



APRI

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*A Prosecutor's Guide
to Psychological
Evaluations
and Competency
Challenges
in Juvenile Court*



Office of Juvenile Justice
and Delinquency Prevention
Office of Justice Programs ♦ U.S. Department of Justice

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This project was supported by Grant Number 2002-MU-MU-0003 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U. S. Department of Justice. This information is offered for educational purposes only and is not legal advice. Points of view or opinions in this publication are those of the authors and do not represent the official position or policies of the United States Department of Justice, the National District Attorneys Association, or the American Prosecutors Research Institute.



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A Prosecutor's Guide to Psychological Evaluations and Competency Challenges in Juvenile Court

September 2006

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INTRODUCTION

Courtrooms have always been the province of lawyers, judges, and juries. Lawyers presented testimony and physical evidence to establish the facts, judges determined the legal issues, and juries brought their life experiences and common sense to bear on issues of credibility and strength of the evidence. Today, dramatic advances in scientific evidence like DNA, blood, hair and fiber analysis have given rise to an increasing use of expert witness testimony. These “hard science” issues are well suited to experts who can make complex scientific phenomena understandable for laypersons.

Less well suited to expert testimony are the so-called “soft sciences,” such as social and behavioral sciences, which are becoming standard fare in courts around the country. In criminal court, for example, eyewitness testimony often elicits a defense “expert” on the fallacies of eyewitness testimony; a confession might prompt a false confession “expert”; and testimony from victims of childhood abuse often brings out memory and suggestibility “experts.” Perhaps no area has seen greater expansion in the use of experts than the area of mental health issues. Once rare, competency and sanity challenges are increasingly used to delay trial or avoid responsibility altogether, especially in juvenile court.

Juvenile court is experiencing the advancing use of experts, particularly mental health professionals. Recent literature now suggests that mental health problems may afflict a large portion of youth in the juvenile justice system, yet the research behind that literature often is “...scarce and methodologically flawed.”¹ More disturbing still is the use of expert testimony to excuse the dangerous and harmful behavior of youth. The purpose of juvenile court is to protect the community, hold offenders accountable, and develop competencies in offenders so that they are bet-

¹ Joseph J. Coccozza and Kathleen R. Skowyra, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST. 3, 6 (2000). Some of the methodological problems listed include “...inconsistent definitions and measurements of mental illness; use of biased, nonrandom samples; reliance on retrospective case report data; and use of non-standardized measurement instruments.” *Id.* at 5.

ter equipped to live crime-free lives.² Relieving or eliminating responsibility through dubious competency challenges and mental defenses is antithetical to the goals of the juvenile justice system.

If juvenile court is to retain its character as a viable alternative to criminal court prosecution, the court must consistently demonstrate a unique ability to protect communities and hold youth accountable, while helping them acquire the skills they need to become productive, responsible adults. The system must demonstrate that it is singularly suited to deliver justice to communities, victims, and juvenile offenders. To accomplish that goal, prosecutors must be knowledgeable about the mental health and competency issues that they will face, including an understanding of the assessment and evaluation tools used by defense experts—particularly their limitations and potential for misuse.

This monograph is divided into three parts, with appendices. Part I covers the basics of psychological evaluations, including a discussion of the Diagnostic and Statistical Manual, the “bible” of mental illness diagnosis. Part II addresses the emerging issue of competency to stand trial and competency to waive *Miranda* rights. Part III addresses preparation for examination of an expert witness. In Appendix I the reader will find a discussion of the Benchmarks of Adolescent Development, essential information for a prosecutor and any expert witness who assesses a juvenile’s behavior. Appendix II is an example of IQ scores in an evaluation report, with a discussion of the significance of the subtest results.

² CAREN HARP, BRINGING BALANCE TO JUVENILE JUSTICE (American Prosecutors Research Institute 2002).

PSYCHOLOGICAL EVALUATIONS AND THE DSM-IV³

One of the most common expert opinion reports a juvenile court prosecutor will see is the report of a mental health evaluation of one or more aspects of the juvenile's (or witness's) psychological makeup. Known by various names such as "psychological report" or "mental health evaluation," this report will be provided to the court in many cases, including many in which no question of sanity or of adjudicative competency is raised. Such reports are appropriate and often useful to the prosecutor when supplied at the dispositional stage of the proceedings. When they are ordered and submitted at the adjudication phase, either to avoid adjudication altogether or to mitigate the juvenile's responsibility, they can be problematic.

Unfortunately, prosecutors (and many judges) simply do not understand enough about how those reports are prepared and what information is found within them to make them meaningful, thus raising the danger that defense attorneys and expert witnesses can manipulate those reports to unfairly benefit the juvenile defendant. It is essential, therefore, for the prosecutor to understand those reports, and the wealth of information they contain, rather than simply turning to the summary and recommendation paragraph and ignoring the remainder of the report. This part of the monograph will review the contents of a typical psychological evaluation, and will examine how a prosecutor can properly contest it and, if needed, profitably use it to the prosecutor's advantage.⁴

³ This chapter was prepared with materials and assistance provided by Dr. Rob Sobo, Psychologist, Chicago, IL and Dr. Steven Shea, Clinical Professor, University of South Carolina School of Medicine.

⁴ For a much more comprehensive treatment of this subject, see JAY ZISKIN AND DAVID FAUST, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (5th ed. 1995, with 1997 and 2000 supplements).

Mental Evaluations and Psychological Reports⁵

When assessing the quality and value of any psychological or neuro-psychiatric⁶ assessment, there are several general questions to keep in mind:

- What are the qualifications of the person performing the evaluation?
- What is the reason for the referral (and therefore, the purpose of the report)?
- What is included in (or noticeably excluded from) the report?
- What is the diagnosis and how was it determined?

This section provides some basic guidelines on what prosecutors should look for in the assessment report. If an assessment does not include the following information, then requests for clarification may be in order.

Basic Qualifications of the Expert

Perhaps the most important consideration in assessing any psychological evaluation is the expert's qualifications. The report must be written by a professional who has the training, appropriate background, licensing, and qualifications both to conduct and to interpret psychological and neuro-psychological assessment tools. A "qualified expert" is one who has a current practice with the appropriate population. An important question is whether the expert is qualified by education and/or experience to conduct the specific kind of evaluation presented. For example, a psychologist whose practice is focused only on adults probably is not qualified to make an assessment of juveniles due to the marked differences in the population's psychological and emotional development. In addition, even a psychologist who works with juveniles is not necessarily appropriate to be involved in a case which requires a certain level of specialization within the field, such as the evaluation and treatment of head-injured juveniles or of sexual victims/perpetrators. Therefore, unless the expert is known to the court, he or she should provide a background which establishes him or her as experienced and appropriate to provide information on the juvenile and the issue referred for evaluation.

⁵ Written by Rob Sobo, Psychologist, Chicago, IL

⁶ A neuro-psychiatric evaluation includes the same mental health evaluation as a psychological evaluation, but adds an assessment of neurological factors, such as possible brain injury, which might have a biological effect on the subject's mental health.

Another important aspect of the expert's qualifications is his or her educational qualifications. Mental health professionals have a wide variety of educational backgrounds and degrees, ranging from social workers with bachelor's degrees to licensed physicians with M.D. degrees who specialize in psychiatry. The kind of services and evaluations each of those practitioners is legally entitled to provide is determined by state licensing laws or regulations, and hence varies from state to state. In general, however, the following degrees, and the licenses that go with them, entitle their practitioners to provide the following kinds of work:

- M.A. — Master's level degree in counseling or clinical psychology. This degree allows an individual to perform psychotherapy, give clinical impressions, and make a clinical diagnosis. Evaluations are done on the basis of a clinical evaluation as opposed to a formal psychological and/or neuropsychological assessment.
- M.Ed. — Master's level of education in educational psychology or education. This degree allows for mental health professionals to perform the same duties as the M.A. However, there may be more of an emphasis on education and counseling from a psycho-educational perspective.
- M.D. — A doctorate of medicine. This doctor has the same qualifications as any physician, and specializes in clinical/psychiatric diagnoses and treatment. The physician assesses medication and monitors medical intervention. Most psychiatrists do not practice psychotherapy, and they do not perform or interpret formal psychological/neuro-psychological evaluations.
- Ph.D. — A doctorate in clinical psychology. This mental health professional can perform and interpret formal psychological and neuro-psychological evaluations. Most psychologists specialize in a given area(s) of clinical and/or research of various populations.
- Psy.D. — Also a doctor of clinical psychology but with more of an emphasis on clinical work.
- Ed.D. — Doctor of Education. Specializes in the assessment, interpretation, diagnosis and intervention of psycho-educational issues.
- MSW/LCSW—Licensed clinical social worker. Specializes in the counseling of populations. Provides recommendations for intervention for individuals, families, or systems.

Thus, an important part of a prosecutor's preparation to address a psychological evaluation will be an assessment of the evaluator's educational and experiential qualifications to conduct the evaluation presented.⁷

Essential Elements of the Evaluation Report

Objectivity

All reports should be objective. To the greatest degree possible, an assessment should be written without bias from the writer. Evaluators should report their findings, not promote a personal agenda (incarcerate or not, juvenile v. criminal court, etc.). To determine the existence or absence of bias, prosecutors should examine the text of the report to see whether its conclusions and predictions of future behavior or estimations of risk of re-offense are stated in the context of, and supported by, the objective data and testing results found throughout the report.

The Referral Question

In some states, statutes or regulations specify the form for psychological examinations, including the specific kinds of questions the examination report may answer. In most states, however, the court or referring agency must fashion an order requiring an examination and specifying the reason for referring the subject for evaluation, or the "referral question." If possible, the prosecutor should give input into the drafting of the court's order to insure that the referral question is written in a manner that directs the evaluator to obtain all the appropriate clinical examinations. The referral question should also be restated in the evaluation report, thereby helping the reader determine whether the information provided in the report, and the conclusions drawn from the assessment, are relevant to the court's question.

The referral question should be clear and concise. For most court-related purposes, the referral should address emotional and cognitive functioning as they relate to the specific circumstances or alleged crime leading to

⁷ It will also often be useful for prosecutors to refer to ethical standards adopted by various psychiatric professional associations, such as the ETHICS GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY (American Academy Of Psychiatry And The Law 2005, at <http://www.aapl.org/pdf/ETHICSGDLNS.pdf>, and *Specialty Guidelines for Forensic Psychologists*, 15 LAW AND HUMAN BEHAV. 655 (American Psychology-Law Society 1991), at <http://www.appls.org/links/currentforensicguidelines.pdf>).

the individual's involvement in the criminal justice system. The following is an example of a clear and concise referral question:

“Please determine the current level of intellectual and emotional functioning of John Doe as it relates to the criminal behavior Doe currently faces in court.”

Since the referral question will never ask the evaluator to determine whether a crime has taken place or whether the juvenile did or could have committed the offense, an assessment should not offer an opinion on guilt or culpability. The purpose of an assessment is to identify inter/intrapersonal dynamics, level of intellectual functioning, and absence or evidence of psychological disorders that may have exacerbated or contributed to the behavior of an individual or which ought to be addressed in disposition after adjudication.

Assessment Tools

The report should include a list of the tests or assessment tools that were used. A wide assortment of assessment tools are available to the evaluator, each of which is designed to yield specific information for the evaluator to use as a part of the overall evaluation. The tools selected for the evaluation should be specifically tailored to provide information that is relevant to the referral question. For example, assessments on individuals referred for sex offenses should generally incorporate some psychosexual assessment instrument such as the Juvenile Sex Offender Assessment Protocol (JSOAP), the Protective Factors Scale (PFS), and the Estimate of Risk of Adolescent Sex Offender Recidivism (ERASOR).

History/Background

The report should provide significant background information on the individual, and identification of where the evaluator learned the background information.⁸ This should include age, sex, marital status, quality

⁸ While most evaluators would welcome background information from other sources, such as parents, police or child welfare investigative reports, or court documents, often the only source of background information or history will be the subject of the evaluation him- or herself. It is important for the report to identify the source of the background information considered—including identifying documents by name, author, date, etc. and stating persons interviewed and the length of time of the interview—so that the prosecutor and other users of the report can consider whether incomplete or inaccurate background information provided by the juvenile compromises the accuracy and usefulness of the report.

of significant interpersonal relationships, and family dynamics. In addition, the history of events leading to the reason of the referral should be described along with any information about the individual or significant others that may be helpful in understanding their current status. For example, any history of substance abuse, sexual abuse, prior arrests, psychological issues, living environment, educational background, etc. should be included in the report. The evaluation should reflect how that background was utilized in reaching its conclusions and recommendations.

Mental Status and Behavioral Observations

Included in the report should be a description of the individual's physical appearance and the manner in which he or she related to the clinician and the assessment process. Mental status should include whether the individual is oriented to time, place, and person. A description of speech in terms of its rate, coherency, and intelligibility should be noted. In addition, the thought process should be described in terms of logical flow and whether it is coherent or tangible. This information helps identify possible levels of anxiety, depression, disturbances, ability to relate to authority figures, and any significant issues between the clinician and the individual being assessed. Any information about the individual's past behaviors should be compared to his or her behavior during the evaluation to identify similarities or differences, which will help assess whether the behavior is chronic, affected, different in certain environments, or different with different people.

Intellectual Functioning

Most psychological assessments include a measure of intellectual functioning or IQ. This helps identify the overall cognitive functioning of an individual as compared to others of the same age range. The most widely used tests for intellectual functioning are the Wechsler scales: Wechsler Adult Intelligence Scale Revised (WAIS-R) for adults and Wechsler Intelligence Scale for Children, third edition (WISC-III). Although the tests are intended for their targeted subjects—WISC-III will be used for most juveniles—the scales and scoring used in each test are the same.

The WISC-III includes three overall levels of IQ; the Verbal IQ, the Performance IQ, and the Full Scale IQ. The Verbal IQ score captures an

individual's capacity for verbal expression, analysis, and recall.⁹ The Performance IQ score reflects an individual's ability for visual activities, mechanical applications, and motor responses.¹⁰ The Full Scale IQ essentially averages the Verbal and Performance IQ to arrive at an overall level of intellectual functioning. The report should list all three scores individually and all three scores should be similar; that is, they should be numerically close to each other. A 15-point or more differential between the Verbal and Performance IQ scores is significant; it could reflect cultural or language issues or even learning disabilities. A 30-point or more differential between the Verbal and Performance IQ scores may be indicative of brain trauma, disease, psychological problems such as thought disorders, or severe pathology that has compromised cognitive functioning. If a 30 point or more differential exists, a neuro-psychological assessment should be considered to assess further specific areas of functioning.

The IQ score should be presented in terms of how the tester compares to others; that is, whether the tester is average, superior, borderline, or mildly mentally handicapped. The most commonly used classification of IQ scores is the Wechsler Scales.¹¹ The scores are generally reported as follows:

IQ Range Included	Description	Percent
130 and above	Very superior	2.2
120-129	Superior	6.7
110-119	High average	16.1
90 -109	Average	50.0
80-89	Low average	16.1
70-79	Borderline	6.7
50-69	Mild deficiency	2.2
35-49	Moderate deficiency	2.2
20-34	Severe deficiency	2.2
19 and below	Profound deficiency	2.2

⁹ HENRY KELLERMAN AND ANTHONY BURRY, THE HANDBOOK OF PSYCHODIAGNOSTIC TESTING: ANALYSIS OF PERSONALITY IN THE PSYCHOLOGICAL REPORT, 65 (Allyn and Bacon 1997).

¹⁰ *Id.* at 67.

¹¹ *Id.* at 62, (citing DAVID WECHSLER, MANUAL FOR THE WECHSLER ADULT INTELLIGENCE SCALE – REVISED (1981)).

Subtests

Verbal, Performance, and Full Scale IQ test scores are too broad to give an accurate picture of the individual being evaluated. Verbal and Performance IQs are each made up of subtests that evaluate different abilities. These subtest scores should be included in the report and interpreted in the profile. The subtest scores give a more detailed picture of an individual's strengths, weaknesses, and coping mechanisms.

Verbal Subtests	Performance Subtests
Information	Picture Completion
Similarities	Digit Symbol-Coding
Arithmetic	Picture Arrangement
Vocabulary	Block Design
Comprehension	Object Assembly
Digit Span	Symbol Search

Here are brief descriptions of what each of the above-referenced subtests captures.¹²

Verbal Subtests

- Information — ability to store, recall, and utilize verbal facts learned as well as incidentally absorbed about the environment.
- Similarities — capacity for forming concepts, thinking in abstract terms, generalizing, and drawing relationships between different elements in the environment.
- Arithmetic — ability to focus one's concentration, thus revealing mental alertness. It also relates to problem-solving abilities.
- Vocabulary — often highly correlated with overall intelligence, particularly when the subject has had ample exposure to verbal stimulation.
- Comprehension — ability to utilize practical judgment and common-sense reasoning — formal education is not necessary.
- Digit Span — based on rote memory — it involves the recall of elements in a current situation.

¹² *Id.* at 77-84.

Performance Subtests

- Picture Completion — ability to concentrate and focus on details in order to differentiate between the essential and nonessential aspects of a situation.
- Digit Symbol-Coding — ability to learn new material readily and efficiently: it requires attention and concentration in a context of speed and visual-motor concentration.
- Picture Arrangement — knowledge of interpersonal relating, along with skills of planning, judgment, and perceptual organization.
- Block Design — capacity for abstraction and concept formation along with planning, judgment, visual analysis, and visual-motor coordination skills.
- Object Assembly — capacity for visual motor coordination following visual analysis and the development of an overall conceptualization of familiar objects cued by their constituent parts.
- Symbol Search — visual perception and speed: it requires examinees to match symbols appearing in different groups.

On the subtests, 16 is the highest score attainable, while 10 is average. The report should discuss and explain any subtest scores that are three points or more from average, as a three-point variance from average indicates particular strength or weakness in the test area. For the average subject, the subtest scores will be similar to each other, so disparities between the subtest scores also can be significant.

There are important combinations of subtest scores that ordinarily should be similar to each other. Significant variance among these scores can indicate significant problems. For example, a collection of subtests referred to as the “stronghold tests” includes the information, vocabulary, and comprehension subtests. These subtests reflect brain function in the deepest, most protected part of the brain. The scores on these three subtests should be within one point of each other. Differences in these scores can indicate brain injury or other significant brain function problems.

Another very important group of subtests for prosecutors is known as the “anxiety triad.” This group includes the digit span, symbol search and

arithmetic subtests. Scores on these subtests also should be within one point of each other. Score disparities here may indicate behavior that is driven by anxiety, bad decision-making when anxious, or potential acting out when anxious or under pressure. A sample set of WISC-III scores and an analysis of the anxiety triad and the stronghold tests arising from those scores is included in Appendix II.

A psychological evaluation report which shows significant disparities within these groups of subtests, without explanation or discussion, is deficient. Either the evaluator has made a significant error in failing to discuss these disparities or is purposefully attempting to hide a fact not favorable to the subject. On cross-examination, prosecutors should ask evaluators the following question: “Can you explain any and all significant variations among the subtest scores?” A competent evaluator will have to acknowledge the variances and attempt to explain them.

Personality or Emotional Functioning

This section provides information about how an individual copes with stress, anxiety, and/or depression, as an individual and in relation to others. In other words, is the person able to cope adequately with these variables in a productive manner, or are they overtly expressed or “acted out”? Furthermore, a description of how emotional factors affect ability to exercise judgment and interpret experiences, both in the environment and in relation to others, should be addressed. For example, under stress or anxiety, does the individual become combative, does he shut down and resort to substance abuse to avoid painful emotions, or is he able to seek help and deal with the source of the problem effectively, and under what circumstances does this happen or not happen? This information should be integrated with data about the individual’s intellectual functioning.

Information in this section also includes the results of other non-objective or projective data, such as the Rorschach Test, the Children’s Apperception Test, and the Thematic Apperception Test. If any academic achievement tests, such as the Woodcock-Johnson III or the Wechsler Individual Achievement Test (WIAT), have been administered or considered by the evaluator, results from those also should be reported in this

section. Data from these tests yield information on thought disorders, reality testing, and emotional status that may or may not be obvious. These data should provide information about the individual's emotional status and behaviors, which may have resulted in the offense charged and whether the status and behaviors are symptomatic of a more significant problem. For example, unresolved abuse, interpersonal conflict, issues of identity, or untreated psychological difficulties would be reported here.

Discussion

This section of the report should synthesize the data from other sections. It provides the evaluator's discussion of how the observations, history, intellectual functioning, and personality functioning relate to one another. In this section the evaluator should explain his or her opinion of the individual's functioning as it relates to the reason for referral.

Diagnosis

This section of the report provides an actual diagnosis of any mental or personality disorders the evaluator has identified. It is important for the prosecutor to remember at this point that the diagnoses in evaluations of this kind are in the nature of an opinion, no different from any other expert witness opinion, and should be treated as an opinion, not an empirical fact. Ordinarily the diagnoses will be expressed on the five axes of the current Diagnostic Statistical Manual of Mental Disorders, which is discussed more fully in the next section. If a diagnosis is not in the report, the evaluator should be asked about it. The lack of a diagnosis may indicate several things:

- The referral question is poorly drafted and doesn't suggest that a diagnosis is necessary.
- The evaluator has done incomplete work.
- The evaluator doesn't want to disclose the diagnosis because it reflects badly on the subject and/or doesn't fit with the recommendations the expert wants to make to the court.

The absence of a diagnosis or a diagnosis which is not supported by the information in the remainder of the report should be fertile ground for cross-examination of the expert.

Recommendations

Some jurisdictions ask that the report contain recommendations, others prohibit it. If recommendations are requested or otherwise included, they should be given in terms of therapeutic interventions that need to take place to attempt to resolve problems related to the reason for the referral, such as individual or family therapy, change of environment, probation requirements, or community work. The recommendation section should not contain a recommendation about the legal disposition of the case unless that was part of the referral question (and it rarely ever should be). Inclusion of a legal recommendation is an indicator of the bias of the evaluator.

Diagnostic and Statistical Manual

The Diagnostic and Statistical Manual of Mental Disorders, currently in its Fourth Edition (“DSM-IV”), is a compendium of diagnoses of mental disorders which all mental health practitioners use to standardize their diagnoses and keep them consistent among patients and evaluators. With the proliferation of mental health defenses, most prosecutors have a copy of the DSM-IV somewhere in their offices. The DSM-IV is an essential resource for juvenile prosecutors to understand the many psychological evaluations they will encounter each week in their practice.

The manual is generally attributed to the American Psychological Association (APA). Understanding some of the history surrounding the manual’s development may help prosecutors understand its uses and limitations. The original work on the manual began in the early twentieth century with the combined efforts of several organizations, including the Census Bureau, the American Medical Association, the U.S. armed forces medical services, and the World Health Organization.¹³ The APA took

¹³ “The DSM had its origin in the Association’s 1917 collaboration with the U.S. Bureau of the Census on a classification of mental illnesses that would enable the collection of uniform statistics on mental disorders seen in hospitals. The American Medical Association later expanded this classification system with its Standard Classified Nomenclature of Disease. During World War II, the U.S. armed forces medical services found these diagnostic criteria too restrictive, and developed a more expanded set, which was later revised for use by the Veterans Administration. In 1948, the World Health Organization (WHO) published its own diagnostic directory of mental illnesses as part of the sixth edition of its International Classification of Diseases (ICD-6).” AMERICAN PSYCHOLOGICAL ASSOCIATION, *PSYCHOLOGICAL DIAGNOSIS AND THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV, FACT SHEET* (4th ed. 1997).

this early work, expanded and refined it, and created a single system that can be used for both diagnostic and statistical purposes, publishing the first edition of the DSM in 1952. The current Fourth Edition of the work was published in 1994.¹⁴

Definitions of the DSM-IV Axes

The DSM-IV uses a system of diagnosis using five categories, referred to in the DSM-IV as “axes,” to identify disorders and other factors affecting or explaining the subject’s behavior.¹⁵ The five axes of a DSM-IV diagnosis—clinical disorders, personality disorders, general medical conditions, psychosocial and environmental problems, and a global assessment of functioning—allow the evaluator, and the reader, to separate out the various factors that affect behavior. The five DSM-IV axes are defined as follows:

- **Axis I: Clinical Disorders** — These are the most serious, major mental illnesses. There are approximately fifteen categories of mental disorders. Examples include: schizophrenia, anxiety disorders, delirium, dementia, mood disorders, bipolar disorders, and dissociative disorders. It is possible however, to see remission of symptoms with intervention.
- **Axis II: Personality Disorders** — Generally considered to be somewhat less serious, these disorders reflect lifelong problems that usually don’t go away even with treatment. These disorders often manifest in childhood. Examples include: schizoid personality disorder, schizotypal personality disorder, borderline personality disorder, and antisocial personality disorder. Axis II disorders generally reflect a style of interacting that is very maladaptive and interferes with all aspects of life.
- **Axis III: General Medical Conditions** — These are physical conditions that can also affect mental status. Examples include infectious and parasitic diseases; endocrine, nutritional, and metabolic diseases; immunity disorders; dehydration; injury; and poisoning.
- **Axis IV: Psychosocial and Environmental Problems** — These factors may include problems with the person’s primary support group, educational problems, occupational problems, and economic problems.

¹⁴ The APA published the second edition of the manual, DSM-II in 1968. DSM-III came out in 1980. The APA published what it refers to as a major revision of this edition —DSM-III (Revised)— in 1987. The DSM-IV (published in 1994) was the next step in this continuing evolution. *Id.* at 2.

¹⁵ DSM-IV at xxii.

- **Axis V: Global Assessment of Function (GAF)** — The GAF is a basic summary of the person’s “psychological, social, and occupational functioning.”¹⁶ This Axis measures the patient’s “overall level of functioning” which is “useful in planning treatment and measuring its impact, and in predicting outcome.”¹⁷ The GAF is reported in a scale of 1 to 100 in increments of 10.

Limitations of DSM-IV Diagnoses

One of the most significant problems arising from the use of the diagnostic criteria and axes of the DSM-IV is the tendency of many people—including many defense counsel, and even a few judges—to view the presence of an Axis 1 or 2 diagnosis as indicative of the presence of a mental illness for court purposes. Such a result not only overstates the meaning of a DSM-IV diagnosis, it fails to take into account the limitations even the APA identifies in the DSM-IV. The DSM-IV itself disclaims this result in the following strong language:

*In most situations, the clinical diagnosis of a DSM-IV mental disorder is not sufficient to establish the existence for legal purposes of a “mental disorder,” “mental disability,” “mental disease,” or “mental defect.” ... Moreover, the fact that an individual’s presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual’s degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one’s behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.*¹⁸

The disorders identified in the DSM-IV generally are intended to describe a group of behaviors which have an adverse impact on an important aspect of the subject’s life.¹⁹ As a result of this approach, some

¹⁶ DSM-IV at 30 (1994).

¹⁷ *Id.*

¹⁸ *Id.* at xxiii (emphasis added).

¹⁹ “The purpose of DSM-IV is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders.” *Id.* at xxvii.

of the DSM-IV's "disorders" often sound like nothing more than descriptions of bad behavior. For example, the DSM-IV contains a diagnosis for "conduct disorder" and "oppositional defiant disorder" whose criteria sound like a description of delinquency rather than a mental disorder.²⁰ These and other disorders found in the DSM-IV (e.g. pedophilia) create a risk that a juvenile respondent displaying these behaviors might be excused by categorizing them as "disorders."

The APA has made very clear, however, that it did not intend inclusion of behaviors grouped as "disorders" in the DSM-IV to excuse illegal or antisocial conduct. Indeed, the DSM-IV itself expressly denies that it is intended to have any legal significance at all:

It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or Pedophilia does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability. *The clinical and scientific consideration involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.*²¹

Moreover, the way in which the DSM was derived, and has evolved over the years, indicates that it may have dubious credibility as an indicator of anything of legal significance. The current work is the result of task forces, committees, and work groups who made decisions about diagnos-

²⁰ The "diagnostic criteria" for a "conduct disorder" are the presence during the previous 12 months of three or more of a list of behaviors that include the following: bullying, threatening, or intimidating others; initiating physical fights; using a weapon to cause serious harm to others; physical cruelty to persons or animals; stealing while confronting a victim; forcible sexual activity; deliberate destruction of property; breaking into another's home; staying out at night contrary to parental prohibitions; running away from home; and truancy from school. *Id.* at 90.

²¹ *Id.* at xxvii (emphasis added).

tic criteria through compromise to achieve consensus. There are no scientific absolutes here—just votes—hence the term “soft science.”²²

Indeed, the manual includes this cautionary statement regarding its use:

These diagnostic criteria and the DSM-IV Classification of mental disorders reflect a consensus of current formulations of evolving knowledge in our field. . . . The clinical and scientific consideration involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.²³

Prosecutors should make full use of these commentaries on the limitations of the DSM-IV in response to defense counsel’s offer of diagnoses involving impulse or conduct disorders, oppositional defiant disorders, Attention Deficit Hyperactivity Disorder (ADHD) or other mental health ailments as the *cause* of a juvenile’s criminal conduct, when in fact they are merely *descriptions* of conduct. The cautionary, limiting statements contained in the manual itself, coupled with other evidence of control, purpose and planning can help defeat sham mental defenses. Prosecutors are also encouraged to find other sources and expert witnesses who can help put the “soft science” of mental health assessment into perspective for the court.²⁴ Finally, prosecutors must also consider in their preparation the known high incidence of malingering in this type of evaluation made for use in a legal context.²⁵ An evaluator who fails to assess for the possibility of such malingering should be cross-examined on that important failure.

²² This form of decision-making by groups also lends itself to decisions based on political pressure and “political correctness.” For example, one noticeable change between DSM-II and DSM-III was the removal of homosexuality as a disorder. Another example is the addition of animal cruelty to the diagnostic criteria for conduct disorder in DSM-III (Revised), and the subsequent movement of those criteria from the “destruction of *property*” subsection of conduct disorder in DSM-III (Revised) to the “violence against *others*” subsection of conduct disorder in DSM-IV. DSM-IV at 775. While the body of knowledge surrounding animal cruelty and its predictive value for future violent behavior against humans continues to grow, the social and political energy around animal rights issues in recent years may also have facilitated the modification.

²³ *Id.* at xxvii.

²⁴ See generally Stuart A. Kirk and Herb Kutchins, *The Myth of the Reliability of the DSM*, 15 J. MIND BEHAVIOR 71 (1994), at www.academyanalyticarts.org/library.htm; Albert Galves, Ph.D, et al., *Debunking the Science Behind ADHD as a “Brain Disorder,”* at www.academyanalyticarts.org/library.htm.

²⁵ See JOSEPH MCCANN, PSY.D., J.D., MALINGERING AND DECEPTION IN ADOLESCENTS: ASSESSING CREDIBILITY IN CLINICAL AND FORENSIC SETTINGS (American Psychological Association 1998).

COMPETENCY: FITNESS TO PROCEED AND WAIVER OF 5TH AMENDMENT RIGHTS

The most active area in the past few years for the application of the soft sciences in juvenile court has been in the area of the competency of the juvenile respondent. These attacks on competency, by the weapon of expert witnesses, have been waged on two fronts: competency to stand trial (adjudicative competence), and competency to waive *Miranda* rights. Although well-settled case law exists on both of these issues, researchers in the mental health profession²⁶ and child advocacy organizations continue to challenge the prevailing legal framework.²⁷ Many in the defense bar have embraced these studies and emerging competency assessment tools as mechanisms to help their juvenile clients avoid prosecution in criminal or juvenile court or obtain rulings suppressing their statements to police.²⁸

This chapter will examine several aspects of this area of expert testimony. First we will examine the emerging issues pertaining to competency, both to stand trial and to waive *Miranda*. Next we will examine some common errors in the use of tests and other assessment instruments in the competency area. Finally, we will explore strategies to counter this growing area of expert testimony, including suggestions for preparing to offer, and to counter, expert testimony in court.

²⁶ See generally, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert Schwartz eds., University of Chicago Press 2000); THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES (Professional Resource Press 1998); THOMAS GRISSO, COMPETENCY TO STAND TRIAL EVALUATIONS A MANUAL FOR PRACTICE (Professional Resource Press 1988).

²⁷ For example, the John D. and Catherine T. MacArthur Foundation has funded much of this research, the most recent and most well known being Thomas Grisso, et al. *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) [hereafter "MacArthur Study"].

²⁸ American Bar Association Juvenile Justice Center et al., "Evaluating Youth Competence in the Justice System," Module 6 of UNDERSTANDING ADOLESCENTS: A JUVENILE COURT TRAINING CURRICULUM (The John D. and Catherine T. MacArthur Foundation 2000).

Competency: Understanding the Issue

Competency to Stand Trial

Since at least Blackstone, a fundamental principle of our criminal justice system is that defendants, adult or juvenile, must be competent to stand trial.²⁹ The legal standard for the modern understanding of competence to stand trial derives from the brief, *per curiam* decision in *Dusky v. United States*, 362 U.S. 402 (1960), and is generally referred to as the *Dusky* standard. Although specific statutory language or case law varies from state to state, competence is generally defined as a functional understanding of the legal proceedings, the ability to consult with a lawyer with a reasonable degree of understanding and to assist the lawyer in preparing a defense.³⁰ Simply stated, defendants must understand what they are accused of doing and what the possible penalties include, and they must be able to assist in their own defense. This standard applies both to adult and juvenile defendants.

In the last few years a new competency standard has been discussed by some mental health professionals and juvenile advocates, led most notably by recent research funded by the MacArthur Foundation, often referred to as the “MacArthur Study.”³¹ This new “juvenile” competency standard suggests that juveniles may be less competent than adults, that is, less able to consult with their attorneys, less able to understand the charges and

²⁹ See generally WILLIAM BLACKSTONE, “Of the Persons Capable of Committing Crimes,” Chapter 2 of Book 4 of COMMENTARIES ON THE LAWS OF ENGLAND (Clarendon Press 1765–1769); U.S. Const. Amend. XIV; *Dusky v. United States*, 362 U.S. 402 (1960).

³⁰ *Dusky*, 362 U.S. at 402 (“the ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.’”).

³¹ MacArthur Study, *supra* note 27.

penalties that they face, and less able to assist in their own defense.³² The MacArthur Study was not about competency in juvenile court; rather, it exclusively studied whether juveniles are competent to stand trial in criminal court. It expressly disclaimed any applicability of its results to juvenile delinquency cases. The study's report does suggest, however, that "a more relaxed competence standard in juvenile court is compatible with the demands of constitutional due process." Thus, the MacArthur Study authors advocate a lesser standard for adjudicative competence for juvenile respondents.

The problems with this "Dusky Light" standard are numerous, but three stand out. First, and perhaps foremost, it simply is not the law, and nothing about the recent studies shows any flaw in the *Dusky* standard, the standard that has been in place for more than forty years and is predicated on hundreds of years of criminal justice practice.³³ It would change this historic benchmark to accommodate the perceived problems of only a small fraction of the juvenile court population.³⁴ Second, in many states, juvenile adjudications can enhance criminal sentences for subsequent criminal court convictions. Constitutional due process problems arise when criminal

³² The MacArthur Study itself is subject to numerous criticisms beyond the scope of this work. Most notable among those are the fact that it is based entirely on two inappropriate measurement instruments. One of those was the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA), an instrument designed to assess competency in adults which has never been validated for use with juveniles. MacArthur Study at 336 ("There are no reports of its use with youths.") The other instrument, the MacArthur Judgment Evaluation (MacJEN), was designed specifically for use in the study and has never been validated or normed for any population. *Id.* There are many criticisms which could be levied against this instrument, most revolving around its bias against cooperation as a sign of immaturity, and therefore, incompetence by the Study's standards. For example, each question on the MacJEN provided an answer among the choices which the researchers deemed "optimal defense orientation" and a score was reported for each sample group about the number of "optimal defense orientation" answers given. In questions relating to interaction with police, however, the answer corresponding to a lack of cooperation always corresponded to the "optimal defense orientation," e.g., choosing to talk to the police versus remaining silent. *Method, Measures, and Procedures for the Juvenile Adjudicative Competence Study* (MacArthur Foundation 2002), at <http://www.mac-adoldev-juvjustice.org/page25.html>.

³³ *Dusky*, 362 U.S. at 402.

³⁴ Even the MacArthur study indicates that approximately 10% of juveniles over age 15, less than 20% of the offenders over 13, and about 30% of the younger offenders ages 11-13 show a "significant impairment" in the competency measures identified in that study. MacArthur Study, 27 LAW OF HUM. BEHAV. at 346. Thus, between 70 and 90 % of the juveniles who were the subjects of the study showed no significant impairment of competency, even under the very lenient standards of the MacArthur Study.

sentencing is enhanced with adjudications obtained when the defendant was less competent than that level of competence required for criminal court. Third, a lower juvenile court competency standard would give mental health professionals a powerful voice in waiver and transfer decisions, *e.g.*, “this juvenile defendant is only competent enough for juvenile court, not criminal court prosecution.”

The MacArthur-funded effort reached its self-described “culmination” with the publication in 2005 of two guides for professionals involved in cases in which adjudicative competency of a juvenile has been called into question. The first and larger work is one designed for mental health professionals who are engaged to conduct a competency evaluation of a juvenile defendant or respondent.³⁵ This guide is designed to educate the evaluator on the significant differences between a competency evaluation of a juvenile and the adult competency evaluation with which the evaluator will likely be more familiar. For example, it includes sections on child development and maturity as they affect competency in a legal context, and assessment and interpretation of assessment results from juvenile subjects.

The companion guide is designed expressly for “legal professionals.”³⁶ It introduces to lawyers and judges the special issues involved in assessing competency in juveniles from a mental health professional’s point of view, and introduces the mental health practitioners’ guide.

It also provides an overview of the methods and logic that are being recommended to mental health professionals who perform evaluations of juveniles when questions of their legal competence are raised. It aims to improve legal professionals’ understanding of the information that mental health professionals offer in cases involving minors’ competence to stand trial, whether in juvenile or criminal court.³⁷

³⁵ THOMAS GRISSO, *EVALUATING JUVENILES’ ADJUDICATIVE COMPETENCE: A GUIDE FOR CLINICAL PRACTICE* (Professional Resource Press 2005).

³⁶ THOMAS GRISSO, *CLINICAL EVALUATIONS FOR JUVENILES’ COMPETENCE TO STAND TRIAL: A GUIDE FOR LEGAL PROFESSIONALS* (Professional Resource Press 2005).

³⁷ *Id.* at 4. It is important to note that the MacArthur Study’s disclaimer about applying its results to juvenile court has disappeared in this volume. It expressly contemplates that the issue is a valid one for both juvenile and criminal court.

While there certainly are grounds for prosecutors to criticize some details of both of these works,³⁸ they do represent a step forward over prior practice. Certainly they should bring some badly needed uniformity to the practice of competency evaluation and adjudication. In addition, they provide prosecutors with an excellent source of material to use in assessing a competency expert witness's work and for cross-examination of the expert. Both volumes should be resources available in the prosecutor's library.³⁹

Competent to Waive Miranda

A different, though related, issue arises when the competency question relates to whether a juvenile was competent to waive his or her rights under *Miranda*⁴⁰ and the admissibility of the statements made after that waiver. The legal standard for a knowing and voluntary waiver of *Miranda* rights by a juvenile is set out in *Fare v. Michael C.*, 442 U.S. 707 (1979), which makes clear that the standard for *Miranda* waiver is the same for juveniles and adults.

The totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. *We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.*⁴¹

The Court went on to enumerate age, experience, education, background and intelligence as appropriate factors in the totality of circumstances assessment of an offender's capacity to understand the *Miranda* warnings, the nature of one's 5th Amendment rights and the consequences of waiving those rights.⁴²

³⁸ For example, the guide for evaluators recommends that the evaluator contact defense attorneys and parents for information to be used in the evaluation, but does not recommend contact with more objective sources of information such as probation officers and school personnel.

³⁹ Both guides are available through popular booksellers like Amazon.com, Borders Books, and Barnes and Noble, as well as many specialized booksellers.

⁴⁰ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴¹ 442 U.S. at 725 (emphasis added).

⁴² *Id.* See also *North Carolina v. Butler*, 441 U.S. 369 (1979).

The Supreme Court's recent decision in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), indicates that the rule in *Fare v. Michael C.* probably continues to control this issue. Although the *Alvarado* case dealt with the determination of "custody," rather than a knowing or voluntary waiver, it is still instructive. In *Alvarado*, the court held that a suspect's age is not a factor in determining whether he or she was "in custody" under *Miranda*. The Ninth Circuit Court of Appeals had modified the standard for custody in a police interrogation under *Miranda* from the "reasonable person" standard to whether a "reasonable juvenile person" would believe he or she was not free to leave. The Supreme Court reversed, holding that there are "important conceptual differences" between the "in custody" determination under *Miranda* and other legal tests which take into account the suspect's age. The Supreme Court held the "in custody" test under *Miranda* is an objective test under which the suspect's characteristics, including age, are irrelevant. As a result, the Court held, the same standard applies to questioning of juveniles as to questioning of adults.

The *Alvarado* case may signal reluctance by some on the Court to create new or modified standards for juvenile offenders. That reluctance may assist prosecutors in the future as "new" competency standards, both for fitness and waiver, are advanced by the defense and mental health profession.

What's at the Core of Competency Challenges?

The current attacks on both legal competencies—fitness and waiver—center on the idea that juvenile defendants, because of their intellectual and developmental immaturity,⁴³ are not competent to participate in their trials or to knowingly and intelligently waive their *Miranda* rights. As a practical matter, this means that if juvenile defendants were older or more mature, they would make "better" decisions. They would choose not to cooperate with law enforcement officers; they would assert their rights and aggressively defend themselves at trial.

There are a number of flaws with this theory, not the least of which is that it far exceeds the requirements of the well-settled law in this area,

⁴³ See the overview of child development in the Appendix for a fuller discussion of these issues.

namely, *Miranda*, *Fare*, and *Dusky*. Competency has never been about subjective judgments of the quality of the choices made, but has always been about the objective capability to make a judgment, good or bad. Offenders are free to make whatever choices they want as long as they understand the process and their rights. The underlying value bias in the new line of thinking is that waiving one's *Miranda* rights or accepting a plea is inherently bad, wrong, or not in the best interests of the offender. It implies that confession, contrition, and accepting responsibility for criminal conduct are marks of incompetence from which juveniles should be protected.⁴⁴ This is contrary to the core purpose of the juvenile justice system, and fails to take into account the very real therapeutic value of admitting one's complicity in wrongdoing. Many parents work hard to instill this quality in their children, recognizing that responsibility learned in childhood attends them into adulthood. Certainly that sort of personal responsibility is something society should encourage, not label as a mark of poor judgment.

The value bias is also apparent in a theory of competence which rewards the assertion of individual rights in every instance and devalues cooperation. It fails to accommodate the importance (at least to the offender) of the reasons, apart from contrition, that might influence an offender, juvenile or adult, to cooperate and plead guilty. For example, they may feel a sense of loyalty to their friends and choose not to "snitch" on them to obtain leniency. They may wish to explain that their role in the crime was minimal compared to the others involved. They may wish to spare their family the expense of a trial when they know they are guilty anyway. They may reasonably believe that their cooperation may result in more favorable sentencing or disposition (a value enshrined in the Federal Sentencing Guidelines). There are doubtless many other reasons for making this decision, which make it a purely value judgment, not a *Dusky* standard competency problem. To the contrary, a decision to cooperate evidences a fairly sophisticated cost-benefit analysis of options on the part of the offender, a thought process consistent with competency under *Dusky* and *Michael C.*

⁴⁴ By these advocates' logic, the substantial majority of adult offenders whose matters are resolved through a guilty plea apparently are exercising immature judgment.

Legal Responses to Competency Challenges

Prosecutors are charged with seeking justice, and, of course, justice normally is not served by obtaining a conviction or adjudication against a defendant who is truly not fit to proceed.⁴⁵ Other remedies generally exist for these offenders. Similarly, use of statements obtained from offenders who are truly not competent to understand and knowingly waive their *Miranda* rights probably does not serve justice either. The problem for prosecutors and judges is sorting out the offenders who have legitimate competency problems from the defendants who claim them just to avoid responsibility for their criminal behavior.

Prosecutors have several strategies available to expose the flaws, biases, and deficiencies in competency assessments and evaluation reports, to refocus the discussion on the law, and to ask the court to perform its gate-keeping function regarding expert testimony. This section will discuss three possible approaches to handling competency assessment testimony. Each is time-consuming and laden with preparation, but one or two successful efforts may stem the tide of sham mental defenses in a jurisdiction. Also, once the background research is done and a process is developed, it can serve as model for other cases, thereby shortening some of the preparation time.

Strategy One: Keep It Out

The first strategy is to keep the expert testimony out altogether. The first opportunity to do that comes even before the evaluation is conducted by challenging the propriety of the referral or evaluation in the first place. In many jurisdictions the court must first find that a bona fide issue regarding competency exists before the referral is made, and even where statutes do not require such a finding, prosecutors should urge it. The

⁴⁵ NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 19.2 (National District Attorneys Association 1991) (the primary duty of the prosecutor "...is to seek justice...while representing the interests of the state. While the safety and welfare of the community and the victim is their primary concern, prosecutors should also consider the special interests and needs of the juvenile to the extent they can do so..."). See also JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH, § 1.1(B) (Robert Shepherd, Jr. ed., Criminal Justice Section, American Bar Association 1960) ("The primary duty [of the prosecutor]...is to seek justice; to fully and faithfully represent the interest of the state, without losing sight of the philosophy and purpose of the family court").

proponent of the evaluation, usually defense counsel, should be required to present facts which give rise to a bona fide doubt about the respondent's competency. This requirement of presentation of facts has several distinct advantages: (1) it makes a record of the facts at the time of the referral, which allows for challenges to the evaluation if those facts change during the process; (2) it allows the prosecutor to investigate the facts and challenge them at the outset and avoid the evaluation altogether; and (3) it allows the prosecutor to argue that the facts presented are insufficient to give rise to a question about competency in the first place.

If the evaluation is conducted, it may be excluded through a motion *in limine* or motion to exclude evidence. This strategy has several advantages. It focuses the court's attention on the scientific evidence itself. The facts of the case are not at issue, nor are the credentials of the expert witness. Rather, the legitimacy of the assessment instruments used and their reliability to assess competence are the issue. The focus should be on the reliability of the scientific evidence proffered by the expert. A ruling excluding the scientific evidence as unreliable may have significant precedential value for future competency challenges raised in the trial court, and potential value for prosecutors across the state if the ruling is upheld on appeal. Focusing on the reliability of the evidence (assessment instrument) rather than the facts of the case or the credibility of a particular expert may help reduce future defense efforts to limit or distinguish the court's ruling to a particular case.

The admission of expert testimony is, of course, controlled by the local rules of evidence. Most states have adopted some version of the Federal Rules of Evidence, which provides the following rule for the admissibility of expert testimony:

Expert testimony is admissible if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience, training, or education,⁴⁶ may testify in the form of an opinion or otherwise.

⁴⁶ FED. R. EVID. 702.

Some courts have begun to express a more circumspect view of the value of expert testimony. For example, the Illinois Supreme Court in *People v. Ennis*, 139 Ill.2d 89 (1990) offered this advisory:

We caution against the overuse of expert testimony. So-called experts can usually be obtained to support most any position. The determination of a lawsuit should not depend upon which side can present the most convincing expert testimony.

Prosecutors should start their preparation by becoming familiar with the tenor of their state's highest court's recent opinions on expert testimony and plan accordingly.

Virtually all states follow one or the other of the two standards for determining admissibility of expert testimony under the state's evidence rules: either the older *Frye* "general acceptance" standard⁴⁷ or the more recent *Daubert* "four-part test" for reliability.⁴⁸ The *Frye* case held that "...while the courts will go a long way in admitting expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."⁴⁹ The *Daubert* test is more defined. For expert scientific testimony to be admissible under *Daubert*, the court must make a preliminary determination that the testimony's underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at issue.⁵⁰ The four factors to consider in this determination are:⁵¹

1. Whether the theory or technique in question can be (and has been) tested;
2. Whether it has been subject to peer review and publication;
3. Its known or potential error rate and the existence and maintenance of standards controlling its operation;
4. Whether it has attracted widespread acceptance within a relevant scientific community.

⁴⁷ *Frye v. United States*, 293 F.1013 (1923).

⁴⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

⁴⁹ *Frye*, 293 F. at 1014.

⁵⁰ *Daubert*, 509 U.S. at 592.

⁵¹ *Id.* at 592-94.

After identifying which test the court will apply and gathering the state-specific case law, the next step is the use of discovery to gather as much information as possible about the assessment tools used by the expert: the names of all assessment tools used, the names of persons administering the tests, the instruction manuals for each test and the assessment instruments themselves. Prosecutors may encounter objections here. Defense experts may claim that they can only release the tools to another licensed psychologist or psychiatrist. It may be necessary for prosecutors to have the items released to the state's expert or obtain a court order requiring release to prosecutors with a stipulation that the tests, the instruction manual, and the results remain confidential.

After obtaining information about the competency instruments used, the prosecutor (or more likely, the State's expert) should determine whether the instruments have been applied properly. These instruments are intended to help assess functional abilities that are relevant to the legal definition of competence to stand trial. They are effective for that purpose, however, only if they have been selected and administered properly, and that process often provides fertile ground for cross-examination. Among the most common misuses of competency assessment instruments in juvenile court are the following:⁵²

1. **Inappropriate use of instruments with juveniles.** Instruments that have been developed for adult defendants should best be assumed to be invalid for use with juvenile defendants until it has been established otherwise. To date, no instruments have been developed specifically for use with juvenile defendants, though some developed for adult defendants, including the MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA), have been normed on juveniles. However, simply obtaining norms on how juvenile defendants perform on such instruments is not equivalent to validating their use with this population. When used with juvenile defendants, instruments developed for adult defendants may contain irrelevant content and may lack appropriate scoring procedures and interpretive guidelines, and they may ignore developmental issues that could be relevant

⁵² This section was written by Jeffrey Musick, Ph.D., Chief Psychologist, Forensic Division, South Carolina Department of Mental Health, Columbia, SC.

to juveniles' competence to stand trial.⁵³ If the expert has used such an instrument, the prosecutor should cross-examine on the limitations of the findings. If properly questioned, the expert is ethically obligated to explain the limitations of the instruments used.

2. **Over reliance on instruments.** No assessment instrument measures all of the abilities relevant to competence to stand trial; as such, instruments should never be the only source of information in competency evaluations.⁵⁴ Other relevant sources of information generally include clinical interviews, academic and mental health records, and reports from third parties about the defendant's current functioning and present mental state. In some cases, psychological testing may also be relevant.
3. **Non-standardized administration or scoring of instruments.** Although some instruments have poorly standardized administration and scoring procedures, forensic examiners should attempt to follow the procedures prescribed for a particular instrument. Standardization also encompasses the physical conditions under which juvenile defendants are evaluated. Prosecutors should ask about non-standardized procedures the expert engaged in, including whether the conditions, such as noise or other distractions, may have adversely affected a defendant's performance, and, if so, how the expert took this into account when interpreting results.
4. **Misidentifying the cause of poor performance on instruments.** Poor performance on instruments may occur for a variety of reasons, including genuine mental disorder and feigned knowledge deficits. The instruments themselves do not reveal the cause(s) of poor performance. Given the nontrivial rates of malingering in forensic evaluations, examiners should not simply accept defendants' incorrect responses or claimed ignorance at face value.⁵⁵ Prosecutors should question experts

⁵³ Jennifer L. Woolard and Samantha Harvell, *MacArthur Competence Assessment Tool—Criminal Adjudication*, in *MENTAL HEALTH SCREENING AND ASSESSMENT IN JUVENILE JUSTICE* (Thomas Grisso, Gina Vincent, & Daniel Seagrave eds., 2005).

⁵⁴ THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (2nd ed., Springer 2005).

⁵⁵ A good reference work on this issue is McCann, *supra* note 25.

specifically about whether they considered and assessed for malingering and other possible explanations for the scores.

5. Predicting the future based on past performance. Dr. Grisso has cautioned that “[t]he significance of scores on [instruments] is misinterpreted when they are said to ‘predict’ functioning in future situations relevant for the question of legal competence.”⁵⁶ Particularly when some time has passed since the instruments were administered, prosecutors should question examiners about whether they assessed the defendant recently as maturation, treatment, or simply the passage of transient emotional distress since an earlier evaluation may allow a juvenile defendant previously perceived as incompetent to be regarded as competent.

There are a number of social science reference books available to help prosecutors assess the quality of the tests used by the defense expert. These publications provide information about population norms for various assessment tools, along with their strengths, weaknesses, and limitations in application. Two important reference books are the *Mental Measurements Yearbook*⁵⁷ and the *Handbook of Scales for Research in Crime and Delinquency (Handbook of Scales)*.⁵⁸ Both sources provide critical peer reviews of commercially available tests, but only if the author or publisher of the tests submits them for aggressive peer review. Failure to find the assessment tools in any of these peer review publications may be useful to prosecutors as some evidence that the assessment tool fails either the *Frye* “general acceptance” test or the peer review prong of the *Daubert* four-part test.

Only one of the competency assessment tools currently in use has been subject to review by either of the above-referenced publications. The Comprehensive Miranda Rights Scale (CMRS) developed by Grisso and Manoogian⁵⁹ appears in the *Handbook of Scales*. That publication con-

⁵⁶ *Id.* at 479.

⁵⁷ THE FOURTEENTH MENTAL MEASUREMENTS YEARBOOK (Barbara Plake & James Impara eds., Buros Institute of Mental Measurement of the University of Nebraska-Lincoln 2005) at www.unl.edu/buros.

⁵⁸ HANDBOOK OF SCALES FOR RESEARCH IN CRIME AND DELINQUENCY (Stanley Brodsky & H. O’Neal Smitherman eds., Plenum Publishing Corporation 1983).

⁵⁹ *Id.* at 336-344 (citing Thomas Grisso and S. Manoogian, “Comprehension of Miranda rights: Manual for Administration and Scoring,” in NEW DIRECTIONS IN PSYCHOLEGAL RESEARCH (Paul D. Lipsitt and Bruce D. Sales, eds., Van Nostrand 1980)).

cludes “In general, the CMRS is well constructed and has presented evidence for content and construct validity. Reliability estimates are good between scorers *after intensive training has been undertaken*. This need for training may be a hindrance, however, the CMRS appears to be a useful instrument in an area which is in need of well constructed techniques.”⁶⁰ Thus, prosecutors should inquire about the expert’s training on this instrument, and absent such training, should argue that the test is invalid. While ultimately the judge may find this argument more of a credibility argument than a *Frye* or *Daubert* challenge, it serves as an example of the utility of these social science reference books.

Other potential arguments for prosecutors to consider under the exclusion strategy include:

- The theory or technique has not been adequately tested. Grisso’s original work was done almost 30 years ago and no one else has replicated it.
- The assessment instruments used have not been subject to peer review. With the exception of the CMRS discussed above, the remaining tests have only been subject to editorial review rather than the rigorous peer review in the social science measurement publications.⁶¹
- Many of the assessment tools have been “normed” on adult populations yet are given to juvenile offenders. Norms are scores from a specific population that provide a frame of reference for interpreting other scores from that population.⁶² Further, “any norm, however expressed, is restricted to the particular normative population from which it was derived.”⁶³ Tests normed on adults and misapplied to juveniles may be argued as defying the correct standards for operation pursuant to the third requirement of *Daubert*.

Courts in several jurisdictions have excluded expert testimony on competency issues—both adjudicative competency and competency to waive *Miranda*—based on some of the arguments above, including the following:

⁶⁰ *Id.* at 339 (emphasis added).

⁶¹ *See, e.g., State v. Griffin*, 77 Conn. App. 424 (2003), *aff’d* 273 Conn. 266 (2005) (“Grisso’s own discussion of his test constituted ‘self-promotion.’ ... What is important, however, for purposes of *Daubert*, is whether Grisso’s peers in his own scientific community have reviewed and have accepted as scientifically valid his test.”).

⁶² JUM C. NUNNALLY, *PSYCHOMETRIC THEORY* 264 (2d. ed. McGraw Hill 1978).

⁶³ ANNE ANASTASI, *PSYCHOLOGICAL TESTING* 89-94 (4th ed. Macmillan 1976).

- *Carter v. State of Florida*, 697 So. 2d 529 (1997)—The state objected to any testimony by the defense expert relating to the results of, and conclusions from, the testing of the appellant conducted pursuant to a procedure referred to as “the Grisso Test.” During *voir dire* examination of the defense expert, he testified that the “Grisso Test” is not a commonly used, nationally recognized test, and that the defense’s attempt to use the Grisso Test results to challenge the appellant’s ability to comprehend his *Miranda* rights was “very unusual.” The Florida Court of Appeal held that the trial court properly found that the defense had not laid an adequate foundation to satisfy the requirements of *Frye*.
- *People v. Rogers*, 247 A.D. 2d 765; 669 N.Y.S. 2d 678 (1998)—The Appellate Division of the Supreme Court of New York found no error in the trial court’s exclusion of defense expert witness testimony attempting to establish that comprehension, vocabulary and suggestibility tests demonstrated defendant’s lack of understanding of the *Miranda* warnings given to him. The trial court held a *Frye* hearing and found that the defense failed to demonstrate that the proposed testimony was based on scientific principles or procedures which have gained general acceptance in its specified field. The appellate court agreed.
- *People v. Cole*, 24 A.D.3d 1021, 807 N.Y.S.2d 166 (2005)—The appellate court affirmed the trial court’s decision, following a *Frye* hearing, to exclude testimony from a defense expert who administered a “Grisso test” and would testify that the defendant was not competent to waive his *Miranda* rights. The appellate court held “the record supports the [trial] court’s conclusions that the tests had not gained sufficient acceptance for reliability and relevance in the scientific community.”
- *State v. Griffin*, 77 Conn. App. 424, 823 A.2d 419 (2003), *aff’d* 273 Conn. 266, 869 A.2d 640 (2005)—Prosecutors in Connecticut successfully used a motion to exclude testimony about competency to waive *Miranda*. The trial court found that the Grisso Test did not meet the *Daubert* standard for admissibility of expert testimony because, even though devised in 1981, the test had not been sufficiently subjected to testing and peer review and “had not been generally accepted in the relevant scientific community.” The Court of Appeals and Supreme Court agreed, holding that the numerous citations to the Grisso Test in law reviews and case law did not meet the *Daubert* test for acceptance, and that the point of *Daubert* is “whether Grisso’s peers in his own sci-

entific community have reviewed and have accepted as scientifically valid his test.” The evidence did not meet that standard.

Strategy Two: The Evidence is Not Credible, Even if Admissible.

Even if the court denies the state’s motion to exclude, all of the evidence used to support the motion to exclude is still strong evidence of the assessment tool’s general lack of credibility. The prosecutor may even opt not to move to exclude the evidence, but choose instead to allow the expert to testify, then attack the credibility of the expert and the evidence at either a fitness or suppression hearing. All of the shortcomings discussed above could be included in the attack at that phase of the case. Also, the expert’s bias, lack of preparation, lack of training, and improper administration of the test are important areas for credibility challenge on cross-examination.

Strategy Three: If the Evidence is Admitted and Found Credible, It’s Not the Law.

As discussed earlier, many competency assessment tools go beyond the requirements of the law. *Dusky*, *Miranda*, and *Fare* each focus the inquiry on whether the defendant had a rational understanding of decision options available to him or her, and whether the defendant had the ability to exercise a choice among those options. Many of the recent assessment tools attempt to evaluate the wisdom of each choice based on a value system imposed by the author of the assessment. In other words, these assessment tools assume that, if the subject made a choice the evaluator considers poor, then he or she must not have understood the choices. But the law does not require that defendants make wise decisions about plea offers, witnesses to call at trial or whether or not to talk with law enforcement. The law is concerned about the autonomy to make choices, not the quality of the choices made; indeed, the law could not possibly define wisdom for each defendant.

The fact that some in the mental health profession are disturbed by adult and/or juvenile offenders who choose to make statements to police or accept plea offers does not justify circumventing or overturning the current law to create new legal standards predicated on untested, flawed and biased soft science. This incursion of soft science into the law should be given close scrutiny by practitioners and judges alike.

EXAMINATION OF EXPERT WITNESSES⁶⁴

In juvenile proceedings, prosecutors will encounter expert witnesses on a wide variety of specialties. In addition to the competency experts discussed throughout this work, juvenile court prosecutors may also call to testify, or cross-examine, experts in fields such as domestic violence, sexual abuse, family reunification and other social work issues, cause of death, medical testimony, and DNA evidence. Presentation of expert testimony requires special considerations in trial preparation. Do not assume, merely because the witness is a professional and has testified in court, trial preparation either is not necessary or may be accomplished just prior to trial. A good expert can be your most valuable asset in persuading the trier of fact. A good expert becomes an outstanding expert with proper preparation.

The State's Expert

Before determining whether to use expert testimony, the state must determine its theory of the case; that is, how did the offense actually occur, what was the motive (not necessary to prove, but helpful to understand), etc. Once the theory is in place, then prosecutors should decide (1) whether an expert is necessary to prove an element of the case, and (2) whether an expert will be needed in rebuttal. If the answer to either question is yes, the prosecutor should consider obtaining an expert to testify (or at least be prepared to testify if needed) in the case.

Meeting the State's Expert

Prosecutors must always be prepared to demonstrate objectively to the trier of fact that the state's expert is better prepared, more thorough, and neutral in arriving at the conclusions in the case. To this end, prosecutors meet with their expert prior to trial and prepare the witness to testify about the following items, in addition to the substantive testimony the witness will provide:

⁶⁴ This chapter was written by Alfonse R. Tomaso, Assistant State's Attorney, Chief, Child Advocacy Division, Cook County State's Attorney's Office, Chicago, IL.

- The witness's current position, duties, and responsibilities, and his or her work history.
- Information about the witness's neutrality. For example, the witness might testify about the number of times the expert has consulted with defense attorneys, or number of times the expert has tested for a positive conclusion and has not found it; that is, the number of times one side has hired the expert and the expert's conclusion actually supported the other side.
- Relevant articles and other written work published by the expert.⁶⁵

Trial Preparation

As in all aspects of trial work, preparation is the key to success. Nowhere is that more true than in presentation of expert testimony. If possible, the state should have its expert assist in the preparation of the case.⁶⁶ The state's expert also can help identify the fallacies in the defense theory of the case.

Prior to court, prosecutors using expert witnesses should do the following:

- Prepare the expert to explain technical matters in simple terms (if you can't understand him, neither can the jury).
- Prepare the expert to communicate to the trier of fact.
- Prepare the expert to explain in simple terms the nature of the testing procedure and its acceptance in the scientific community.
- Review the use of exhibits and technological presentation.
- Have the state's expert help prepare for the cross-examination of the defense expert.
- Give the state's expert all defense reports and publications.
- Discuss the defense expert's qualifications and associations.
- Prepare the state's expert for the potential areas of attack by the defense.

⁶⁵ This is also a good time to prepare the witness to testify about the authoritative nature of articles that the prosecutor plans to use in cross-examining the defense expert.

⁶⁶ It is essential that prosecutors be aware of the rules of discovery and tender to the defense all necessary opinions and documents. Not only is it an ethical obligation, failure to comply with discovery rules casts the state in a bad light with the court, and may result in continuances or possibly suppression of the evidence.

Direct Examination

The direct examination should be presented in a manner that explains the significance of the known facts, their relationship to the conclusions and opinions of the expert, and ultimately how that testimony proves the elements of the allegations. Many states have procedural rules or traditions with which the prosecutor must comply, such as whether the witness must first be tendered for recognition by the judge as an expert before giving an opinion, or whether the expert's opinion must include the magic words "within a reasonable degree of medical or scientific certainty." Prosecutors should be aware of any special language or peculiarities necessary to make opinions admissible in their jurisdictions.

The following is a checklist of things prosecutors should consider including in their expert's testimony:

- Qualifications
- Business or occupation
- Education
- Training
- Licenses
- Professional associations
- Publications
- Teaching experiences
- Honors
- Prior testimony

Ultimately, at the end of the expert's testimony, the trier should clearly understand the following:

- What did the expert do in this case?
- What conclusions did the expert reach in the case?
- What are the expert's opinions concerning those conclusions?

Defense Experts

Effective cross-examination of a defense expert should accomplish three primary goals: (1) support the state's closing argument, (2) corroborate the state's case through concessions from the defense expert, and (3) establish through impeachment the weaknesses and biases of the defense expert.

Preparation for Cross-Examination

Prosecutors must learn everything they can about the defense expert offered in a particular case. Preparation for the cross examination of a defense expert begins with a thorough examination of the expert's *Curriculum Vitae* ("CV"). Ideally, the witness's CV will permit the prosecutor (or someone in the office) to accomplish the following tasks prior to trial:

- Investigate all employment references.
- Investigate each organization listed on the CV. (Note that some alleged professional organizations require only the payment of an initiation fee and/or annual dues to join.)
- Investigate prior testimony and obtain transcripts (including prior civil cases where deposition transcripts might be available).
- Call APRI to find out whether it has a file on the witness.
- Investigate each case in which the expert previously testified. Inquire of both sides from prior cases concerning the expert.
- Use the Internet, Lexis, and other web sites to obtain information concerning the expert, such as the Expert Witness Network at www.witness.net. Lexis/Nexis includes several databases of expert witnesses, such as the JurisPro Expert Witness Directory.
- Check with the state board of licensing to determine whether the expert is licensed or board certified in a particular field.
- Examine all qualifications, professional associations, and published articles to determine whether they support the field of expertise that the defense expert is being offered for his testimony.
- Obtain and read as many listed articles as possible. They may contain helpful information. If the articles contain information harmful to your case, discuss them with your expert to explore areas for cross-examination.

Defense Documents

Obtain all written reports and notes from defense experts through discovery. Obtain, examine, and know all documents, reports, or physical items relied upon by the defense expert in forming his or her opinion. Remember, you planned to have your expert appear more professional and prepared than the defense expert. Demonstrating the lack of time or professionalism by the defense expert will help accomplish this goal.

Knowledge of State's Expert and Case

First determine whether the state's expert knows the defense expert. If not, he or she should try to learn about the expert from others in the professional community in which they work. The state's expert should know or determine whether the defense expert is authoritative in the field, and whether the expert has a reputation in the professional community which is favorable or unfavorable. It will be important to know whether the defense expert has ever consulted with the state's expert or worked jointly on a project with the state's expert.

Defense's Testing and Preparation

The prosecutor should learn all he or she can about the work the defense expert has done to prepare. First, determine from the appropriate record-keepers whether the defense expert has examined any police reports or state exhibits and interviewed any witnesses. The prosecutor then should meet with or telephone the defense expert to discuss the case and the expert's preparation. When discussing the case with a defense expert, always have a witness present. This person should be available for rebuttal testimony. Among the information the expert should be willing to share are the following:

- Whether the defense expert owns a lab facility. If so, obtain articles of incorporation. Determine whether the lab is licensed and/or accredited. If so, by whom is it licensed and accredited?
- When the expert was retained.
- The financial arrangements for the defense expert's work. If not paid in full prior to any scientific testing or testimony in court, this may be fertile ground for impeachment (*i.e.* the witness's testimony may be influenced by an expectation of future payment).
- The time spent by a defense expert.
- The number of times an expert has testified or been consulted for litigation. Which side? What areas?
- Whether the witness has ever *not* been qualified or accepted as an expert witness. If so, determine the case names, dates, issues, and the side for which testimony was offered.

Preparation for Trial

Make an outline or checklist of things that you want to cover with the witnesses. Organize the flow of the cross-examination. It should not be a script, just a reminder of what areas should be covered. Writing out questions may inhibit your ability to listen and ultimately destroy the flow of your cross-examination. Have a checklist of exhibits you wish to use in the cross-examination.

Trial Presentation

Good cross-examination is confined to topics and issues favorable to the state's case that the defense expert must concede, and areas of impeachment. *Do not try to change the expert's opinion.*

Keep in mind the following cross-examination advice, which is all the more important when cross-examining expert witnesses:

- Listening is a skill. Listen to what the defense expert is really saying.
- Look for intellectual biases. The defense expert's disagreement with the state's expert's opinion may be very subtle.
- Avoid open-ended questions.
- Be careful about interrupting an expert. The trier may think you are trying to hide some relevant fact.
- Sometimes, less is better. Cross-examinations don't have to be long – just effective.

APPENDIX I: BENCHMARKS IN ADOLESCENT DEVELOPMENT⁶⁷

Every decision a juvenile prosecutor makes inevitably involves considerations of child development. The prosecutor must consider a child's capacity to testify in court, whether the offender has the capacity to waive his or her constitutional rights, and whether the offender is competent to proceed to trial or be held responsible for his or her conduct. Often, prosecutors are called upon to assess children's capabilities with little to no formal training in child development. This Appendix will provide benchmarks in normal development of children in the age group most likely to come into the juvenile justice system—adolescence (ages 12–17)—and apply this knowledge to questions of competency. Obviously, benchmarks are only that—a set of guidelines based on contemporary American norms. The development of every individual is affected by the complexities of heredity and environment, and so these benchmarks will not uniformly apply to all children. They do, however, provide an excellent starting point for the prosecutor's work.

Physical Development

Adolescence can be characterized as a second infancy. Whereas the first infancy is birth into the existence of childhood, the second infancy is birth into the existence of adulthood. Adolescents experience rapid physical changes, ushered in by a greater influx of hormones. They develop secondary sex characteristics (*e.g.*, breasts, pubic hair, and elongated penis). For girls, their biggest growth spurt generally occurs between ages 13 and 15. For boys, their biggest growth spurt usually peaks between ages 16 and 19.

Cognitive Development

Adolescents understand abstract ideas and can use symbolic reasoning. Therefore, they are generally able to reason, generalize, form hypotheses,

⁶⁷ Written by Allison F. DeFelice, Ph.D., Program Director, Assessment and Resource Center (ARC), William S. Hall Psychiatric Institute, Columbia, SC.

and test them. They are capable of introspection, considering how things are and how they might be. Research has generally demonstrated that after the age of 14, adolescents typically engage in a decision-making process that is the same as that of adults. Just like adults, older adolescents will proceed through a cost-benefit analysis to determine what action seems to be in their best interest. Yet, adolescents will inevitably make decisions which demonstrate a greater tolerance for risk and are weighted toward short-term gains with less regard for long-term consequences.

There are two primary reasons for the difference between adolescent and adult decision-making. For one, the adolescent brain is a work in progress. The frontal lobes and prefrontal cortex remain under construction until sometime in young adulthood. Two key processes known as *pruning* and *myelination* are actively underway to speed up and refine the functioning of this most executive area of the human brain.⁶⁸ The prefrontal cortex is often termed the brain's CEO and the "area of sober second thought."⁶⁹ It is the area responsible for goal and priority setting, impulse inhibition, emotional control, determining right from wrong and cause and effect relationships. Once it reaches maturity, the individual graduates from the emotional, reactive thought processes that define childhood to the rational and reflective judgments that define adulthood. In addition to coping with an immature brain, adolescents lack the life experience to think of all the potential risks and consequences associated with their decisions. Since young adolescents look to their peer group for consultation in problem-solving, the inherent vulnerability is reinforced by the naiveté of the friends. Since they do not know what they do not know, they have difficulty identifying when they need to ask for adult help.

During later adolescence (16–19), symbolic reasoning and use of formal logic improves. "Fluid intelligence," the on-the-spot reasoning ability that is not dependent upon experience, emerges.⁷⁰ This skill improves the ability to cope with new problems and situations.

⁶⁸ ELKHONON GOLDBERG, *THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND*, 23 (Oxford University Press 2001).

⁶⁹ Claudia Wallis, Kristina Dell, "What Makes Teens Tick," *TIME*, May 10, 2004, at 56..

⁷⁰ JANET BELSKY, *THE PSYCHOLOGY OF AGING THEORY, RESEARCH, AND INTERVENTIONS* (Brooks/Cole Publishing Company 1990).

Language Development

Adolescents can often communicate like adults, using sophisticated vocabulary and following adult conversational style. However, these teens may not fully understand the meanings of the very words that they utilize and may not ask for clarification when they do not understand adult language. It is therefore important for prosecutors to maintain a simplified vocabulary, and encourage adolescents to ask for clarification, just as the prosecutor will ask the adolescent for clarification when advanced vocabulary or slang is used. Slang is the ever-evolving language of sub-cultures, designed to allow “in-groups” to communicate while keeping outsiders at bay. So, as soon as adults master the popular slang of teens, it goes through its next mutation and leaves baffled adults behind. Slang is often connected to stronger emotional states for teens, so it should not be ignored. Rather, professionals are well-served to acknowledge their ignorance and implore the adolescent to explain the meaning behind slang terms.

Social / Emotional Development

Carrying the “second infancy” theme through, the adult-like bodies and adult-like brains of these “baby adults” fuel an adult-like transformation in their social and emotional lives. Adolescents are intensely concerned with questions of identity and place (*e.g.*, who am I? What do I stand for? Do others see me for who I am?), and as a result may come across to adults as quite self-absorbed. They are critical yet sensitive to criticism; they are idealistic in their beliefs and often feel misunderstood. It is a heady and passionate time as they experience deeper physical, cognitive, emotional, and moral connections to society, played out primarily within the universe that is their peer group. They can experience rapid mood changes, in part the result of hormones, but in part the result of self-appraisal and the appraisal of others. They are concerned with meaningful interpersonal relationships, and experience them in a way that imprints upon them a set of heart-felt “firsts” (first love, best friend, first betrayal, etc.).

During the early adolescent years (approximately 12–15), conflicts between family and peer values are typically at their worst. A burgeoning

“personal morality code” comes into the forefront, an amalgam of family and social values and whatever reactions against those beliefs the adolescent and peer group may be exploring. The adolescent will value his personal morality code over society’s rules, which may or may not put the adolescent in conflict with the law; in short, it depends upon how risky or antisocial the juvenile’s behavior becomes. This tension between society and the adolescent’s personal morality code may be one barrier to eliciting testimony from adolescent witnesses. Whereas the court system is concerned with the principles of justice and constitutional rights, the adolescent may be more concerned with loyalty to a friend than cooperation with adults. In early adolescence (13–15), conformity to peer pressure is at its peak. In later adolescence (16–19), social cliques and peer pressure decline in importance, and society’s laws and norms tend to be internalized anew as one’s own. This age group presents as more assertive than oppositional, and though conflicts between family and peer values may persist, the older adolescent is better able to work for a reconciliation that honors both groups and is true to his or her unique sense of self.

Sexual Behavior

For adolescents, masturbation becomes goal-directed. This population can experience a full range of sexual behavior, regulated by a mix of familial, cultural, religious and community factors and the adolescent’s developing self-perception as a sexual being. Adolescents tend to be preoccupied with sexual issues. They must contend with how their bodies are changing and how their changing bodies affect the behavior of others; they contend with sexual desires and the sexual demands of others.

Adolescents often experience ambivalence about this new territory, and there can be significant pride in and discomfort with their new bodies. According to research on sexuality in young adolescents, 19% are sexually active, 13–15% of the girls become pregnant, 13% of the girls describe the sex as involuntary, 24% of the relationships involve a partner two or more years older, 12% involve a partner three or more years older. Sexual activity among these young adolescents is highly correlated with alcohol and drug use and engaging in other delinquent acts. According to parallel parent /child surveys, parents believe they are talking to their kids about

sex a lot more than the kids say that they are. 34% of boys think it is okay to pressure girls for sex, and 14% of girls think it is okay to be pressured.⁷¹

Risk-Taking

Risk-taking is a normal part of the adolescent process of individuation and identity formation. On the one hand, young adolescents are particularly vulnerable as they reference one another for guidance in such uncharted territories. On the other, the mortality rate is dramatically higher among older adolescents, suggesting in part that their mistakes have graver consequences.⁷² One of the great mediating factors for how children come through this risk-taking phase is how the family functions. Children and adolescents whose parents are authoritative, as opposed to permissive or authoritarian, rate themselves—and are rated by objective measures—as more socially and instrumentally competent.⁷³

In conclusion, while the benchmarks reviewed in this section should provide prosecutors and other professionals with guidelines for consideration, it is of course critical to consider every child as an individual within a unique context. Research on children's competencies, especially in terms relevant to the criminal justice system, remains a young science. Further, neuroscientists are rapidly amassing new information about brain development, with substantial emphasis on the distinguishing features of the adolescent brain.

⁷¹ 14 AND YOUNGER: THE SEXUAL BEHAVIOR OF YOUNG ADOLESCENTS (SUMMARY). (Bill Albert, Sarah Brown, & Christhe Flanigan eds., National Campaign to Prevent Teen Pregnancy 2003).

⁷² Charles E. Irwin, Jr., *Adolescence and Risk Taking: How Are They Related?* ADOLESCENT RISK TAKING 7 (Nancy J. Bell & Robert W. Bell eds., Sage Publications 1993).

⁷³ See also Diana Baumrind, *The Influence of Parenting Style on Adolescent Competence and Substance Use*, 11 EARLY ADOLESCENCE 56-95 (1991); Nancy Miller, et al. *Externalizing In Preschoolers and Early Adolescents: A Cross-Study Replication of a Family Model*, 29 DEV. PSYCHOL. 3-18 (1993). Laura Weiss and J. Conrad Schwarz, *The Relationship Between Parenting Types and Older Adolescents' Personality, Academic Achievement, Adjustment, and Substance Use*, 67 CHILD DEV. 2101-2114 (1996).

APPENDIX II: EXAMPLE OF IQ SCORES IN AN EVALUATION REPORT

Verbal Subtests	Scaled Score	Performance Subtests	Scaled Score
Information	9	Picture Completion	8
Similarities	14	Coding	13
Arithmetic	6	Picture Arrangement	12
Vocabulary	12	Block Design	9
Comprehension	15	Object Assembly	13
Digit Span	11	Symbol Search	7

Verbal IQ: 107 Performance IQ: 107 Full Scale IQ: 107

While the individual in this IQ test placed well within the average range for intellectual functioning, and there is no difference between the Verbal and Performance IQ scores, the subtest scores indicate a significant issue.

Stronghold tests: Information, Vocabulary, and Comprehension—

These three subtests have vast differences in scoring. The comprehension score is extremely high (15 out of 16) while the information score is only 9. The vocabulary score is only 12. With a comprehension score of 15 you would expect this individual to have a high IQ. Disparities in these scores suggest that there is something significant preventing this person from performing to his or her potential and achieving better results.

Anxiety Triad: Digit Span, Symbol Search, and Arithmetic—

These three subtests should be within one point of each other. In this case, the digit span score is 11 (near average), the symbol search is 7 (3 points below average) and the arithmetic score is 6 (4 points below average). This subtest combination reflects an individual who performs poorly when under pressure. This individual may engage in bad decision-making or other inappropriate behavior when anxious, feeling pressured or overwhelmed by emotions. This information is important to the individual's

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prognosis and to prosecutors' decision-making about community safety, offender accountability, and skill development.

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