gov/apps10/poms.nsf/lnx/0422510006, April 16, 2015. Chafetz, M. (2015). *Intellectual disability: Criminal and civil forensic issues*. New York, NY: Oxford University Press.

61 Chaftez, M. (2008). Chafetz, M., & Underhill, J. (2013). Estimated costs of malingered disability. *Archives of Clinical Neuropsychology*, 28(7), 633-639. http:dx.doi.org/10.1093/arclin/act038

62 Ohlemacher, S. (2013). Judges: Social Security pushes approval of claims. Washington, DC: Associated Press.

63 *Hodge v. West*, 153 F. 3d 1356 (Fed. Cir. 1998).

64 Poyner, G. (2010). Psychological evaluations of veterans claiming PTSD disability with the Department of Veterans Affairs: A clinician's viewpoint. *Psychological Injury and Law*, 3(2), 130-132. http://dx.doi.org/10.1007/s12207-010-9076-x. Russo, A. C. (2014). Assessing veteran symptom validity. *Psychological Injury and Law*, 7(2), 178-190. http://dx.doi.org/10.1007/s12207-014-9190-2. Worthen, M. D., & Moering, R. G. (2011). A practical guide to conducting VA compensation and pension exams for PTSD and other mental disorders. *Psychological Injury and Law*, 4(3-4), 187-216. http://dx.doi.org/10.1007/s12207-011-9115-2

65 Armistead-Jehle, P. (2010). Symptom validity test performance in U.S. veterans referred for evaluation of mild TBI. *Applied Neuropsychology*, 17(1), 52–59. http://dx.doi.org/10.1080/09084280903526182. Burkett, B. G., & Whitley, G. (1998). *Stolen valor: How the Vietnam generation was robbed of its heroes and its history*. Dallas, TX: Verity Press. Freeman, T., Powell, M., & Kimbrell, T. (2008). Measuring symptom exaggeration in veterans with chronic posttraumatic stress disorder. *Psychiatry Research*, 158(3), 374–380. http://dx.doi.org/ 10.1016/j.psychres.2007.04.002.

proof that a defendant is considered disabled by the SSA or VA is not compelling proof of a disabling condition. Further, even legitimate inability to work should not be equated with incapacity to stand trial.

Most mental health treatment providers cannot be relied on to distinguish real from exaggerated presentations. This is simply not their role and most lack adequate training or motivation to do so. In fact, diagnosing a patient as malingering (which is very rare) will likely bring the provider nothing but trouble, including possible complaints to the agency administration and to the state professional board, threats, and loss of income when the patient seeks future treatment elsewhere. One recent study found 42.4% of mental health patients reported having agendas for their MH treatment beyond getting better, while only 9.5% informed their providers of these issues.[66] Finally, even if prior examiners or treatment providers addressed response style, the thoroughness and competence of this effort should be carefully considered and not assumed: Few mental health clinicians are competent in this area.

Mental Health and Veterans Courts have been created to deal with the special needs of these defendants. Because these settings may lead to more favorable treatment than a general criminal court, the possibility of feigning must be considered. While veterans with combat experience do appear to be at greater risk for subsequent legal problems, one should not assume this a result of PTSD. While most veterans have a clean legal history, a substantial number report having gotten in trouble in school for fighting. Soldiers that seek or are selected for infantry and other combat roles may have a higher basal level of aggression than others even prior to any specialized training and combat. Further, episodes of violence may be triggered by use of alcohol, not PTSD-related symptoms, as is the case for many crimes.

Claimed Amnesia

Defendants frequently claim amnesia for the offense.[67] Even legitimate amnesia is not an automatic bar to competence,[68] and often, amnesia is offered as an attempt to reduce responsibility. The most plausible cause for legitimate amnesia during a crime, based on sheer numbers, is heavy use of alcohol or alcohol combined with depressant or sleep-inducing drugs. Confusion following an epileptic seizure is also a plausible cause.[69] Alcohol use is frequently involved in crimes,[70] and it has been estimated that amnesia during a crime is roughly five million times more likely due to alcohol intoxication than to a sleep disorder.[71] While blackouts are usually associated with very high BACs (e.g., .30%),[72] some authors have reported them at BACs as low as .07%.[73] While one might assume that claims of alcohol-induced blackouts could be corroborated by observations of intoxication, some people, presumably chronic alcoholics, can reach very high BACs (e.g., .30) without showing typical signs of intoxication.[74] Blackouts are not uncommon among alcoholics and even samples of students. Most are "partial," in that some memories are encoded and recoverable, while those with a total lack of recall occur about one-third as often.[75]

Amnesia due to dissociation, anger, or other psychological processes is highly controversial, with some authors giv-

66 Van Egmond, J., Kummeling, I., & Balkom, T. (2005). Secondary gain as hidden motive for getting psychiatric treatment. *European Psychiatry*, 20(5-6), 416-421. http://dx.doi.org/10.1016/j.eurpsy.2004.11.012

67 Kopelman, M. D. (1995). The assessment of psychogenic amnesia. In A. D. Baddeley, B. A. Wilson, & F. N. Watts (Eds.), Handbook of memory disorders (pp. 427–448). West-Sussex: Wiley.

68 *Wilson v. United States*, 391 F.2d 460 (1968).

69 Mart, E. G., & Connelly, A. W. (2010). An unusual case of epileptic postictal violence: Implications for criminal responsibility. *Open Access Journal of Forensic Psychology*, 2, 49-58.

70 Bradford, J. M. W., & Smith, S. M. (1979). Amnesia and homicide: The Padola case and a study of thirty cases. *Journal of the American Academy of Psychiatry and the Law Online*, 7(3), 219-231. Evans, J. R., Schreiber Compo, N., & Russano, M. (2009). Intoxicated witnesses and suspects: Procedures and prevalence according to law enforcement. *Psychology, Public Policy, and the Law*, 15(3), 194-221. http://dx.doi.org/10.1037/a0016837.

71 Pressman, M. R., Mahowald, M. W., Schenck, C. H., & Cramer Bornemann, M. (2007). Alcohol induced sleepwalking or confusional arousal as a defense to criminal behavior: A review of scientific evidence, methods, and forensic considerations. *Journal of Sleep Research*, 16(2), 198–212. http://dx.doi.org/10.1111/j.1365-2869.2007.00586.x

72 Hartzler, B., & Fromme, K. (2003). Fragmentary and en bloc blackouts: similarity and distinction among episodes of alcohol-induced memory loss. *Journal of Studies on Alcohol*, 64(4), 547-550. DOI: http://dx.doi.org/10.15288/jsa.2003.64.547. Perry, P. J., Argo, T. R., Barnett, M. J., Liesveld, J. L., Liskow, B., Hernan, J. M., ... & Brabson, M. A. (2006). The association of alcohol–induced blackouts and grayouts to blood alcohol concentrations. *Journal of Forensic Sciences*, 51(4), 896-899. http://dx.doi.org10.1111/j.1556-4029.2006.00161.x/.

73 Hartzler, B. & Fromme, K. (2003).

74 Perper, J. A., Twerski, A., & Wienand, J. W. (1986). Tolerance at high blood alcohol concentrations: A study of 110 cases and review of the literature. *Journal of Forensic Sciences*, 31(1), 212-221. http://dx.doi.org/10.1520/JFS11873J. Rubenzer, S. J. (2011). Judging intoxication. *Behavioral Sciences & the Law*, 29(1), 116-137. http://dx.doi.org/10.1002/bsl.935. Sullivan, J. B., Hauptman, M., & Bronstein, A. C. (1987). Lack of observable intoxication in humans with high plasma alcohol concentrations. *Journal of Forensic Sciences*, 32(6), 1660–1665. http://dx.doi.org/10.1520/JFS11224J. Urso, T., Gavaler, J. S., & Van Thiel, D. H. (1981). Blood ethanol levels in sober alcohol users seen in an emergency room. *Life Sciences*, 28(9), 1053–1056. http://dx.doi.org/10.1016/0024-3205(81)90752-9

75 Pressman, M. R., & Caudill, D. S. (2013). Alcohol–induced blackout as a criminal defense or mitigating factor: An evidence–based review and admissibility as scientific evidence. *Journal of Forensic Sciences*, 58(4), 932-940. http://dx.doi.org/10.1111/1556-4029.12134. White, A. M. (2003). What happened? Alcohol, memory blackouts, and the brain. *Alcohol Research and Health*, 27(2), 186-196.

ing such claims credence,[76] and many others asserting that nearly all amnesia claims pertaining to crimes are feigned.[77] Although such patients diagnosed with dissociative conditions, like multiple personality disorder, often claim to have no memory for events experienced in other personality states, experimental studies show normal levels of memory transfer, retention, and interference with similar material to be remembered.[78] One such defendant I evaluated claimed to have a dissociative disorder and no recollection for the offense. However, she signed papers in her own name, in her regular penmanship, at the time of her arrest, seemingly contradicting her claim.

Often collateral data, such as police reports and videos of the crime scene, can be important in disputing such claims. Validity tests, as described above, can also contribute. Finally, psychologists have developed a method to objectively assess for feigned amnesia of a crime.[79] Briefly, a two-choice alternative knowledge test is created about the crime. Details of the crime should be culled from the police report and other sources. These should be details the defendant would have noticed but claims not to know. The items should be equally plausible to a naïve test-taker, such as, "What weapon did the robber use — a gun or a knife?" A test-taker that scores significantly below chance reveals knowledge of the crime. Conversely, because the procedure has modest sensitivity (typically less than 50%),[80] passing such a test does not rule out feigning.

Bias

Bias in expert witnesses has long been recognized by legal professionals and more recently, investigators of forensic practice.[81] Murrie and colleagues[82] found across 60 clin-

Bias in expert witnesses has long been recognized by legal professionals and more recently, investigators of forensic practice.[81]

76 Bradford & Smith, 1979. Bourget, D., & Whitehurst, L. (2007). Amnesia and crime. *Journal of the American Academy of Psychiatry and the Law Online*, 35(4), 469-480. Kopelman, 1995, 2002. Parwatikar, S. D., Holcomb, W. R., & Menninger, K. A. (1985). The detection of malingered amnesia in accused murderers. *Bulletin of the American Academy of Psychiatry & the Law,* 13(1), 97-103. Pyszora, N. M., Barker, A. F., & Kopelman, M. D. (2003). Amnesia for criminal offences: A study of life sentence prisoners. *The Journal of Forensic Psychiatry,* 14(3), 475-490. http://dx.doi.org/10.1080/14789940310001599785. Pyszora, N. M., Fahy, T., & Kopelman, M. D. (2014). Amnesia for violent offenses: Factors underlying memory loss and recovery. *Journal of the American Academy of Psychiatry and the Law Online*, 42(2), 202-213.

77 Centor, A. (1982). Criminals and amnesia: Comment on Bower. *American Psychologist,* 7(2), 240. http://dx.doi.org/10.1037/0003-066X.37.2.240. Cima, M., Nijman, H., Merckelbach, H., Kremer, K., & Hollnack, S. (2004). Claims of crime-related amnesia in forensic patients. *International Journal of Law and Psychiatry*, 27(3), 215-221. Frederick (2011). Marshall, W. L., Serran, G., Marshall, L. E., & Fernandez, Y. M. (2005). Recovering memories of the offense in" amnesic" sexual offenders. *Sexual Abuse*, 17(1), 31-38. Merckelbach, H., & Christianson, S. A. (2007). Amnesia for homicides as a form of malingering. In S. A. Christianson (Ed.), *Offenders memories of violent crimes* (pp. 165–190). Chichester, England: Wiley. http://dx.doi.org/10.1002/9780470713082.ch7. Ornish, S. A. (2001). A blizzard of lies: Bogus psychiatric defenses. *American Journal of Forensic Psychiatry 22*(1), 19-30. Peters, M. J., van Oorsouw, K. I., Jelicic, M., & Merckelbach, H. (2013). Let's use those tests! Evaluations of crime-related amnesia claims. *Memory*, 21(5), 599-607. http://dx.doi.org/10.1080/09658211.2013.771672.

78 Boysen, G. A., & VanBergen, A. (2014). Simulation of multiple personalities: A review of research comparing diagnosed and simulated dissociative identity disorder. *Clinical Psychology Review*, 34(1), 14-28. http://dx.doi.org/10.1016/j.cpr.2013.10.008

79 Denney, R. L. (1996). Symptom validity testing of remote memory in a criminal forensic setting. *Archives of Clinical Neuropsychology*, 11(7), 589-603. http://dx.doi.org/10.1093/arclin/11.7.589. Frederick, R. I., Carter, M., & Powel, J. (1995). Adapting symptom validity testing to evaluate suspicious complaints of amnesia in medicolegal evaluations. *Bulletin of the American Academy of Psychiatry and the Law,* 23(2), 231-237.

80 Greve, K. W., Binder, L. M., & Bianchini, K. J. (2009). Rates of below-chance performance in forced-choice symptom validity tests. *The Clinical Neuropsychologist*, 23(3), 534-544. http://dx.doi.org/10.1080/13854040802232690

81 Dror, I. E. (2015). Cognitive neuroscience in forensic science: understanding and utilizing the human element. *Philosophical Transactions of Royal Society B*, 370(1674), 20140255. Available on-line at http://rstb.royalsocietypublishing.org/content/370/1674/20140255

82 Murrie, D. C., Boccaccini, M. T., Zapf, P. A., Warren, J. I., & Henderson, C. E. (2008). Clinician variation in findings of competence to stand trial. *Psychology, Public Policy, and Law,* 14(3), 177- 193. http://dx.doi.org/10.1037/a0013578.

icians who conducted a combined total of more than 7,000 CST evaluations, different examiners found widely differing numbers of their examinees incompetent: The figures ranged from 0 to 62%! Recently, over 100 psychologists and psychiatrists were randomly assigned and paid as consultants to score of a measure of dangerousness. Even though they met only 15 minutes with the presumed referring attorney, scores produced on the risk assessment measure depended on whether the examiner thought they were hired by the defense or prosecution, and some of the effects observed were quite large.[83]

While the *Specialty Guideline for Forensic Psychologists* are a bit oblique on the need to assess for feigning, they are clearer regarding issues of bias and distinguishing between facts, inferences, and conclusions:

1.02 Impartiality and Fairness

Forensic practitioners strive for accuracy, impartiality, fairness, and independence. Forensic practitioners recognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.

"Rival hypotheses" means alternative ways of perceiving or interpreting the evidence, such as a defendant reporting he hears voices. Several hypotheses might be considered: 1) That the person is schizophrenic, 2) that the person is withdrawing from alcohol or drugs, or 3) the person is feigning.

9.01 Use of Appropriate Methods

Forensic practitioners seek to maintain integrity by *examining the issue or problem at hand from all reasonable perspectives* and *seek information that will differentially test plausible rival hypotheses*.

9.02 Use of Multiple Sources of Information

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible … When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.

11.02: Differentiating Observations, Inferences, and Conclusions

In their communications, forensic practitioners strive to distinguish observations, inferences, and conclusions. Forensic practitioners are encouraged to explain the relationship between their expert opinions and the legal issues and facts of the case at hand.

Because they are presented as aspirational guidelines, not minimal standards of practice, cross examination may wish to first establish that the expert regards him/herself as a well-credentialed forensic psychologist that practices at the highest level of the profession.

Reports often contain many clues about examiner bias. Some of these include:

- ***Use of the defendant's first name (for adults) rather than a more formal appellation (e.g., Mr. Smith); sympathetic reporting of life events.***

- ***Reporting the defendant's (or other friendly sources') answers about personal history, perceptions, and feelings as if they are facts.*** (E.g., "Ms. X was born in Ann Arbor, MI and sexually abused by her father from the ages of 5 through 12.")

- ***Failure to comment on and fairly consider contradictions between the defendant's accounts and other sources.***

- ***Accepting and reporting the defendant's demeanor and performance at face value and as representative.*** An examinee might project a very different persona during the evaluation than in other settings. I often observed defendants swagger into my office building, then act like a helpless, mistreated puppy during the exam. Such nonverbal behaviors can have a powerful influence on judgments, like competency, that they have no bearing on.[84]

- ***Intermixing observations, facts, and inferences in the body of the report.*** A frequent example is, "Mr. Jones was unable to describe what a plea bargain is and was not able to benefit from tutoring." This is a conclusion, as it provide an interpretation of what was actually observed: Mr. Jones not answering the question. Another variant: "Mr. Jones acknowledged hearing voices and thoughts of suicide." The word "acknowledged" is loaded with additional meanings and suggests the author believes the account. For this reason, I stick to very neutral words such as "reported" and "said" that do not editorialize.

[83] Murrie, D. C., Boccaccini, M. T., Guarnera, L. A., & Rufino, K. A. (2013). Are forensic experts biased by the side that retained them?. *Psychological Science, 24*(10), 1889-1897.

[84] Dror, I. (2015). Keynote Address on the Psychology and Impartiality of Forensic Expert Decision Making, Youtube.

- ***Relying on subjective assessments of truthfulness or good effort.*** There is at best conflicting evidence that psychologists can detect feigning or poor effort without the aid of tests and collateral data.[85] A recent survey of neuropsychologists found the over-whelming majority believed validity testing is more accurate than subjective impressions about effort expended in an exam.[86]

- ***Failure to seek or obtain collateral data, such as offense reports, psychiatric records, or speak with persons familiar with the defendant***—especially those that may contradict the defendant's account or show him or her in a different light. Relying on family members and selective medical records or sources provided by the defense attorney are common.

- ***Failure to consider or sufficient assess the possibility of malingering or poor effort.*** As described earlier, highly respected authors have stated such assessments are necessary since at least 1988.

- ***Use of weak or inappropriate validity tests, or discounting the significance of those that are failed.*** Because many validity tests have set cutoff scores to minimize false positive errors, they sacrifice the ability to catch those that are feigning. To compensate for the stringent cutoff scores, multiple validity tests should typically be used.[87] Sometimes examiners employ validity tests, but rationalize failures as due to depression, fatigue, or pain, none of which are plausible explanations.[88]

- ***Failure to weigh the importance of validity tests failed in a previous evaluation.***

- ***Misrepresenting the meaning of a passed validity test.*** Passing a validity test with low sensitivity is not meaningful, and much less informative than failing the same test.

- ***Equating the presence of a legitimate mental condition with genuine presentation during the exam.*** These are two, entirely separate issues. A person with a mental condition can present genuinely or not, as can one without a mental condition. *The presence of a legitimate mental condition tells you nothing about whether the examinee presented genuinely.*

> Quality CST exams are facilitated when examiners are court-appointed and have adequate time and resources to complete their work.

- ***Allowing the defense attorney or others to remain in the room during testing.*** Doing so violates two important principles: Maintaining standardization of test administration (APA Ethical Code 9.02) and protecting test security (APA Ethical Code 9.11).[89] No tests has been standardized with the examinee's attorney looking over their shoulder.

- ***Offering facile and unsupportable explanations for apparent malingering.*** One defendant I examined was subsequently examined by a defense psychologist, who reported the defendant spoke incoherently throughout a nearly three-hour interview. Phone calls recorded from

85 Rubenzer, S. J. (in press).

86 Green, D., & Rosenfeld, B. (2011). Evaluating the gold standard: A review and meta-analysis of the Structured Interview of Reported Symptoms. *Psychological Assessment*, 23(1), 95-107. http://dx.doi.org/10.1037/a0021149

87 Larrabee, G. J. (2003). Detection of malingering using atypical performance patterns on standard neuropsychological tests. *The Clinical Neuropsychologist*, 17(3), 410–425. http://dx.doi.org/10.1076/clin.17.3.410.18089. Victor, T. L., Boone, K. B., Serpa, J. G., Buehler, J., & Ziegler, E. A. (2009). Interpreting the meaning of multiple symptom validity test failure. *The Clinical Neuropsychologist*, 23(2), 297-313. http://dx.doi.org/10.1080/13854040802232682

88 Green, P. & Merten, T. (2013). Noncredible explanations for noncredible performance on symptom validity test. In D. Carone & S. Bush (Eds.), *Mild traumatic brain injury: Symptom validity assessment and malingering*. New York, NY: Springer.

89 "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code."

the jail revealed him speaking in a completely lucid and rational manner in lengthy conversations with family the week before and after the psychologist's interview. During testimony, the psychologist opined the discrepancy could be due to the defendant's comfort in talking with family vs. the psychologist.

What's a Prosecutor to Do?

Prosecutors should be aware of systemic problems that contribute to poor CST assessments. Quality CST exams are facilitated when examiners are court-appointed and have adequate time and resources to complete their work. Unfortunately, the fee for a CST evaluation, conducted by a certified CST examiner, is as low as $170 in some locales.[90] Examiners often rely on defense attorneys to supply school or medical records, which may be redacted or thinned before being passed on. Even state examiners may have difficulty accessing corrections staff and recorded phone calls, and a defense-retained examiner has little chance of doing so. To the extent that prosecutors can do so and provide such data to examiners, these important sources are more likely to be used. Similarly, court orders that direct the defendant to identify any facilities where psychiatric treatment was obtained (or schools for defendants presenting as intellectually disabled), and direct those facilities to release records to the examiner, are preferable to relying on the defense attorney.

Prosecutors can also improve the quality of CST reports by holding examiners to the standards set out in this article. The available evidence suggests judges have difficulty appraising the relative quality of conflicting reports, and when faced with conflicting professional opinions, overwhelmingly side with the majority.[91] Since examiners often avoid critiquing a colleague's report, prosecutors might consider hiring a separate expert to do so.

Summary

Forensic mental health professionals are expected to assess for possible poor effort or feigning during competency exams. A prominent scholar recommended thirty years ago that such efforts should be triggered by *any* apparent significant impairment in psychiatric or cognitive status or competency to stand trial. Recent data suggest that approximately half of defendants who present as impaired during a CST exam are not presenting genuinely,[92] and my experience in multiple states[93] suggest the actual ratio might be more like 3:1 or even 4:1. Examiners who report impairment but don't assess whether such presentations are legitimate are potentially misleading the Court and should be vigorously challenged. Without such accountability, defendants can falsely claim psychiatric or cognitive impairment and have a good chance of seeing justice delayed or thwarted altogether.

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90 Gowensmith, W. N., Pinals, D. A., & Karas, A. C. (2015). States' standards for training and certifying evaluators of competency to stand trial. *Journal of Forensic Psychology Practice*, 15(4), 295-317. http://dx.doi.org/10.1080/15228932.2015.1046798

91 Gowensmith, W. N., Murrie, D. C., & Boccaccini, M. T. (2012). Field reliability of competence to stand trial opinions: How often do evaluators agree, and what do judges decide when evaluators disagree?. *Law and Human Behavior*, 36(2), 130-139. http://dx.doi.org/10.1037/h0093958.

92 Rubenzer, S. J. (in press).

93 Texas, New Hampshire, and Alabama

The PROSECUTOR

Too Big to Fail

The Lesson from the Nan Patterson Case

BY JAMES M. DEDMAN III

THE OBITUARY for her was simple. It read "Mrs. Prescott, the former Ann Patterson, came to Seattle with her husband after their marriage in St. Paul in 1910. She was born in Washington, D.C."[1] The paragraph about her husband was longer. The total obituary was only four paragraphs and a total of 102 words. There was no mention about her being one of the original Florodora Girls, that she was a silent film star, or that she had been tried three times for murder in the first degree in New York City.

Mrs. Sumner Kimball Prescott was the former Ann Elsbeth Patterson, but she was better known by her stage name of Nan Patterson. The woman whose obituary contained only four paragraphs commanded front page coverage four columns wide on June 5, 1904,[2] when nationally prominent gambler Frank Thomas "Caesar" Young was shot and killed in a horse-drawn carriage with Patterson. The only witness to the shooting was Nan Patterson herself, and she told the police they were talking about Caesar leaving for Europe with his wife. She heard a pistol shot and told the police, "After the [shot] he sank forward and his head dropped into my lap. I reached for the revolver and finally found it in his pocket—in his right-hand pocket". She ended her statement with the observation, "It seemed strange that he could do that, but the entire thing is terribly strange and I do not know what happened."[3]

The physical evidence was inconsistent with Patterson's account of the shooting. The angle of the wound, the gunpowder on Young's coat, and the entry wound suggested a different situation. However, stains on Young's hands appeared to have come from gunpowder, but no stains or gunpowder marks were found on Patterson's hands. The actress was committed to the Tombs without bail to await her fate. Two witnesses would eventually emerge to say they saw Young shoot himself. With the strongest evidence being the confusing angle of the bullet, the New York County District Attorney's office charged her with capital murder.

Her first trial ended with the illness of a juror. The second trial ended when the jury split.[4] The prosecutors decided to try her a third time,[5] relying on expert opinions that the fatal wound could not have happened the way Patterson claimed. By this time the public sentiment had changed from the theory of Patterson's jealous rage[6] to believing that the prosecution was hounding the real victim in the situation.[7] The third trial ended with a hung jury, and District

1 "Mrs. Sumner K. Prescott Dies", *The Seattle Times*, September 11, 1947.
2 ""Caesar" Young, The California Turfman, Slain While Riding In Cab With Actress", *The San Francisco Call*, June 5, 1904.
3 Statement to Police Captain Sweeney as reported in *The San Francisco Call*, ibid.
4 "Nan Patterson", *The Hawaiian Star*, December 23, 1904.
5 "Nan Patterson Will Have A Third Trial", *Oil Review*, February 17, 1905.
6 Patterson, Ada, "The Red Rage of Jealousy", *The Scrap Book, First Section*, Vol. IV (New York 1907) p. 603.
7 "Levy Paints The Other Side Of The Picture--Nan Patterson's Lawyer Holds Prosecutor Rand Up As A Deluder", *The Fairmont West Virginian*, May 1, 1905.

James M. Dedman III retired as Director of Academics of NDAA having spent twenty-eight years training prosecutors for the National College of District Attorneys and NDAA. He is the co-author of 'The Lindbergh Kidnapping Case: A Critical Analysis of the Trial of Bruno Richard Hauptmann" (2016). He served as an Assistant District Attorney General in Memphis, TN.

Attorney William Travers Jerome ordered Patterson released.[8]

Arthur C. Train was an Assistant District Attorney in the Manhattan prosecutor's office during the famous trials of Carlyle Harris and Dr. Robert Buchanan in the 1890s. Train became an author famous for writing about court-themed topics. His observations about the Nan Patterson cases ring true today.

> There will always be some persons who think that every defendant should be convicted and feel aggrieved if he is turned out by the jury. Yet they entirely forget, in their displeasure at the acquittal of a man whom they instinctively 'know' to be guilty, that the jury probably had exactly the same impression, but were obliged under their oaths to acquit because of an insufficiency of evidence.
>
> An excellent illustration of such a case is that of Nan Patterson. She is commonly supposed to have attended, upon the night of her acquittal, a banquet at which one of her lawyers toasted her as 'the guilty girl who beat the case'. Whether she was guilty or not, there is a general impression that she murdered Caesar Young. Yet the writer, who was present throughout the trial, felt at the conclusion of the case that there was a fairly reasonable doubt of her guilt. Even so, the jury disagreed, although the case is usually referred to as an acquittal and a monument to the sentimentality of juries.[9]

What happens when a case that hits the front pages of every major newspaper in the country lands on the prosecutor's desk? Does the office charging policy change because of the notoriety? Is the office charging policy adequate at all? Does the prosecutor use the assets of the office to try a case where there is only probable cause? Would a charging policy of "reasonable probability of conviction" have prevented the Nan Patterson situation in New York?

The West Virginia Bar was harsher on the Patterson prosecutors than Arthur C. Train. In an article entitled "The Prisoner Goes Free, But The Attorneys Are Convicted", the writer states:

> It is the most impressive object lesson we have had in years of the false ideals and vicious methods that obtain among members of the legal profession in the conduct of a criminal case both on the part of the prosecution and the defense.
>
> And first in regard to the prosecution: On the first of the three trials of that case, the attorney representing the State knew that he had all the evidence obtainable or existing to convict the accused; and he must be presumed to have known, as a lawyer, that no jury would be justified in finding a verdict which took the life of the defendant on such evidence, and no prosecutor could justify himself in asking for such a verdict, because her guilt could not be proved beyond a reasonable doubt.
>
> That a disagreement of the jury or an acquittal of the defendant would have been the only probable or proper result in a hundred trials ought to have been discerned on the first trial and accepted by any prosecutor who was fitted for that responsible office either by knowledge of the law or knowledge of his duty as an officer of the law. The evidence against the woman was wholly circumstantial. Nothing more than a hypothesis of guilt was or could be established. And that hypothesis, too, was based on metaphysical, rather than proved facts that pointed to guilt beyond a reasonable doubt.
>
> Nevertheless, the prosecutor, knowing that this was his case after the first trial, determined, not surely in the interest of justice, but to augment his own consequence as an attorney, to gratify his ambition or his spite, or otherwise to take his chances on the life of this feeble woman to enhance his reputation by a possible verdict in his favor, kept this woman languishing in jail for eleven months and subjected her to three severe trials on the same evidence.
>
> The question may be well propounded, whether a prosecutor who is either so deficient in judgment or the moral responsibility that should possess one in such a position, has not, after such conduct demonstrated his unfitness to such an extent as to justify his removal from office.[10]

Nan Patterson was arrested at the scene of the shooting and her attorney filed a Petition for Writ of Habeas Corpus challenging her confinement. In the opinion of New York

[8] "Jerome Frees Nan Patterson—Florodora Actress Released On Motion Of The District Attorney, Who Bitterly Replies To The Critics Of Rand", *The Washington Times*, May 12, 1905.

[9] Train, Arthur C., *Courts and Criminals — The District Attorney Series*, McKinlay Stone & Mackenzie (New York 1912) p. 61.

[10] "The Prisoner Goes Free, But The Attorneys Are Convicted", *The Bar, Official Journal of the West Virginia Bar Association*, v. xii, June-July, 1905, No. 6-7, p 13.

Supreme Court Justice Clarke who dismissed the prisoner's petition, "The affidavit of the officer who took relator into custody does not, in terms, charge the relator with any crime. It simply narrates the circumstances attending the death."[11] Nan Patterson was subsequently charged with the most serious criminal offense which carried the penalty of death. She was tried three times upon not much more than "the circumstances attending the death" of Caesar Young.

The author of the West Virginia Bar article describes the problem in taking a too weak case to trial instead of using official discretion to admit there is no case:

> Is there not, in fact, a shocking misconception of the true relation of a prosecuting attorney to one accused of crime, apparent in the everyday proceedings of our Courts? Is it not the rule rather than the exception that he assumes the guilt of everybody brought before the bar of the Court, forgets that he represents the people of the State, and is presumed to act impartially in the interest only of justice, and proceeds in advance of any evidence to proclaim to the jury the guilt of the accused, and to ask that the extreme penalty of the law be inflicted?
>
> When a public prosecutor thus lays aside the impartiality that should characterize his official action to become a heated partisan seeking only a professional victory, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy, or resentment.
>
> Moreover such a prosecutor is a weak man even in a strong case. It is questionable if he does not help to bring about the defeat of justice if by the manner of his prosecution he gives the jury or any member of it an impression that he is pursuing the accused as the huntsman would pursue a wild beast, simply as game, for thereby he is likely to provoke sympathy fatal to a just decision.[12]

The professionalism issues became more complex when the trial judge, who presided over Patterson's first two trials, shared his opinions about her guilt at the monthly banquet of the Phi Delta Phi Club shortly after Patterson was freed on her own recognizance after the third trial. "Today, in light of the last disagreement, I feel sure that most people are convinced, that a majority of the people believe, that the pistol that killed Caesar Young was held by Nan Patterson, was discharged by her, and was bought by [Patterson's brother-in-law]", Justice Vernon M. Davis told the audience.[13] The Justice became more explicit by adding, "In the second trial before me, the defendant went on the stand, and it was quite obvious that she was telling falsehoods from beginning to end. The very air seemed charged with the fact that she was lying."[14] Davis' comments provoked an editorial response from *The American Lawyer* which noted, "We have no leaning towards either theory. Suffice to state that the course pursued by a Judge who discusses the guilt or innocence of an accused whose case is technically pending is one which can hardly commend itself to thinking members of the profession. It is certainly indiscreet, to say the least."[15] In freeing Patterson from custody and further prosecution, District Attorney Jerome announced, "This case has caused one more step in this country toward trial by newspaper rather than trial by jury. I do not refer to those papers which have merely reported the proceedings, but to those that in their editorial rooms have labored to arouse sympathy for the prisoner with the result of a serious miscarriage of justice."[16]

The cause of the "serious miscarriage of justice" to which Jerome referred was a *New York Times* editorial on May 5, 1905, simply entitled "The Patterson Case". The editorial questioned Jerome's putting Patterson to trial a third time and subjecting the citizens to the expense of that trial after a six to six juror mistrial on the second trial. *The Times* further questioned the tactics of Assistant District Attorney Rand in the trials, particularly the final one. Speaking of Rand, the editorial noted, "He did not prove her guilt—not even by circumstantial evidence. He did not, he could not, prove that she shot Young. He did not prove the purchase of the revolver by anyone who could have supplied it to the prisoner. He proved nothing at all about the purchase of the weapon save by inferences which it would have been dangerous to draw and improper for the jury to entertain. Yet he discoursed to the twelve men in the box as if he had proved the purchase of the pistol by [Patterson's brother-in-law] as if he had excluded all reasonable possibility that any other than the woman under indictment could have shot Young, as if her case were altogether lost and the verdict of conviction certain.

11 People ex rel. Patterson v. Flynn, Warden, 89 N.Y. S. 697, 44 Misc. Rep. 20 (1904).
12 "The Prisoner Goes Free", p 14.
13 "Nan Patterson Held Pistol—Justice Davis", *The New York Times*, May 16, 1905.
14 "Woman Lied Like Veteran", *The New York Times*, May 9, 1905
15 "Coram Nobis", *The American Lawyer*, vol. XIII, no. 6 (June 1905) *See* Cynthia Gray, "Ethical Standards for Judges", American Judicature Society, 1999 p 18.
16 "Nan Patterson Given Freedom", *The New York Times,* May 9, 1905.

Commenting upon the refusal of the defense to put the prisoner on the stand, he declared that silence is confession. Silence is not confession, and his saying so was claptrap. Assistant District Attorneys in New York County ought to be above the use of claptrap in murder trials." The editorial ended with the question, "Do reputable lawyers want to influence a murder trial improperly?"[17]

Will the public understand why a prosecutor dismisses a sensational case that cannot be proved beyond a reasonable doubt, or should that prosecutor let the weak case play out

The NDAA Standards are a good beginning point for the resolution of some of the most troubling decisions a prosecutor has to make.

in front of the public and have the public form an opinion of the prosecutor's office from that experience? *The Times* editorial and the public celebration upon Patterson's release may serve as an example of case screening which may not have been adequate. George W. Yeandle was a juror on the second trial of Nan Patterson and wrote a letter to the editor of *The New York Times* after Patterson's third trial resulted in a hung jury: "I was a juror in the second trial of Miss Patterson, which unfortunately resulted in a disagreement. I have served as a juror in this city many times, but never saw a more flimsy case made up than this one. Right from the start it was apparent to me that no conviction could be had."[18] The public may have other feelings about sensationalized cases as expressed by New Yorker Charles E. Peny in a letter to *The New York Times*: "The story of Nan Patterson, her relations with Caesar Young, and her possible responsibility for his death is getting to be a nuisance. She was not proved guilty of murder; she is not of mental caliber sufficient to make her an interesting subject for editorial or even reportorial comment. Let us drop the subject."[19]

The NDAA National Prosecution Standards begin with the primary responsibility of the prosecutor.

> 1-1.1 Primary Responsibility
>
> The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

The NDAA Standards are a good beginning point for the resolution of some of the most troubling decisions a prosecutor has to make. A good charging decision is never difficult to explain. A risky charging decision may never have a satisfactory explanation.

We don't know whether Nan Patterson was innocent or whether she did kill Caesar Young out of a jealous rage. What we do know is that her case is a prime example of what can happen to a prosecutor who has not created a firm charging policy that would include a case that would be a national news story for months. We learn from Nan Patterson's trials that no case is too big to fail. Joseph Hodges Choate, perhaps the greatest trial lawyer of the late 1800s and early 1900s explains the duty of the public prosecutor in such a situation in his remarks upon the retirement of William Travers Jerome, the District Attorney in the Nan Patterson cases. Regarding the office of the public prosecutor, Choate states, "It is equally his duty to protect the innocent and to refrain from prosecuting those against whom no sufficient or reasonable proofs can be found. In the course of his duties he sometimes has to stand between an incensed public sentiment, voiced by a clamorous press, and suspected persons against whom no proofs of crime can be produced."[20]

The obituary doesn't mention her trials for murder, her eleven months in jail, her Easter morning in the Tombs in 1905, or the hundreds of front page stories about her all across the world. "Mrs. Ann Elsbeth Prescott, widow of Sumner K. Prescott, Seattle industrialist, died last evening at her home, 3931 Prince St. She was 64 years old."[21]

17 "The Patterson Case", *The New York Times*, May 5, 1905.
18 "Thinks The Case Ought Never To Have Come To Trial", To The Editor of *The New York Times*, May 11, 1905.
19 "Tired Of Nan Patterson", To The Editor of *The New York Times*, June 4, 1905
20 Letter upon retirement of William Travers Jerome, *The New York Times*, May 8, 1909.
21 "Mrs. Sumner K. Prescott Dies", *The Seattle Times*, September 11, 1947

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