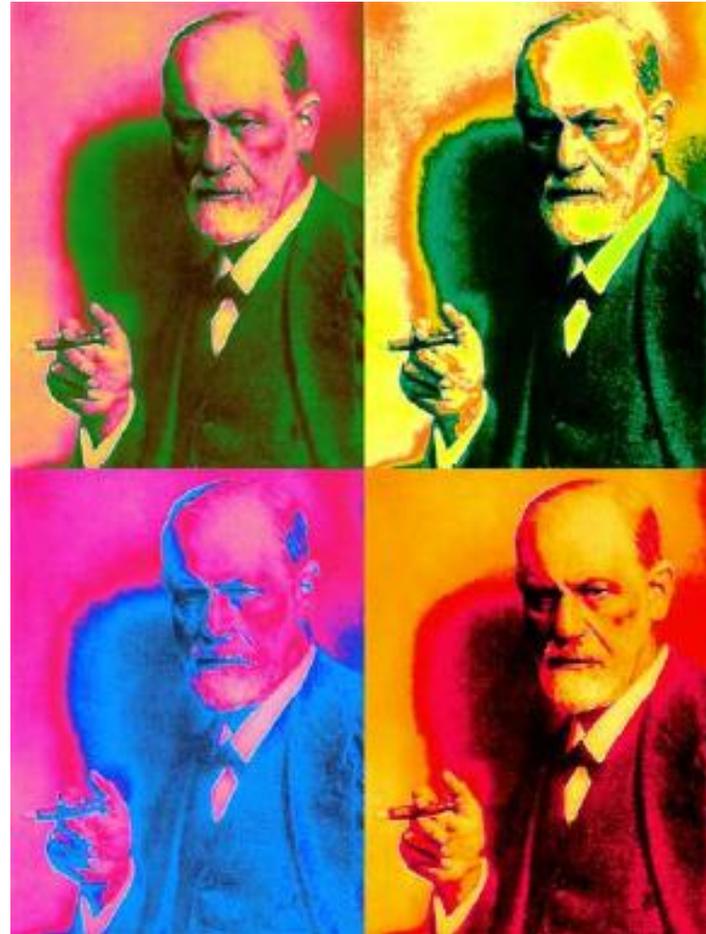


MAGICAL MYSTERY TOUR

- **Cross-examination of Defense Experts**
- **October 2016**
- **Creighton Horton**
- **Former Utah Prosecutor**

- **Dr. Nancy Cohn**
- **Forensic Psychologist**



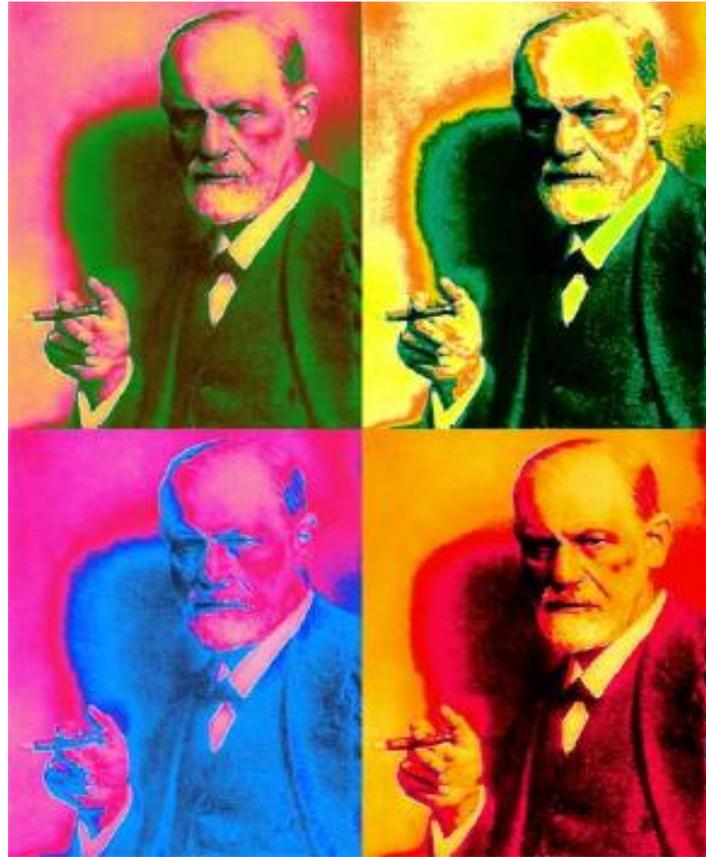


So you've got a case with mental issues

- Probably a high-profile case
- Probably a murder case, so the stakes are high
- Probably not a whodunit
- And you're not comfortable stipulating either to the defendant's incompetency or mental defense
- No choice but to take on defense experts in court
- But you don't want to go it alone
- You're going to need a forensically trained expert whose judgment you trust

REMEMBER:

The Quality of Your Mental Health Examiners Can Make or Break Your Case





Good vs. Poor Evaluators

- Quality of examiners varies widely
- Key is to get good ones appointed
- If you have the option, don't agree to defense-suggested evaluators unless you have info about them, and know they're reputable
- Can make huge difference to your case to have bona fide forensic experts involved



Quality of Forensic Reports and Opinions

- Affects how well the system works
- Few mental health examiners in Utah have received formal forensic training
- Wide variability in quality of product
- State doesn't require demonstration of forensic proficiency to be "state-approved" forensic examiner
- State doesn't have an effective peer review system to improve or weed out substandard examiners



How to approach a case with mental health issues

- Don't assume this stuff is beyond your ability to figure out
- Dig into the field and become knowledgeable about mental health issues and the law
- Get a copy of DSM-5, the *Diagnostic and Statistical Manual of Mental Disorders* – you're going to need it
- Get as much info as you can about defense expert – training, experience, credentials, etc.
- Get the actual psych tests, including raw data
- Have your expert review the tests and defense expert's report
- Look for “nuggets” in the tests, notes, reports, etc.



Most problems with forensic reports and opinions boil down to . . .

- Failure to focus on the relevant legal issue or standards;
- Failure to attempt to question or corroborate information the defendant told the examiner;
- Failure to link the diagnosis of a defendant to the relevant legal issues; and
- Failure to explain the reasoning which supports the examiner's opinions.



Excerpts from a report in a murder case 2016

- “There appeared to be no evidence of planned, purposeful, goal directed behavior.”
- “Because of the delusion, the defendant’s decision-making and rationality were impaired.”
- “But for the fixed delusion, the defendant would not have carried out the crimes in which he has been charged.”
- “In my opinion, he would qualify for [a mental defense].”



What statements in the report addressed the relevant legal criteria in any meaningful way?

- “There appeared to be no evidence of ~~planned~~, purposeful, goal directed behavior.”
- ~~“Because of the delusion, the defendant’s decision-making and rationality were impaired.”~~
- ~~“But for the fixed delusion, the defendant would not have carried out the crimes in which he has been charged.”~~
- ~~In my opinion, he would qualify for [a mental defense]~~



What's missing?

- Lack of focus on mens rea for crime (i.e. intentionally or knowingly); and
- How defendant's mental disorder may have impacted his formation of that intent; and
- The expert's reasoning process rather than just giving an opinion in the form of a conclusion



Excerpt from another forensic mental health report:

- “Did the defendant lack the mental state required for Forcible Sexual Abuse? Yes, in my opinion he did. It is also my opinion that he should never have been released from the halfway house where he could have been maintained in a safer environment.”



What was the legally relevant portion of the report?

- “Did the defendant lack the mental state required for Forcible Sexual Abuse? Yes, in my opinion he did.”
- Problem: This is nothing but a bare conclusion
- Irrelevant language: ~~“It is also my opinion that he should never have been released from the halfway house where he could have been maintained in a safer environment.”~~



The report concludes . . .

- “In summary, the defendant appears to meet the criteria for [a mental defense]; that is, he was diminished and likely continues to have problems that will require he be placed in a secure setting.”
- What’s lacking?
- Pretty much everything – legal standard, reasoning process and basis for the opinion



Let's talk about malingering

- How do we know a defendant is not faking symptoms of mental illness?
- DSM-5 definition: “the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives”
- One such external incentives noted in DSM is “evading criminal prosecution”



Malingering

- Should always be considered when doing an evaluation of a defendant, but . . .
- Many experts are not forensically trained and don't bother to investigate the possibility
- DSM-5 is a vital resource, both for understanding the diagnostic criteria for mental disorders and for cross-examination of defense experts
- Every prosecutor's office should have at least one copy of DSM-5



Query: So how hard would it be to fake mental illness?

- Things that make it easier:
- Gullible or poorly trained mental health examiners who take everything a defendant says at face value
- The simplicity of Utah's insanity defense law
- "Herrera" decision is a road map to success
- The winning "delusion" is you didn't know you were killing a human being; gets you all the way to NGI
- Similar situation with special mitigation – not that hard to figure out what you need to say to come within the statute

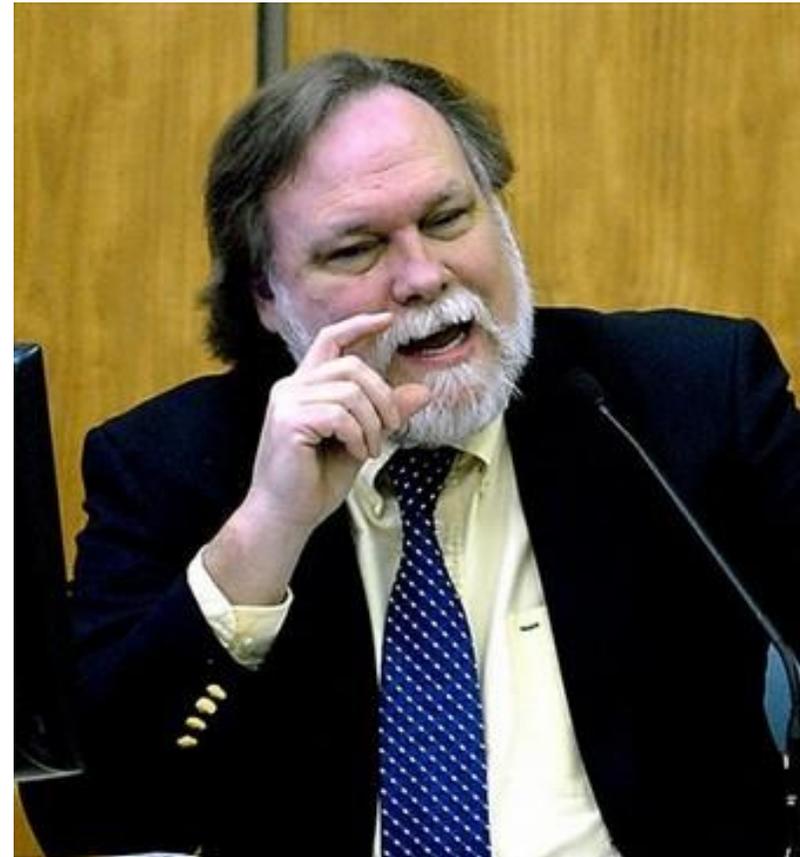


The key to detecting malingering

- Corroboration & checking collateral sources
- Checking with people who interact with a defendant in a non-clinical setting – it can be very enlightening
- *Jerry Lee Robertson case:*
 - “Hammer, bad.”
- *Ron Lafferty case:*
 - “Oh, hell, only the doctors believe that crap.”

How to examine and cross-examine mental health experts

- Either way, preparation is the key!
- Educate yourself about psychological diagnoses & terms
- Don't put on experts with favorable opinions "cold"
- Meet with them and review their findings



Fertile areas for cross-examining defense experts



- Lack of forensic training
- Lack of legitimate board certification
- Mis-scoring or distorting test results
- Couching boilerplate computer-scored psychological test results as personal opinions, which makes it appear they did an intense personalized analysis of the defendant



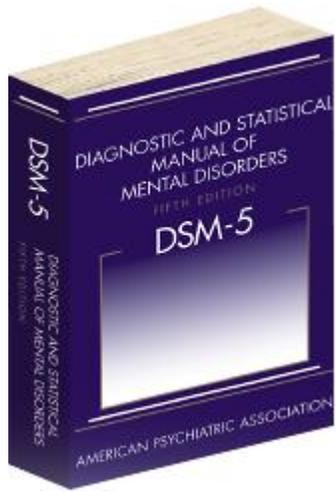
More ideas for cross

- Accepting uncritically a defendant's statements
- Failing to investigate the possibility of malingering or check collateral sources
- Attributing defendant's criminal conduct to mental illness without considering that such behavior might as easily be explained by traditional motivation – anger, jealousy, revenge, etc.
- Admitting that determining a defendant's past mental state cannot be done with any level of scientific certainty and is an educated guess at best



And more . . .

- Bias (if examiner routinely testifies for defense)
- Being privately retained rather than court-appointed. (In that circumstance, does the examiner consider the defendant a client?)
- Acknowledging that their diagnosis of a defendant's past mental state is based on psychological tests which were not designed for that purpose
- Acknowledging that their diagnosis is based largely on defendant's self-report
- Admitting that they could be wrong
- Admitting that they could be fooled



DSM-5 is a great tool for cross-examination when you suspect malingering

- Experts can't claim that it's not an authoritative source, since they all use it in their diagnoses
- DSM says that malingering “should be strongly suspected” under the following circumstances:
 - 1. Medicolegal context
 - 2. Discrepancy between self-report and medical findings
 - 3. Poor patient cooperation; and
 - 4. Presence of anti-social personality disorder



DSM-5 definition of “Anti-Social Personality Disorder”

- A pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years, as indicated by three or more of the following:
 - 1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;
 - 2. deception, as indicated by repeatedly lying, use of aliases, or conning others for personal profit or pleasure;
 - 3. impulsivity or failure to plan ahead;



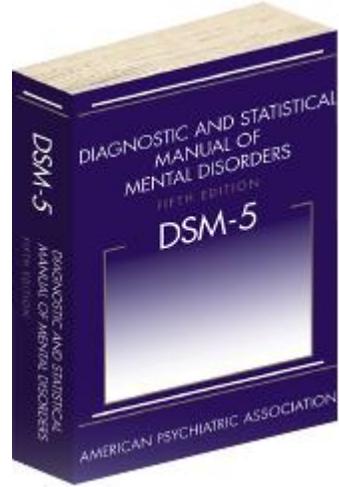
DSM-5 definition of “Anti-Social Personality Disorder”

- 4. irritability and aggressiveness, as indicated by repeated physical fights or assaults;
- 5. reckless disregard for safety of self or others;
- 6. consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;
- 7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

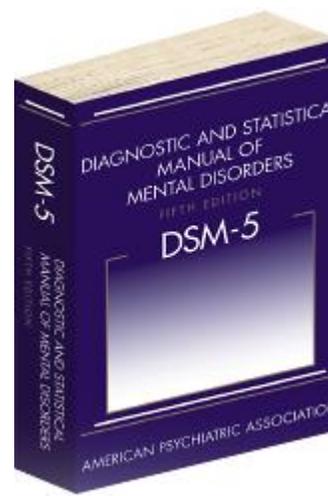


Anti-social personality disorder

- Those who fit this criteria are commonly referred to as “psychopaths” or “sociopaths”
- Often the defendant’s ASPD is the alternative explanation used by the prosecution to explain the crime and refute the mental illness defense
- The issue often boils down to whether the defendant was truly mentally ill at the time of the crime and had the “right delusion” to qualify for a mental defense, or
- Is a sociopath who killed for reasons unrelated to mental illness and is faking symptoms of mental illness in an effort to “beat the rap.”



- In many bogus mental defenses, defendants have been diagnosed by at least one examiner as having anti-social personality disorder (ASPD)
- When crossing an expert, you can review the list of diagnostic criteria for ASPD, which demonstrates the defendant's manipulative and anti-social behavior, disregard for the rights of others, etc.
- And you'll always have the factor of the “medicolegal context” of the examination



- There may also be a discrepancy between the defendant's self-report and medical findings
- (And between the defendant's self-report and collateral information and facts that don't square with the defendant's version)
- Sometimes, the defendant will cooperate with his own expert more than with a court-appointed or prosecution expert, which you should highlight as another indicator of malingering



One more point you can make with DSM-5

- You can use the DSM's Preliminary Statement, indicating that diagnoses may not be wholly relevant to legal contexts such as determining criminal responsibility
- So even if the expert got the diagnosis "right," that doesn't automatically translate into a mental defense
- It's a functional inquiry – did the defendant have the mens rea for the crime. Labels don't control



What about psychological tests?

There defendant may have been given many tests. One report listed:

Benton Visual Retention Test, Complex Figure Test, Expressive One-Word Picture Vocabulary Text, Facial Recognition, Finger Localization, Finger Tapping, Grip Strength, Grooved Pegboard, Judgment of Line Orientation, Multilingual Aphasia Examination, Peabody Picture Vocabulary Test, Pin Test, Seashore Rhythm, Tactile Recognition, Test of Nonverbal Intelligence (TONI-e), and subtest from the Wechsler Intelligence Scale for Adults-III (WAIS-III), and the Minnesota Multiphasic Personality Inventory (MMPI) .



Look impressive?

- Don't be impressed
- None of these tests provides any scientifically validated window into what a defendant was thinking at the time of the alleged crime
- If they claim a test can do that, ask for the peer-reviewed literature establishing it
- You can also have them demonstrate what the tests consist of, which will let the jury see that their claim is patently absurd



Demystifying the Psych Tests

Show the jury what the actual tests consist of --
“soft science” at best

Highlight inconsistencies between test answers and
known facts

Highlight indications of exaggeration or skewing of
tests

Highlight defendant has no incentive to “look good”
on tests

Test: What's the most fun you can have in a courtroom?

- Answer: Cross-examining mental health experts whose opinions, methods or credential are on shaky ground.



WHY?



When psychological tests and reality just don't jive

- Let jury see what's wrong with the picture
- Opportunity to bring common sense to bear to debunk defense expert



State v. Jason Pearson



While driving a stolen car,
Pearson shot and killed a
U.H.P. Trooper during a high-
speed chase



State v. Jason Pearson

The defendant had a history of alcoholic binges and illegal drug abuse

The defense psychologist's report indicated that in her opinion, when the defendant fired in the direction of pursuing officers during a high-speed chase, he did so impulsively and without any intent to harm the officers; in fact, his only intent was to provoke the officers to shoot him, in an effort to commit "suicide by cop"

Pearson's expert



- Bases her opinion upon the defendant's MMPI test and his self-report
- Has determined that the test is "valid"
- Now it's your turn
- Go!

LIGHTLY TRUE, circle ST.

MAINLY TRUE, circle MT.

VERY TRUE, circle VT.

Be sure to answer every statement. Erase completely any answer you wish to change and respond to every statement.

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- * 22. Sometimes I use drugs to feel better. ST MT VT
23. I've tried just about every type of drug. ST MT VT
24. Sometimes I let little things bother me too much. F ST MT VT
25. I often have trouble concentrating because I'm nervous. F ST MT VT
26. I often fear I might slip up and say something wrong. F ST MT VT
27. I feel that I've let everyone down. F ST MT VT
28. I have many brilliant ideas. ST MT VT
29. Certain people go out of their way to bother me. ST MT VT
30. I just don't seem to relate to people very well. F ST MT VT
31. I've borrowed money knowing I wouldn't pay it back. ST MT VT
32. Much of the time I don't feel well. ST MT VT
33. I often feel jittery. F ST MT VT
34. I keep reliving something horrible that happened to me. F ST MT VT
- * 35. I hardly have any energy. ST MT VT
36. I can be very demanding when I want things done quickly. F ST MT VT
37. People usually treat me pretty fairly. F ST MT VT
38. My thinking has become confused. F ST MT VT

- T 84. Sometimes I am afraid for no reason. F ST MT VT
 T 85. It bothers me when things are out of place. F ST MT VT
 T 86. Everything seems like a big effort. F ST MT VT
 T 87. Recently I've had much more energy than usual. F ST MT VT
 T 88. Most people have good intentions. ... F ST MT VT
 T 89. Since the day I was born, I was destined to be unhappy. F ST MT VT
 T 90. Sometimes it seems that my thoughts are broadcast so that others can hear them. F ST MT VT
 T 91. I've done some things that weren't exactly legal. F ST MT VT
 T 92. It's a struggle for me to get things done with the medical problems I have. F ST MT VT
 T 93. I like to meet new people. F ST MT VT
 T 94. My mood is very steady. F ST MT VT
 T * 95. There have been times when I've had to cut down on my drinking. F ST MT VT
 T 96. I would be good at a job where I tell others what to do. F ST MT VT

54. My moods get quite intense. F ST MT VT
- * 55. I have trouble controlling my use of alcohol. F ST MT VT
56. I'm a natural leader. F ST MT VT
57. Sometimes I feel terribly empty inside. F ST MT VT
58. I tell people off when they deserve it. F ST MT VT
59. I want to let certain people know how much they've hurt me. F ST MT VT
60. I've thought about ways to kill myself. F ST MT VT
61. Sometimes my temper explodes and I completely lose control. F ST MT VT ^{0.5}
62. People have told me that I have a drug problem. F ST MT VT
- * 63. I never use drugs to help me cope with the world. F ST MT VT
64. Sometimes I'll avoid someone I really don't like. F ST MT VT
65. It's often hard for me to enjoy myself because I am worrying about things. F ST MT VT
66. I have exaggerated fears. F ST MT VT
67. Sometimes I think I'm worthless. F ST MT VT
68. I have some very special talents that few others have. F ST MT VT
69. Some people do things to make me look bad. F ST MT VT
70. I don't have much to say to anyone. F ST MT VT
71. I'll take advantage of others if they leave themselves open to it. F ST MT VT

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88. Most
89. Since destir
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91. I've d exact
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93. I like
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- MT VT 129. I think I have three or four completely different personalities inside of me. F ST MT VT
- MT VT 130. Others can read my thoughts. F ST MT VT
- MT VT 131. I used to lie a lot to get out of tight situations. F ST MT VT
- MT VT 132. My medical problems always seem to be hard to treat. F ST MT VT
- MT VT 133. I am a warm person. F ST MT VT
- MT VT 134. I have little control over my anger. F ST MT VT
- MT VT 135. My drinking seems to cause problems in my relationships with others. F ST MT VT
- MT VT 136. I have trouble standing up for myself. F ST MT VT
- MT VT 137. I often wonder what I should do with my life. F ST MT VT
- MT VT MT VT 138. I'm not afraid to yell at someone to get my point across. F ST MT VT
- MT VT 139. I rarely feel very lonely. F ST MT VT
- MT VT 140. I've recently been thinking about suicide. F ST MT VT
- MT VT 141. Sometimes I smash things when I'm upset. F ST MT VT
- MT VT 142. I never use illegal drugs. F ST MT VT
- MT VT * 143. I sometimes do things so impulsively that I get into trouble. F ST MT VT
- MT VT 144. Sometimes I'm too impatient. F ST MT VT
- MT VT 145. My friends say I worry too much. F ST MT VT
- MT VT 146. I'm not easily frightened. F ST MT VT
- MT VT 147. I can't seem to concentrate very well. F ST MT VT

Sample cross-examination . . .

- of a mental health expert who accepts a defendant's version uncritically and fails to investigate malingering





Final thought

- Some defendants may in fact be mentally ill and incompetent to stand trial
- Some may be mentally ill and have legitimate mental defenses
- And some mental health experts are excellent – well trained, insightful, principled, and helpful to the process
- But if you end up with a defendant who is a manipulator trying to beat the system and an expert who is supporting bogus claims . . .

It's your job to not let them get away with it!

