

# Sexsomnia as a Defense in Repeated Sex Crimes

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Sexsomnia and related sexual behaviors during sleep may be diagnosed in individuals accused of sex crimes. Although sexsomnia is now formally recognized in the DSM-5, the variable presentation of such behaviors and the possibility of malingering in medicolegal situations can cause challenges for forensic evaluators and legal professionals alike. Review of the literature reveals a paucity of cases involving allegations of repeated incidents due to abnormal sexual behaviors or experiences in sleep. It is important for experts involved in such cases to understand how the courts have responded to sexsomnia defenses involving diverse alleged incidents. The authors review the case law and discuss methods of examining evaluatees with suspected sexsomnia in cases of alleged sexual assault.

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Sexsomnia has garnered attention internationally after defendants in sexual assault cases have suggested that sleep disorders led to their alleged crimes. Forensic examiners have the difficult task of evaluating the defendant's level of consciousness and volitional criminal intent during these incidents. This involves examining evidence as to whether an underlying sleep disorder is the basis for the criminal behavior.

A review of the literature demonstrates that sexsomnia has been described in a variety of medicolegal contexts over the past three decades, but there is limited information in the literature about cases involving sexsomnia, with diverse alleged incidents. There have been no studies examining whether repeated sleep-related sexual incidents are less likely than single incidents. The lack of knowledge on this issue creates a challenge for forensic evaluators who may be tasked with evaluating claims that an individual repeatedly engaged in sexual assault because of a sleep disorder. In this article, we review the United States case law involving sexsomnia and related defenses in

which multiple sex crime charges were alleged and forensic evaluations were conducted.

Hurwitz *et al.*<sup>1</sup> first reported abnormal sexual behavior during sleep with diverse alleged incidents in 1989. Their series highlighted three cases, one of which involved multiple incidents. The case involved a severely obese male with obstructive sleep apnea (OSA) who was accused of two episodes of sexual abuse against his 10-year-old stepdaughter. The legal outcome of this case was not reported.

Fenwick<sup>2</sup> reviewed sexual offending during sleepwalking in 1996. He described the history of sexual behavior during sleepwalking in case reports. Fedoroff *et al.*<sup>3</sup> later described "sleep sex" in reference to a case involving sexual behaviors during sleep. The term "sexsomnia" was not coined until Shapiro *et al.*<sup>4</sup> published a case series in 2003 featuring 11 patients with sexual behaviors during sleep. They described the hallmark feature of sexsomnia as "frequently present sexual arousal with autonomic activation" during sleep (Ref. 4, p 315).

The American Psychiatric Association has now included the diagnosis of sexsomnia in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).<sup>5</sup> The DSM-5 identifies sexsomnia as a "specialized" form of sleepwalking under the classification of non-rapid-eye-movement (NREM) sleep-arousal disorders and defines it as: "varying de-

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grees of sexual activity (e.g., masturbation, fondling, groping, sexual intercourse) occurring as complex behaviors arising from sleep without conscious awareness” (Ref. 5, p 401). Minimal dream imagery is recalled, and amnesia for the episode is present. However, establishing the diagnosis of sexsomnia can be difficult, as various sexual activities during sleep have been described in different contexts.<sup>6–16</sup>

Schenck *et al.*<sup>6</sup> first classified sleep-related disorders associated with abnormal sexual behaviors in 2007. They concluded that sexual behaviors occurring in sleep are related to a broad range of underlying neurologic, medical, psychiatric, and primary sleep disorders. Marca *et al.*<sup>7</sup> published a case study of three individuals that further demonstrated the variable presentation of abnormal sexual behaviors in sleep disorders. They concluded, “the observation of automatic, unconscious sexual behaviors during sleep in patients with different sleep disorders (OSAS, arousal disorders, RBD) confirms that sleep sex may not be unequivocally linked to a peculiar sleep stage” (Ref. 7, p 3494). Accordingly, these patients may present with heterogeneous polysomnograph findings.

Multiple comorbid sleep disorders may be present in patients with abnormal sexual behavior in their sleep. Cicolin and colleagues<sup>8</sup> reported two cases of parasomnia overlap disorder (POD), or situations in which patients present with REM sleep behavior disorder, NREM sleep parasomnia, and sexual behavior documented by video polysomnography. One of these cases was notable for involving a male with a history of sleepwalking and REM behavioral disorder who was charged with fondling a young girl on separate occasions. POD was documented by polysomnography and the patient successfully put forth a sexsomnia defense that resulted in acquittal. This case is one of few documented sexsomnia cases in the literature involving repeat offenses in which a legal outcome was reported.

Ingravallo *et al.*<sup>17</sup> performed the first review of legal cases involving violence and sexual behavior in sleep, examining cases reported in the literature from 1980 to 2012. The authors identified nine cases of sexual behavior in sleep with charges ranging from sexual touching to rape. All cases involved male defendants. The victims in these cases were unrelated young females. Of the nine persons, only one was identified with repeat offenses, which was first reported by Cicolin *et al.*<sup>8</sup> Organ and Fedoroff<sup>18</sup> re-

viewed Canadian case law involving sexsomnia and did not report cases with repeat offenses.

Schenck<sup>19</sup> published an update on sexsomnia and sleep-related seizures and their forensic implications. Schenck identified 94 cases of sexsomnia in the literature from nine different countries (United States, Spain, Holland, Italy, France, Turkey, Australia, Brazil, and United Kingdom). Of these cases, four were related to Parkinson’s and omitted from analysis. Of the remaining 90 cases, the offender was male in 82 percent; the mean age of onset was between 32 and 35 years; amnesia was reported 97–98 percent of the time; aggression and violence occurred in 32 percent; and legal consequences were involved in 14 percent (Ref. 19, p 529). Of the 14 percent of cases involving legal consequences, only the case originally reported by Cicolin *et al.*<sup>8</sup> makes mention of repeated offenses.

To date, the only known study of United States criminal cases involving a potential sleep disorder was an abstract presented by Bornemann *et al.*,<sup>20</sup> in 2014. The authors identified 262 cases, of which 50 percent involved parasomnias. Sexsomnia was the most common type of parasomnia, present in 39.3 percent of all the cases. About 39 percent of the cases involved male defendants aged 18 to 55 years; 37.8 percent of the cases involved female victims, aged 3 to 17 years. The victim knew the defendant in 86 percent of the cases. The authors did not mention whether these cases involved repeated alleged incidents.

Bornemann,<sup>21</sup> later described a case with multiple alleged incidents. G.D., a 34-year-old man, was accused of repeatedly molesting his 12-year-old stepdaughter (L.K.). He reported a history of sleeptalking and two episodes of sleepwalking as a child. He was drinking vodka on the evening in question. G.D.’s attorneys consulted a sleep medicine expert to develop a sleepwalking defense. The outcome of this case was not reported.

Despite the sleep expert community’s international acceptance of sexsomnia as a legitimate diagnosis, the legal community remains skeptical of criminal defendants who put forth the diagnosis in court. Badawy<sup>22</sup> states, “Testimony about unproven conditions like sexsomnia can be challenged on its validity and lack of acceptance in the general medical community under *Frye* or *Daubert*”<sup>23,24</sup> (Ref. 22, p 6). This stance may pose challenges to the individual

alleging a sexsomnia defense, as well the forensic examiner tasked with evaluating such cases.

### Existing Case Law Descriptions

The objective of this review is to identify existing cases of sexsomnia, or related sleepwalking disorders, involving instances of multiple alleged sex crimes. We searched the LexisNexis database<sup>25</sup> for all reported U.S. federal, state and territories cases. The term “sexsomnia” yielded 10 cases, “sleep sex” yielded 8, “sleepwalking and rape” yielded 86, and “sleepwalking and sex” yielded 109. There was overlap in the results of the various searches. We included cases involving multiple alleged sexual incidents in which the defendant received a diagnosis of a sleep disorder and a forensic evaluation was conducted.

We excluded many of the cases identified during the search for several reasons. First, most of the cases included the terms sexsomnia, sleep sex, sleepwalking and rape, and sleepwalking and sex in the case footnotes in descriptions of existing case law. Second, we excluded cases that involved only a single alleged incident. We also excluded cases that did not involve a forensic evaluation. We ultimately identified eight cases that met our criteria for review.

#### People v. Ellington

In *People v. Ellington*,<sup>26</sup> Joseph Ellington was charged with six counts of lewd acts on a child under age 14. Mr. Ellington’s family history was notable for sleepwalking in his daughter. He had no prior criminal history and used marijuana chronically.

The first victim (A.), a nine-year-old friend of Mr. Ellington’s daughter, testified that he put his hand inside her (A.’s) clothing on several occasions. A second victim (K.), another nine-year-old friend of Mr. Ellington’s daughter, testified that he pulled down her (K.’s) tights and panties and put his finger on her “privacy” (Ref. 26, p 1). K. testified that Mr. Ellington had touched her in the same two places on another occasion when she stayed overnight with his daughter.

Mr. Ellington testified that he sat next to K. and subsequently fell asleep. He stated that he did not recollect what happened. Mr. Ellington’s wife described him as a restless sleeper who would wake up violently if startled. She testified he would sometimes make sexual advances in his sleep. She reported that he did not respond when spoken to during these

episodes and that he occasionally would sit up and bark out an order that she could not understand.

Defense expert, Clete Kushida, MD, was retained the day before he testified and did not conduct any interviews or clinical examinations. He presented literature and general information regarding sleep disorders. The jury found Mr. Ellington guilty of one count of oral copulation for the alleged offenses against both victims, but was unable to reach a verdict on the other counts and enhancement charges. Subsequently, the court declared a mistrial as to those counts and the enhancement allegations were stricken.

Before sentencing, Dr. Kushida performed a sleep study on Mr. Ellington, who motioned for a new trial. The defense presented Dr. Kushida’s report from polysomnography, which demonstrated “non-specific subtle indications” that required further interview and evaluation (Ref. 26, p 11). The court denied Mr. Ellington’s motion for new trial as they determined that the meager evidence of “nonspecific subtle indications” would not have any impact on the result of the trial. The appellate court affirmed the judgment. Mr. Ellington was sentenced to six years.

#### United States v. Brady

U.S. Air Force Chief Master Sergeant (SMsgt) Steve Brady<sup>27</sup> was charged with two specifications of committing an indecent act upon a female under 16 years of age on multiple occasions. The daughter (A.S.) of SMsgt Brady’s girlfriend testified that he came into her bedroom wearing nothing on five occasions. On one occasion SMsgt Brady pulled her hand into his “private area” (Ref. 27, p 3). On another occasion, he inserted his finger into her anus. A.S. was nine-years-old at the time of the alleged incidents.

SMsgt Brady called his mother and two ex-girlfriends as witnesses. Through witness testimony he established that he had an extensive history of sleepwalking dating back to childhood. His female partners also testified that he would initiate sex while asleep. SMsgt Brady testified that he never knowingly sexually abused A.S. An unnamed expert on sleep disorders conducted his forensic evaluation. The expert opined that “[SMsgt Brady] is, in fact a sleepwalker, that it is possible to engage in a variety of behaviors while sleepwalking, and that it would be very difficult to tell whether [SMsgt Brady] was sleepwalking on the night he was found in AS’s bed” (Ref. 27, p 3).

SMSGT Brady was found guilty of two charges of committing an indecent act upon a female under 16 years of age. On appeal, the court affirmed the findings as to one charge but set aside the other charge. The court returned the record of trial for remand to the convening authority. SMSGT Brady was given a dishonorable discharge and sentenced to confinement for two years and a reduction in military status.

### United States v. Livengood

U. S. Army Staff Sergeant (SSG) Dewayne Livengood<sup>28</sup> was charged with false official statement, carnal knowledge on multiple occasions, and committing indecent acts upon a female under the age of 16 on multiple occasions. SSG Livengood was accused of several incidents of molesting his intellectually disabled daughter (C.L.). He engaged C.L. in sexual intercourse, fondled her breasts and private areas, and kissed her in a sexual manner, usually while in his own bed. C.L. was 14 years old during the time of the alleged incidents.

SSG Livengood did not testify at trial. He initially denied ever inappropriately touching, having sexual intercourse with, or kissing C.L. on the lips. He later submitted the following written statement, "Concerning the touching of my daughter's private parts described in the first statement, the only time I felt my daughter's vagina was I reached over thinking to have sex with my wife and I felt clothing. This occurred approximately 4 or 5 times" (Ref. 28, p 5).

In SSG Livengood's forensic evaluation, Boris Kaim, MD, a sleep expert, conducted two polysomnographs. He opined that SSG Livengood carried the diagnoses of insomnia, confusional arousal, peripheral neuropathy, sleep talking, dyskinesia, and crossed dominance and had a history of dyslexia. He ruled out somnambulism, REM behavior disorder, and sleep apnea.

The judge conducted a Military Rules of Evidence balancing test and determined that "the probative value of Dr. Kaim's proffered expert testimony was substantially outweighed by the unfair prejudice associated with its unreliability" (Ref. 28, p 7). The judge held that the defense presented insufficient evidence as to whether the theories and techniques used by Dr. Kaim could be and had been tested. The defense presented no evidence about the techniques that Dr. Kaim used in his evaluation, whether such techniques were ever subjected to peer review, or that the diagnosis of confusional arousal was widely accepted in the scientific community.

An officer panel sitting as a general court martial found SSG Livengood guilty. He appealed and asserted that the military judge abused his discretion by excluding expert witness testimony concerning his alleged confusional arousal disorder. The appellate court determined that the judge correctly analyzed the requested expert testimony using the standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>24</sup> and *United States v. Houser*<sup>34</sup> and found that he did not abuse his discretion. The court affirmed the guilty verdict and sentence. SSG Livengood was given a dishonorable discharge, and sentences to confinement for five years, forfeiture of all pay and allowances, and reduction in military status.

### State v. Scott

Adrian Scott<sup>29</sup> was charged with three counts of sexual battery by an authority figure and two counts of rape of his stepdaughter. Mr. Scott's stepdaughter reported that he fondled her groin while the family was sleeping in close quarters. On other occasions, she reported similar behavior when he had fallen asleep in her room. Mr. Scott reported no recollection of this behavior. The victim was between 13 and 18 years of age during the alleged incidents.

Sleep medicine expert, J. Brevard Haynes, MD, conducted a forensic evaluation of Mr. Scott. Dr. Haynes interviewed Mr. Scott's spouse, who reported that he had fondled her vagina while asleep on several occasions without recollection. Dr. Haynes performed polysomnography and a mean sleep latency test, which failed to show aberrant sexual behaviors during sleep. Dr. Haynes opined, "[S]exual behavior in sleep parasomnia is the explanation for [Mr. Scott's] touching of his stepdaughter" (Ref. 29, p 6). He testified that the basis of his opinion was due to the following

- (1) [Mr. Scott's] history of night terrors and sleep walking,
- (2) he has exhibited similar behavior with his wife, (3) his behavior is in keeping with that reported in other individuals with this parasomnia, (4) there is no history of vaginal foundling [*sic*] during wakefulness, (5) this behavior is not in keeping with his character" [Ref. 29, p 6].

The state filed a pretrial motion in the criminal court for Davidson County, Tennessee, to exclude expert testimony. The trial court determined that the expert testimony was not sufficiently trustworthy and reliable to be presented to the jury. A Davidson County grand jury found Mr. Scott guilty on all five counts. This case reached the Supreme Court of Tennessee. The court determined that the trial court

erred by excluding Dr. Haynes' testimony regarding sexomnia, and the judgment was reversed and remanded.

### State v. Hutchinson

Jonathan Hutchinson<sup>30</sup> was charged with 14 counts from multiple alleged incidents and four counts of second-degree endangering the welfare of a child. His girlfriend's 15-year-old daughter (C.D.) awoke to find the defendant in her bed with his finger inside her vagina. Months later C.D. awoke to find Mr. Hutchinson in her bed and touching her vagina with his penis. Per C.D., Mr. Hutchinson proposed vaginal intercourse with C.D., which she refused. Mr. Hutchinson testified that he woke up, not knowing where he was, and subsequently realized he was in C.D.'s bed. She told him to get out, and he apologized and left.

Both the defense and prosecution obtained expert witnesses for evaluation at trial. The defense expert, Gerald Cooke, PhD, a forensic psychologist, opined that Mr. Hutchinson carried the diagnoses of dysthymic disorder and sleepwalking disorder. He testified that Mr. Hutchinson's family history, significant personal history of sleepwalking, and corroborating information from his ex-wife and ex-girlfriend supported his diagnoses. He added that reports of prior history of sexual activity while sleepwalking and confusion when awakened by C.D. provided additional support for his conclusions. Dr. Cooke concluded that Mr. Hutchinson demonstrated behavior consistent with sleepwalking during those incidents.

The prosecution's expert witness, Mark Pressman, PhD, a sleep specialist, opined that "all the evidence points to defendant being awake . . . and aware" when he was in bed with C.D. (Ref. 30, p 4). He opined that Mr. Hutchinson's actions were inconsistent with sleepwalking, since C.D. had said that he responded to her when she spoke to him, and he appeared aware of the situation as he apologized and endorsed fear of going to jail.

Following a mistrial, Mr. Hutchinson was convicted of three counts of endangering the welfare of a child. The trial court denied his motion for judgment of acquittal *non obstante veredicto* and a motion for a new trial. The Supreme Court of New Jersey affirmed this decision. Mr. Hutchinson was sentenced to three concurrent five-year terms, parole supervision for life, and Megan's Law conditions, and mandated to pay fines.

### People v. Hurtado

Anthony Hurtado<sup>31</sup> was charged with four counts of committing a lewd or lascivious act on a child under age 14. His defense stated that he was asleep and intoxicated and had sexomnia during the alleged incidents. Mr. Hurtado had no prior diagnosis of sleepwalking or family history of sleepwalking.

Mr. Hurtado's son (A.H.) testified that his father touched his penis approximately five times while the two were on the couch at night. A.H. stated that he knew Mr. Hurtado was awake because he noticed his eyes were open. A.H. was seven to nine years of age during the alleged incidents. Mr. Hurtado's nephew (N.E.) testified that his uncle touched his "private part" while riding home from a family party in a van (Ref. 31, p 1). N.E. was five years old at the time of the alleged incident. At trial, Mr. Hurtado denied ever molesting N.E. or touching A.H. in a sexually inappropriate way. Mr. Hurtado testified that he had been drinking heavily at a family party before the alleged incident, was asleep in the back of the van between A.H. and N.E., and woke up because his sister was yelling. Mr. Hurtado claimed that, in the past, he had made sexual advances toward people with whom he shared a bed. At trial, he presented two witnesses, both of whom were his friends, to support this claim.

Abraham Argun, PhD, a forensic psychologist, interviewed Mr. Hurtado and reviewed the testimony. He opined that Mr. Hurtado carried the diagnoses of sexomnia, as well as bipolar disorder, and ruled out malingering. Mr. Hurtado was found guilty of three counts of committing a lewd or lascivious act on a child under age 14 because of the incidents involving A.H. and one count related to the incident involving N.E. Judgment was affirmed on appeal, and Mr. Hurtado was sentenced to 15 years to life.

### State v. Stewart

Lymonta Stewart<sup>32</sup> was charged with two counts each of second-degree rape, incest, and sexual activity by a substitute parent for acts committed against his stepdaughter (L.). Mr. Stewart presented a sexomnia defense at trial. L. testified that Stewart began sexually abusing her in 2004 when she was 16 years old. Mr. Stewart abused L. sexually on nearly a daily basis, including oral sex and vaginal penetration. L. became pregnant and gave birth at the age of 17. In another matter, Mr. Stewart was convicted of assault with a deadly weapon after inflicting serious injury

by shooting someone in a road-rage incident. While he was incarcerated, he wrote to L. and demanded that she send him nude photographs of herself, a command with which she complied.

Mr. Stewart testified that one night, he awoke from a deep sleep to find L. on top of him and having sex with him. He claimed he ejaculated as he awoke and before he could push L. off and this incident was the only time he engaged in sexual activity with his stepdaughter.

John F. Warren, PhD, conducted Mr. Stewart's forensic evaluation. Dr. Warren did not form an opinion as to whether Mr. Stewart experienced sexsomnia, but rather presented general information regarding sexsomnia. The trial court ruled to exclude Dr. Warren's testimony, noting that "Dr. Warren doesn't have an opinion as to a central matter in the issue, an issue in this case whether or not Mr. Stewart was subject to sexsomnia or sleeping sex when he had his encounter with L. or encounters with L." (Ref. 32, p 3). Mr. Stewart was found guilty. He appealed that the trial court erred by excluding the testimony of Dr. Warren as to the existence of sexsomnia. The appellate court disagreed and the sentences were affirmed. The trial court suspended judgment on the convictions for incest and sentenced him to 300 to 309 months of imprisonment.

### Malloch v. State

Steven Malloch<sup>33</sup> was charged with two counts of felony child molesting. Mr. Malloch's stepdaughter (C.P.) testified that on one occasion she awoke with him lying next to her with his hand underneath her shirt and on her breast. He appeared to be asleep. On another occasion, C.P. fell asleep in her bed with Mr. Malloch beside her. When she woke up, his hand was in her underwear and his finger was in her vagina. Again, Mr. Malloch appeared to be asleep. C.P. was 11 years old at the time of the alleged incidents.

During the police interview, Mr. Malloch stated he was in bed with C.P. because she was scared. He woke to find his hand in her pants and his finger in her vagina, he pulled his hand out, and C.P. kicked him off the bed. He also admitted to the earlier incident, when his hand was underneath C.P.'s shirt on her breast, but claimed he had woken up that way and thought she was asleep when he got up and went to his room. Mr. Malloch testified that he had sexsomnia, which caused him to engage in sexual behavior while asleep, that he was asleep when he put his

finger in C.P.'s vagina, and that his confession was coerced.

Neeraj Kaplish MD, a sleep expert, conducted Mr. Malloch's forensic evaluation. Dr. Kaplish could not attend the trial, and Mr. Malloch's request for continuance to secure expert testimony was denied. On appeal, Mr. Malloch contended that the trial court abused its discretion by denying his motion for continuance. The jury was deadlocked in this case. The court declared a mistrial and scheduled a second jury trial. He was found guilty in the second jury trial. Judgment was affirmed on appeal. Mr. Malloch was sentenced to 28 years in prison, followed by two years of probation.

### Discussion

Our review has focused on legal cases of sexsomnia involving allegations of repeated sexual offenses and with subsequent forensic evaluation. Criminal charges varied from case to case. The defendants were men in all cases. Most cases involved a single victim with multiple offenses with the exception of two cases<sup>26,31</sup> that involved multiple victims. All victims were minors and female, with the exception of *People v. Hurtado*,<sup>31</sup> which involved two minor males. In all cases, the victim or victims knew the defendant. Most of the forensic cases involving sexsomnia that have been previously reported in the literature involve defendants who are generally males and single victims that were usually female, minors and known to the defendant.<sup>36-42</sup> This tendency is consistent with what we observed in our review.

The expertise of the forensic evaluator is necessary to educate judges and juries about sexual behaviors in sleep, particularly as they pertain to sleep diagnoses such as sexsomnia. As observed in this case review, forensic evaluators do not always conduct sleep studies to evaluate sexsomnia claims. In the cases described in which sleep studies were performed, there was no clear indication that the defendant was experiencing sexsomnia during the incidents in question.

The polysomnography in *State v. Scott*<sup>29</sup> did not demonstrate aberrant sexual behaviors in sleep, but the forensic expert offered a diagnosis of "sexual behaviors in sleep parasomnia" based on data obtained on the defendant's sleep history, collateral information from family and sleep partners, and a character evaluation of the accused. This testimony ultimately led to a favorable outcome for the defendant.

Polysomnography in *People v. Ellington*<sup>26</sup> also did not demonstrate sexual behaviors in sleep. The defendant's motion for a new trial was denied by the court on the basis that the polysomnography results of "nonspecific subtle indications" did not have any impact on the outcome of the trial.

Sleep medicine experts consistently note the lack of utility of sleep evaluations in evaluations of sexsomnia and related sleep disorders. As Bornemann<sup>21</sup> described, "Polysomnography is not routinely performed as part of a medicolegal evaluation in part as this diagnostic tool is not associated with the crux of the legal focus upon *mens rea* with the criminal allegation" (Ref. 21, p 454). This finding is largely because "there is absolutely no after-the-fact polysomnograph finding that could possibly have any relevance as to whether the accused was sleepwalking at the time of the event in question" (Ref., 35, p 1). Simply stated, polysomnography may capture sexsomnia but such evidence does not determine whether sexsomnia occurred during the alleged incidents. Similarly, the absence of sexsomnia on polysomnography does not rule out that sexsomnia did occur during the purported episodes. Thus, the utility of sleep studies in forensic evaluations is limited to observing sleep behaviors in a controlled setting and establishing the presence or absence of sexsomnia and comorbid sleep disorders.

Though sleep studies may have limited utility in the forensic evaluation of sexsomnia, sleep experts have developed guidelines describing important components of any forensic sleep assessment. Ingravallo *et al.* recommended that the forensic sleep evaluation should include the elements in Table 1 (Ref. 17, p 933).

The recommendations noted in Table 1 have merit. However, the evaluation should also assess for malingering, particularly in cases involving multiple alleged incidents. Because the diagnoses of sexsomnia and somnambulism are established largely on clinical history, there may be a strong incentive for individuals to try to feign sleep-disordered sexual behavior when accused of sexual offenses. Therefore, collateral reports from credible individuals who have observed the individual's sleep-related behavior throughout his life or a documented history in his medical record, may suggest that the individual has a genuine sleep disorder. Furthermore, individuals who have engaged in parasomnic sexual behavior may reasonably be concerned about such behavior and consider

**Table 1** Recommended Elements of Forensic Sleep Evaluations (Ref. 17, p 933)

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Review of family history for sleep disorders
A complete history of the defendant's lifetime motor behavior activity during sleep. This includes obtaining collateral information from possible witnesses such as bed partners/relatives/friends. These details should include age at onset, the usual timing of the event during the sleep, the degree of amnesia, and both the duration and frequency of the episodes
Information about sleep/wake habits, prescribed and illicit drug use, herbal products, habitual caffeine and alcohol consumption should be obtained
Information about circumstantial factors of both the person's life and hours prior to the incident are essential
Complete physical, neurologic and psychiatric evaluations, and administration of standardized questionnaires for sleep disorders should be carried out
A video-polysomnography study to identify or rule out other sleep disorders associated with abnormal motor behaviors (to include standard polysomnographic monitoring, scalp EEG, electromyographic monitoring of limbs, and time-synchronized audiovisual recording)

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taking measures to prevent further incidents. As such, it is reasonable to expect such individuals to be aware of the danger of sexual acts while sleeping and use discretion when considering sleeping in proximity with other individuals. Failure to do so must also be considered, as it demonstrates a lack of consideration for the impact on the victim of the sexual behavior.

Although there are no published, standardized assessments to evaluate for feigned sleep disorders, general principles of the detection of malingering apply. The report of rare or improbable symptoms or unlikely symptom combinations increases the likelihood that an individual is feigning. For that reason, evaluators must be aware of typical presentations and actions of individuals diagnosed with sleep disorders. In addition, though polysomnography is not necessary in diagnosing sexsomnia, individuals endorsing frequent or severe aberrant sleep activity can be observed in a clinical setting or while incarcerated to determine whether there is evidence supporting their reports. Collateral information from correctional officers may also aid in the forensic evaluation.

## Conclusion

The use of sexsomnia as a defense for criminal prosecution of sex crimes has been controversial in the legal community.<sup>22</sup> As public and scientific awareness of sleep-disordered sexual behavior increases, so does the likelihood that it will arise in litigation in genuine cases and fabricated ones. This

review of the sexsomnia defense in cases involving multiple alleged incidents indicates that the diagnosis is rarely exculpatory. Of the eight cases, only one defendant was acquitted of his charges based on expert testimony involving sleep-disordered sexual behavior.<sup>29</sup> There was one case in which claims of intoxication were raised by the defense but the court found the evidence insufficient to warrant an instruction for a lesser battery charge.<sup>31</sup> In addition, forensic evaluators of potential sleep-disordered sexual behavior provide information and assessment that are of widely varying depth and utility. Sexsomnia may be a relatively new frontier of forensic evaluation, but the importance of rigorous history-taking, gathering of collateral information, thorough record review, and assessment of malingering remain key elements. As our understanding of sleep-disordered behaviors improves, so will our ability to make diagnosis and opine on sexsomnia in the forensic context.

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