

the majority wrote, “the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense” (*Ake*, p 83). Most courts have read *Ake* narrowly and appoint experts only when they are essential to the defense. The Ohio Supreme Court held that *Ake* was satisfied by a court clinic psychiatrist.

In *Awkal*, an insanity defense was essential to the defendant’s case. *Awkal* is significant in that it establishes that, irrespective of overall defense strategy, even non-state-appointed counsel may render ineffective assistance in calling a mental health expert whose cross-examination testimony directly contradicts a capital murder defendant’s sole defense of insanity.

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## Reliability of Sleep Parasomnia and the Trustworthiness of Patient Self-Reporting

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### Court Found That Patient Self-Reporting to the Testifying Psychiatrist Was Reliable and Trustworthy

In *State v. Scott*, 275 S.W.3d 395 (Tenn. 2009), the Tennessee Supreme Court considered whether the trial court erred in excluding the expert testimony of a physician regarding sleep parasomnia involving the sexual behavior of the defendant.

#### Facts of the Case

On May 15, 2006, a Tennessee grand jury returned a five-count indictment against Adrian Leroy Scott for alleged criminal sexual contact between Mr. Scott and his stepdaughter (who at the time was a minor). Mr. Scott was charged with three counts of sexual battery by an authority figure in violation of *Tenn. Code Ann.* § 39-13-527 (2006) and two counts

of rape in violation of *Tenn. Code Ann.* § 39-13-503 (2006). Mr. Scott intended to call an expert witness in his defense and provided the state with a report from Dr. J. Brevard Haynes, the Medical Director of the St. Thomas Health Services Center for Sleep. Dr. Haynes opined that “sexual behavior in sleep parasomnia [was] the explanation for [Mr. Scott’s] touching of his step-daughter.” The state filed a pretrial motion to exclude the testimony. Following a hearing, the trial court entered an order excluding Dr. Haynes’ testimony on two grounds. First, the trial court concluded that “intent is not an element of either offense. Therefore, the information which the defendant [sought] to admit through Dr. Haynes as an explanation of the alleged conduct [did] not aid the jury in an understanding of the offense” (*Scott*, p 400). Second, the trial court ruled, without elaboration or explanation, that the “methodology and principles underlying the scientific evidence [were] not sufficiently trustworthy and reliable to be presented to the trier of fact” (*Scott*, p 400). Mr. Scott filed an appeal to the court of criminal appeals, which denied his application. Thereafter, Mr. Scott filed an application under *Tenn. R. App. P. 11*, and the Tennessee Supreme Court granted Mr. Scott’s application for permission to appeal.

On appeal, Mr. Scott argued that the trial court erred by excluding Dr. Haynes’ testimony. Specifically, Mr. Scott argued that Dr. Haynes’ opinion regarding sleep parasomnia was based on reliable scientific methodologies and principles.

#### Ruling and Reasoning

The Tennessee Supreme Court ruled that the trial court erred by concluding that Dr. Haynes’ testimony was not sufficiently reliable or trustworthy to substantially assist the trier of fact.

The supreme court discussed the factors that determine the admissibility of expert witness testimony, opining that a trial court “must assure itself that the [expert’s] opinions are based on relevant scientific methods, processes, and data, and not upon an expert’s mere speculation” (*McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997)). The court’s reliability analysis employed four general inter-related components: assessment of professional qualification; analytical cohesion (i.e., basis for the expert’s opinion); methodological reliability; and foundational reliability (i.e., reliability of the expert’s testimony and opinion).

The court focused its analysis on the fourth component, the expert's foundational reliability, using a two-step approach. First, it assessed the expert's field by focusing on the reliability of the studies, articles, and data that compose the field and provide the foundation for the expert's testimony. Second, the court analyzed the reliability of the underlying facts on which the expert's opinion is predicated—in this case, Mr. Scott's self-report to Dr. Haynes.

The court found merit in the field of sleep medicine and that a diagnosis of sexual behavior as sleep parasomnia had been generally accepted within the field of sleep science. Further, the court stated:

The underlying research relied upon by Dr. Haynes [was] built on a medical and psychological foundation, and its methodologies [were] consistent with this foundation. Expert sleep disorder testimony is not entirely novel; such testimony has been found by other courts to warrant admission as expert testimony [Scott, p 408].

In this case, the state challenged Mr. Scott's self-reporting of his own conduct, arguing that because the facts relied on by Dr. Haynes were self-reported by and in the self-interest of a criminal defendant, they were inherently lacking in trustworthiness. The court rejected the state's argument and noted that Dr. Haynes' analysis went beyond Mr. Scott's self-reporting. Dr. Haynes indicated that reliance on self-reporting was critical to diagnosis and evaluation, and the court concluded that self-reported facts could be relied on by sleep science experts in reaching a diagnosis.

#### Discussion

The United States Supreme Court set standards for the admissibility of expert witness testimony in several cases. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court ruled that judges should consider the following factors to establish the validity of a scientific methodology: whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; the known or potential error rate; whether there are standards available and maintained that govern the operation of the method; and whether it has been generally accepted by a relevant scientific community. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court expanded the *Daubert* standard to include nonscientist experts who have expertise based on "technical" and "other specialized" knowledge. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Court held that the

appropriate standard for reviewing a district court's decision to admit or exclude scientific evidence is an "abuse of discretion" standard.

This case presents an interesting discussion and analysis of the admissibility of expert witness testimony that includes patient self-reporting. The Tennessee Supreme Court found that Dr. Haynes was an expert in his field, given his extensive professional qualifications and experience in sleep medicine. The court found that the record on appeal did not show a wide gap between Dr. Haynes' conclusions and the data on which he based his conclusions. Dr. Haynes interviewed Mr. Scott, performed a physical examination, conducted polysomnography followed by multiple sleep latency tests, listened to taped interviews conducted by police detectives interviewing Mr. Scott, and extensively reviewed medical literature on the subject of sexual behavior in sleep parasomnia. Dr. Haynes testified that his diagnosis of Mr. Scott was reached on a basis that was normal for such diagnoses in his field. The state objected to Dr. Haynes' reliance on Mr. Scott's self-reporting. However, the court found that Dr. Haynes' methodology was consistent with the accepted practices of physicians who treat and make such diagnoses. Considering the factors outlined in *Daubert*, this court found that sleep parasomnia was an established field of medicine that had been subject to peer review and was generally accepted in the scientific community.

In this case, the court ruled that expert testimony based on self-reporting did not render it inadmissible under *Daubert*. Rather, the degree to which the expert's opinion was based on the defendant's self-reporting affected the weight given to the opinion. The court suggested that any prejudice that might result from self-reporting can be addressed by cross-examination. Through cross-examination, the trier of fact can determine whether there is a basis for excluding an expert's opinion due to the lack of an adequately trustworthy foundation. In other words, the degree of reliance on patient self-reporting influences the weight given to the testimony, rather than its overall admissibility.

This case is relevant to mental health professionals because mental health expert testimony often relies heavily on patient self-reporting. This court declined to accept the state's argument that a rule should be established that would effectively bar expert testimony based on self-reported statements. By rejecting the state's argument, this court protected the impor-

tant role of self-reporting in mental health expert examinations.

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## Waiver of *Miranda* Rights

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### Variety of Factors Considered in Determining That a *Miranda* Waiver Was Knowing and Intelligent; Application of Grisso Test Criticized

In *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009), the U.S. Court of Appeals for the Sixth Circuit considered a wide range of evidence about William Garner's capacity to waive his *Miranda* rights knowingly and intelligently before confessing to his crime. They assessed evidence of Mr. Garner's other capacities near the time of his confession, such as his capacity to recognize the criminality of his conduct and his competency to stand trial. They considered expert testimony about Mr. Garner's capacity to understand and waive his *Miranda* rights based on an evaluation conducted years after his confession. The court also focused on the conduct of the police at the time of Mr. Garner's waiver of his *Miranda* rights.

#### Facts of the Case

In 1992 in Cincinnati, Ohio, Mr. Garner burglarized an apartment. He then set it on fire to destroy evidence, killing five children whom he knew were sleeping inside. After his arrest, he received a *Miranda* warning, signed a waiver form, and confessed on tape to setting the fire. He was convicted and sentenced to death for five counts of aggravated murder. He filed a writ of *habeas corpus* and appealed on three claims relating to his *Miranda* waiver. The most substantive was that he did not knowingly and intelligently waive his *Miranda* rights before confessing.

#### Ruling and Reasoning

Affirming the judgment of the district court, the appeals court found that Mr. Garner was not entitled

to *habeas* relief because the totality of the circumstances showed that he had knowingly and intelligently waived his *Miranda* rights before his confession. Therefore, the court determined that his *Miranda* claims lacked merit. The relevant legal questions were whether the defendant knew that he could choose not to talk to police, could talk with counsel present, and could stop talking at any time. The question was not whether he understood every potential consequence of waiving his Fifth Amendment privilege.

To answer these questions, the court focused on evidence of Mr. Garner's mental state and capacities during the crime and during the police interview, the conduct of the police at the time of his confession, and his competency to stand trial. First, the court opined that since Mr. Garner's conduct at the time of his crimes indicated his capacity to understand the criminality and consequences of his acts, he would have had the capacity to understand the consequences of speaking to the police about his crimes during his interrogation the following day. Mr. Garner deceived the taxi driver who took him to the apartment that he burglarized by telling the driver that his girlfriend had thrown him out and he was removing his belongings. Mr. Garner also set the fire to eliminate evidence. Second, he was described as appearing "perfectly normal" and "very coherent" when he waived his rights and gave his confession. After the police read him each provision of the *Miranda* warning they asked him if he understood its meaning, and he answered in the affirmative. He never expressed any misunderstanding of the provisions of the warning.

Third, the court considered the perspective of the police officers at the time of Mr. Garner's confession, opining that the police "had no indication that Garner's 'age, experience, education, background and intelligence' may have prevented him from understanding the *Miranda* warnings" (*Garner*, p 262). The court attached special significance to this finding, since "the original purpose underlying the *Miranda* decision . . . was to 'reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation'" (*Garner*, p 262). Since it was undisputed that the police were reasonable and careful in issuing Mr. Garner his *Miranda* warnings and obtaining his confession, the court said that there was no basis for invalidating Mr. Garner's *Miranda* waiver.