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Murder and the MMPI-2: The Necessity of Knowledgeable Legal Professionals

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COMMENT

MURDER AND THE MMPI-2:

THE NECESSITY OF KNOWLEDGEABLE LEGAL PROFESSIONALS

"There are no facts, only interpretations."[1]

INTRODUCTION

Early in the morning hours of March 30, 1996, a man approached the apartment of a young college woman in Pittsburg, Kansas.[2] He rang the doorbell and as she opened the door, he burst in so forcefully that she was thrown back against the couch.[3] He beat her repeatedly in the face, fracturing her jaw and causing an open wound above her eye.[4] Forcing her down the long hallway at knifepoint, he shoved her into the bedroom, made her undress, and tied her to a chair using socks.[5] As she lay on the floor bound to the chair, naked, crying, and begging for him to leave, he sat on the bed for awhile pondering what to do.[6] He attempted to rape her but was unable to obtain an erection.[7] Instead, he vaginally penetrated her with his fingers.[8] After that, he stuffed a piece of clothing into her mouth

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[1] FRIEDRICH NIETZSCHE, NACHLASS (A. Danto trans. 1863).
[2] State v. Kleypas, 40 P.3d 139, 171 (Kan. 2001).
[3] *Id.* at 173, 287.
[4] *Id.* at 173, 171.
[5] *Id.* at 287, 173, 171.
[6] *Id.* at 173-74.
[7] *Id.* at 173.
[8] *Id.*

and attempted to strangle her with his hands.[9] He beat her and stomped on her until her body was heavily bruised and her liver badly damaged.[10] He then grabbed his filet knife and viciously stabbed her in the chest seven times, puncturing her heart.[11] The terrifying ordeal lasted one-and-a-half to three hours.[12] Ultimately, the man fled, taking the engagement ring from her finger and varied items from her purse.[13] He left behind her dead body as well as his fingerprints, footprints, and blood all over the apartment.[14]

The gruesome facts stated above are from an actual case, *State v. Kleypas*.[15] Once in custody, Gary Kleypas admitted that he had killed the young woman.[16] At trial, Mr. Kleypas claimed he was incompetent and suffered from blackouts and amnesia.[17] He was subjected to psychological evaluations by both the prosecution and the defense.[18] A defense expert testified that Mr. Kleypas was a paranoid schizophrenic.[19] Further, three psychological professionals submitted affidavits attesting to Mr. Kleypas' incompetence to stand trial.[20] Conversely, a prosecution expert testified that Mr. Kleypas was clearly competent to stand trial, adding that the decision was "not even a close call."[21] An important issue in the psychological evaluations of Mr. Kleypas was the Minnesota Multiphasic Personality Inventory-2 (hereinafter "MMPI-2"), because it was *not* ad-

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[9] *Id.*

[10] *Id.* at 171.

[11] *Id.* at 173, 171.

[12] *Id.* at 275, 287.

[13] *Id.* at 173.

[14] *Id.* at 171-73. Upon police investigation, blood was also found on the entryway of Kleypas' apartment. *Id.* at 172.

[15] State v. Kleypas, 40 P.3d 139 (Kan. 2001). The facts of the case are accurate, as indicated by the victim's injuries, the police report, and the murderer's confession; however, the actual order of the beatings may not be in the proper sequence. *Id.*

[16] *Id.* at 173.

[17] *Id.* at 213, 175, 215. Mr. Kleypas "had initially notified the State...that he would rely on evidence of a mental disease or defect excluding criminal responsibility, [but Mr.] Kleypas later withdrew this notice." *Id.* at 175.

[18] *Id.* at 213. The prosecution stated at one point in the trial that Mr. Kleypas had been subjected to nine evaluations. *Id.* at 280.

[19] *Id.* at 285.

[20] *Id.* at 213.

[21] *Id.*

ministered.[22] As the MMPI-2 is such a commonly used assessment measure in court, its absence in this case was striking.[23]

In his closing argument to the jury, the prosecutor stated, "it is curious that one psychologist...could have given a test that had a validity scale built into it. It is the MMPI[-2] test and the validity scales...are an indication of whether the person who takes the test is lying or not. And isn't it interesting that this is the one test that [he] didn't give...?"[24] Clearly, the prosecution was using the absence of the MMPI-2 in the defense expert's psychological evaluation as an attempt to impeach the credibility of the defense experts.[25] Further, the prosecution insinuated that the defense experts were trying to hide information from the jury by stating that the defense did not use the MMPI-2 "because they were afraid of the validity scales."[26] The weight given to the prosecution's impeachment is unclear. Regardless, Mr. Kleypas was found competent, stood trial, and was convicted of capital murder, attempted rape, and aggravated burglary, and he was sentenced to death.[27]

Murder is considered the most heinous of violent crimes, due to its finality.[28] Those accused of murder face long, hard sentences or possibly even death if convicted.[29] Zealous representation of a client becomes particularly important in a murder trial because of the serious nature of the crime as well as the severe consequences faced by the accused.[30] In a murder

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[22] *See id.* at 283-85. *See also infra* Part I, pp. 6-10 (providing thorough explanation of MMPI-2). *See also infra* Part II, pp. 10-16 (explaining the MMPI-2 further, including correct administrative procedures).

[23] *See infra* Part III.B, pp. 17-19 (describing the prevalence of the MMPI-2 in court generally). *See also infra* Part V.B, pp. 31-32 (describing the prevalence of the MMPI-2 in court cases specifically involving murder).

[24] *Kleypas*, 40 P.3d at 283. *See also infra* Part I.B, pp. 8-10 (providing detailed discussion of the validity scales of the MMPI-2).

[25] *See Kleypas*, 40 P.3d at 283.

[26] *Id.* at 284.

[27] *Id.* at 213, 216, 139. Upon appeal to the Supreme Court of Kansas, all convictions were affirmed. *Id.* at 170. His death sentence was vacated, however, due to an instructional error, and was remanded for "another separate sentencing proceeding to determine whether Kleypas should be sentenced to death." *Id.*

[28] *See, e.g.,* People v. Steger, 128 Cal. Rptr. 161, 164 (1976) (stating "Murder, the unlawful killing of another human being with malice aforethought, is undoubtedly one of the most heinous crimes that can be committed in a civilized society.").

[29] It is common for capital cases to carry a sentence of life imprisonment or death, though sentence varies by case as well as by jurisdiction. *See, e.g.,* CAL. PENAL CODE § 190.2 (a) (West 2004) (describing penalty for first-degree murder in California).

[30] *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1997). "A lawyer should represent a client zealously within the bounds of the law." *Id.* There is some dispute

case, such as *State v. Kleypas*, a defense attorney may employ a mental incompetence defense to argue the defendant's lack of criminal responsibility.[31] In contrast, a prosecutor in a murder case will attempt to refute mental defenses.[32] In both instances, forensic psychologists will be called upon as experts to perform psychological evaluations and to testify to their findings.[33]

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over the accuracy of the statement, however, that it is "particularly important in a murder trial" when referring to psychological professionals. *See, e.g.,* James F. Hemphill & Stephen D. Hart, *Forensic and Clinical Issues in the Assessment of Psychopathy, in* HANDBOOK OF PSYCHOLOGY: VOLUME 11, FORENSIC PSYCHOLOGY, 98 (Alan M. Goldstein, ed., 2003). "Because forensic mental health testimony can have significant impact on individual and collective freedoms, the standards of practice in forensic psychology must be higher than in regular clinical practice." *Id. But see, e.g.,* Personal Communication with Roger L. Greene, Ph.D., MMPI-2 expert (Fall 2002). "Stating that higher standards are required for forensic vs. clinical or murder vs. other crimes implies that less than adequate performance is acceptable in those venues. Attorneys/psychologists should uphold the highest standards regardless of the 'importance' of the case." *Id.*

[31] Mental incompetence may include such defenses as legal insanity, incompetence to stand trial, lack of criminal responsibility, mental retardation, diminished capacity, and incompetence to be executed, and may be asserted as a mitigating factor or argued as an affirmative defense. *See* STEVEN F. SHATZ, CALIFORNIA CRIMINAL LAW: CASES AND PROBLEMS 614-17 (1999); *See generally* HANDBOOK OF PSYCHOLOGY: VOLUME 11, FORENSIC PSYCHOLOGY (Alan M. Goldstein, ed., 2003) (describing a variety of mental defenses and corresponding forensic evaluations).

[32] Prosecutors will try to refute mental defect defenses in order to hold offender responsible for committed actions. *See, e.g.,* SHATZ, *supra* note 31, at 614-17 (describing mental defenses in California).

[33] *See generally* HANDBOOK OF PSYCHOLOGY: VOLUME 11, FORENSIC PSYCHOLOGY, *supra* note 31 (describing the role of forensic psychologists in court including a variety of mental defenses and corresponding forensic evaluations). Forensic psychologists are generally psychologists who have gained specialized education, training, and experience in psycholegal issues and the practice of psychology in legal or forensic settings. *See generally* Ira K. Packer & Randy Borum, *Forensic Training and Practice, in* HANDBOOK OF PSYCHOLOGY: VOLUME 11, FORENSIC PSYCHOLOGY, 21-8 (Alan M. Goldstein, ed., 2003) (describing the training and practice common among forensic psychologists). Though not all mental health professionals who testify in court consider themselves forensic psychologists, the term "forensic psychologist" will be used throughout this Comment to indicate a psychologist who has the requisite knowledge, training, and experience to act as a forensic psychologist, as these individuals are most properly used in this capacity. *See generally id.* (describing the training and practice common among forensic psychologists).

Those accused of murder are commonly subjected to extensive psychological evaluations.[34] The MMPI-2 is, by far, the most common of all the psychological assessments employed.[35] Those involved in the judicial process must understand the basic structure, purpose, and administrative process of the test to effectively question expert witnesses, recognize the implications of their testimony, and interpret these findings to the jury.[36] Furthermore, the correct applications of the MMPI-2 are just as essential for attorneys and judges to be aware of as the misapplications. When used correctly, the MMPI-2 can be a valuable tool in the assessment of those charged with or convicted of murder.[37]

Part I of this Comment discusses the basic structure and purpose of the MMPI-2, the development and evolution of the MMPI into the MMPI-2, and reliability and validity issues.[38] Part II provides a basic understanding of the correct administration, scoring, and interpretation of the MMPI-2 and describes standards for expert testimony.[39] Part III presents a historical overview of the use of the MMPI-2 in court.[40] The different types of cases in which the MMPI-2 is used are discussed along with the many applications of its use.[41] Part IV describes the legal standards of admissibility of scientific evidence in court and how the MMPI-2 fares under each standard.[42] Part V analyzes the use of the MMPI-2 in murder trials, including the prevalence and application of the MMPI-2 in murder cases.[43] Part VI provides a thorough discussion of some of the misapplications of the MMPI-2 in murder cases.[44] Part

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[34] Psychological evaluations are common in murder cases because the accused's mental state or competency is often an issue as the crime of murder involves a mental element that must be proven. *See, e.g.,* CAL. PENAL CODE §§ 187-189 (defining crimes of murder in the state of California).

[35] KENNETH S. POPE, JOYCE SEELEN, & JAMES NEAL BUTCHER, THE MMPI, MMPI-2, AND THE MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS 9 (2d ed. 1999).

[36] *See infra* notes 38-46, and accompanying text (providing a detailed discussion of the MMPI-2 and asserting that knowledgeable legal professionals are necessary).

[37] *See generally* POPE, *supra* note 35 (discussing the utility of the MMPI-2 in court).

[38] *See infra* Part I, pp. 6-10 and accompanying notes.

[39] *See infra* Part II, pp. 10-16 and accompanying notes.

[40] *See infra* Part III, pp. 16-21 and accompanying notes.

[41] *See infra* Part III, pp. 19-21 and accompanying notes.

[42] *See infra* Part IV, pp. 21-30 and accompanying notes.

[43] *See infra* Part V, pp. 30-35 and accompanying notes.

[44] *See infra* Part VI, pp. 36-43 and accompanying notes.

VII recommends possible solutions to the issues raised by the use of the MMPI-2 in murder trials.[45] Part VIII of this Comment concludes that the widespread use of the MMPI-2 in the legal arena necessitates that legal professionals be knowledgeable about the basic structure and process of the MMPI-2.[46] Despite the sometimes negative reviews of the MMPI-2, it remains a valuable assessment tool for use in murder trials, when used correctly by both psychologists and legal professionals.[47]

I. BACKGROUND[48]

A. DEVELOPMENT OF THE MMPI

The MMPI-2 (and its predecessor, the MMPI) is the most widely used and researched self-report inventory of psychopathology.[49] Starke Hathaway and J. Charnley McKinley devised the original version of the MMPI in 1940 as "an objective means of assessing psychopathology."[50] The MMPI consisted of 566 statements or "items" that were answered "true" or "false."[51] The responses to these items were scored on four validity scales to assess the person's test-taking attitudes.[52] Then, the responses were scored on ten clinical scales that assessed the major categories of abnormal behavior.[53] Finally,

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[45] *See infra* Part VII, pp. 43-46 and accompanying notes.

[46] *See infra* Part VIII, p. 46 and accompanying notes.

[47] *See, e.g.,* Dennis P. Saccuzzo, *Still Crazy After All These Years: California's Persistent Use of the MMPI as Character Evidence in Criminal Trials*, 33 U.S.F. L. REV. 379 (1999) (criticizing the use of the MMPI-2 in criminal trials).

[48] *See generally* ROGER L. GREENE, THE MMPI-2: AN INTERPRETIVE MANUAL 1 (2d ed., 2000); JOHN R. GRAHAM, MMPI-2: ASSESSING PERSONALITY AND PSYCHOPATHOLOGY (3d ed., 1999); ALAN F. FRIEDMAN, RICHARD W. LEWAK, & DAVID S. NICHOLS, PSYCHOLOGICAL ASSESSMENT WITH THE MMPI-2 (2000) (providing background information, for interested readers, about the MMPI-2 that is reflected generally in the psychological field , though cited only to the first named text in this Comment).

[49] GREENE, *supra* note 48, at 1.

[50] *Id.*

[51] *Id.* at 8, n.4. *See also id.* at 1. *See generally id.* at 5-9 (discusses construction of the MMPI).

[52] *Id.* at 1. "Test-taking attitudes" describes the consistency and tendency to answer falsely or inaccurately. *Id.* at 10-11. *See also infra* pp. 8-10 and accompanying notes (discussing test-taking attitudes in the context of validity of the MMPI-2).

[53] GREENE, *supra* note 48, at 1.

the fourteen scales were plotted on a profile sheet to give the forensic psychologist a visual display of the test-taker's scores.[54]

The MMPI-2, published in 1989, restandardized the MMPI and provides current items and norms.[55] The new norms consist of a nationally representative sample of the United States population with appropriate representation of ethnic minorities.[56] The MMPI-2 is virtually identical to the MMPI, although the MMPI-2 contains 567 items.[57] The same validity and clinical scales are used,[58] rendering the MMPI-2 profile sheet identical to the original.[59] Once the scores are plotted on the profile sheet, high scores on individual scales, as well as a combination of these scales, may indicate psychopathology.[60] At this point, the forensic psychologist's interpretive skills come into play.[61]

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[54] *Id.* at 1-2.

[55] *Id.* at 17. The MMPI-2 was developed by Butcher, Dahlstrom, Graham, Tellegen, and Kaemmer. *Id.* at 1. The new items were constructed in order to remove out-dated and sexist language that was common in the 1940's, and to make them more easily understood. *Id.* at 18. Examples of items on the MMPI-2 include statements such as "I brood a great deal," and "The people I work with are not sympathetic with my problems." *Id.* at 47. The original normative group for the MMPI developed in the 1940's consisted of Caucasian individuals from Minnesota, with the typical person being approximately 35 years old, married, with eight years of school, and working as (or married to) a semi-skilled or skilled-laborer. *Id.* at 11 (quoting Dahlstrom, Welsh, & Dahlstrom, 1972, p. 8).

[56] *Id.* at 20. "The MMPI-2 was standardized on a sample of 2,600 individuals who resided in seven different states...to reflect national census parameters on age, marital status, ethnicity, education, and occupational status." *Id.*

[57] *Id.* at 17, 20.

[58] *Id.* at 23. There were also new scales developed for the MMPI-2. *Id.* In addition to the four validity and ten clinical scales of the original MMPI, the MMPI-2 also has fifteen new content scales and ten new supplementary scales, including three new validity scales. *Id.*

[59] *Id.* at 17.

[60] *Id.* at 1-2. The plotted scores represent the examinee's "profile." *Id.* at 24. The combinations of the two highest elevated clinical scales are called "codetypes." *Id.* at 2. A single elevated clinical scale is called a "spike" codetype. *Id.; See generally id.* at 287-360 (providing detailed discussion of codetypes).

[61] *Id.* at 41.

B. RELIABILITY AND VALIDITY

The MMPI-2 is the most researched psychological assessment administered.[62] A review of the psychological literature reveals that the MMPI-2 has been used in over ten thousand research studies.[63] Many studies involve the use of the MMPI-2 as a personality assessment measure.[64] Thousands of research studies have been performed on the MMPI-2 measure itself.[65] These research studies are conducted on the test as a whole, as well as on specific items, scales, codetypes, and profiles.[66] As a result, the reliability and validity of the MMPI-2 have been repeatedly established.[67]

The term "reliability" refers to a test's "ability to produce similar results when repeated measurements are made under identical conditions."[68] In other words, reliability refers to the results of the test being "reliable," in that the same results are obtained when the test is administered again (test-retest reliability) or by another evaluator (inter-rater reliability).[69] The actual reliability obtained varies, depending on the scale or profile.[70] The MMPI-2 coefficients are high, indicating that the reliability of the assessment measure has been more than sufficiently established.[71]

The traditional concept of 'validity' means "the degree to which a test actually measures what it purports to measure."[72] Validity, in the traditional sense, has been proven repeatedly

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[62] *Id.* at 1.

[63] A search of the online psychological literature database, PsycINFO, revealed 10,476 published research articles, though this number continues to increase as research with the MMPI-2 is ongoing. *See* PsycINFO, at http://www.psycinfo.com (using search terms "MMPI" or "M.M.P.I.," or "Minnesota Multi*" and updated March 5, 2004).

[64] *See id.* (revealing that the MMPI-2 was used as an assessment measure, or variable, of individuals in MMPI/MMPI-2 studies).

[65] *See id.; See generally* GREENE, *supra* note 48, at 5-9 (providing descriptions of many research studies on the MMPI and MMPI-2).

[66] *See* PsycINFO, *supra* note 63.

[67] *See id.*

[68] KENNETH S. BORDENS & BRUCE B. ABBOTT, RESEARCH DESIGN AND METHODS: A PROCESS APPROACH 83 (3d ed. 1996).

[69] *See id.* at 200, 84.

[70] POPE, *supra* note 35, at 190.

[71] *Id.*

[72] GREENE, *supra* note 48, at 42 (quoting Anastasi, 1968).

for the MMPI-2 through research.[73] Validity on the MMPI-2 is more complex, however, because it is also assessed using its own internal measure: the four "validity scales."[74] The validity scales measure the test-taking attitudes of the test-taker.[75] Specifically, the validity scales measure the test-taker's consistency and tendency to answer falsely or inaccurately.[76]

Responding falsely or inaccurately to MMPI-2 items is often referred to as "faking good" and "faking bad."[77] "Faking-good" refers to the test-taker's tendency to respond to items in a manner intended to make him or her appear to have less psychopathology.[78] This tendency is commonly seen in situations such as employment-screening administrations or child-custody evaluations.[79] Conversely, "faking bad" refers to the test-taker's tendency to respond to items in a manner intended to make him or her appear to have more psychopathology.[80] An example of a situation in which such "faking bad" is common is a psychological evaluation conducted to determine mental damages in a personal injury litigation case.[81] The inclusion of these validity scales in the MMPI-2 makes it possible for the forensic psychologist to determine if the specific administration was valid.[82]

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[73] *See* POPE, *supra* note 35, at 24-25. This statement is also based on more than 10,000 psychological research studies in which the MMPI/MMPI-2 was used and found valid and reliable. *See supra* note 63.

[74] GREENE, *supra* note 48, at 42.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 10. Greene prefers to refer to these tendencies as the *underreporting* and *overreporting* of psychopathology to "avoid the connotations inherent in the terms *faking-good* and *faking-bad*, because it is not always clear whether the person's motivation for distorting responses is conscious or unconscious." *Id.*

[78] *Id.* This is also referred to as "defensiveness" or denial of psychopathology. *Id.*

[79] *See, e.g.*, POPE, *supra* note 35, at 43 (discussing tendency of parents in child custody disputes to "assert their lack of problems"). *See also* Roger L. Greene, et al., To Tell the Truth: MMPI-2 Underreporting in Child Custody, Police, and Clergy Settings (2001) (APA proposal, on file with author) (stating that there are certain settings, such as police and clergy personnel screening as well as child custody evaluations, in which "the individual can reasonably be assumed to be motivated to minimize the reporting of any form of psychopathology or problem behaviors").

[80] GREENE, *supra* note 48, at 10. This is also referred to as "plus-getting" or exaggeration of psychopathology. *Id.*

[81] *See, e.g.*, POPE, *supra* note 35, at 41 (discussing motivation of some litigants to "present themselves as much more disturbed psychologically than they actually are in order to appear disabled").

[82] GREENE, *supra* note 48, at 42.

II. CORRECT ADMINISTRATION, SCORING, INTERPRETATION, AND TESTIMONY

For testimony related to the MMPI-2 to be admissible in court, the entire procedure leading up to the testimony must be navigated correctly.[83] Specifically, the forensic psychologist must administer, score, and interpret the MMPI-2 correctly to ensure accuracy.[84] Correct procedures also enable the MMPI-2 and related testimony to gain admission into court.[85] Finally, familiarity with the following basic guidelines will aid in the questioning of expert witnesses testifying to MMPI-2 results.

A. ADMINISTRATION

Administration of the MMPI-2 is generally not a difficult task.[86] Nonetheless, procedures exist that should be followed, and certain guidelines must be kept in mind.[87] The forensic psychologist must always stay with the examinee, especially in forensic evaluations.[88] Thus, sending test materials home or leaving them alone with a forensic client is inappropriate.[89] Reading ability is also crucial when taking the MMPI-2, as "inadequate reading ability is a major cause of inconsistent patterns of item endorsement."[90] A test-taker should generally be able to read at approximately the 8th-grade level to ensure comprehension of the test questions.[91] Age and intelligence

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[83] *See, e.g., infra* Part VI, pp. 36-43 and accompanying notes (discussing cases in which misapplications of the MMPI-2 resulted in its failure to be admitted).

[84] *Id.*

[85] *Id.*

[86] GREENE, *supra* note 48, at 27. "The ease of MMPI-2 administration does not absolve the clinician of the responsibility for ensuring that it is handled properly." *Id.*

[87] *See id.*

[88] POPE, *supra* note 35, at 84.

[89] *Id.* "If the professional...is not present, there can be no assurance that the client filled out...the MMPI independently...." *Id. See also* GREENE, *supra* note 48, at 27-30 (stating that observation of the examinee allows the psychologist to observe test-taking behaviors, to ensure that the test and answer sheet are being utilized correctly, and to answer any questions or clarify test instructions: the test-taker should be reporting current feelings and experiences).

[90] GREENE, *supra* note 48, at 27.

[91] *Id.* Some studies have determined that the test-taker's reading level need only be at the 5th- to
6th-grade level. *See id.* at 27-8. If the psychologist is uncertain as to the reading ability of the test-taker, it may be necessary to administer a screening instrument to first determine reading ability. *Id.* at 28.

may also affect the ability of the test-taker to accurately complete the MMPI-2.[92] Test-takers must be at least 18 years of age and should obtain a minimum score of 70 on a standardized intelligence measure.[93]

Alternative administration techniques can be employed when necessary.[94] For example, in cases of a substandard reading level, it is possible to administer the MMPI-2 orally.[95] The oral administration should be administered via audiocassette tape, as this is the only standardized procedure.[96] The MMPI-2 has also been translated into several different languages for those whose first language is not English,[97] and into American Sign Language for the hearing impaired.[98] Computer administration is also available and is becoming more common.[99]

The MMPI-2 does not have a time limit, so a test-taker should be allowed to complete the test at his or her own pace.[100] Although it is preferable for the test-taker to complete the test in one session, it is not mandatory.[101] The most recent or up-to-date version of the MMPI-2 should be used.[102] In addition, the

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[92] *Id.* at 28.

[93] *Id.* at 28-9. There is no upper age limit. *Id.* at 28. Persons younger than 18 years of age should be administered the MMPI-A: the Minnesota Multiphasic Personality Inventory for Adolescents (Butcher et al., 1992). *Id.* at 28. A person with an IQ below 70 on the current Wechsler Adult Intelligence Scale (WAIS-III) will likely be unable to complete the MMPI-2. *Id.* at 29.

[94] *See id.* at 29.

[95] *Id.* One study found that the oral (taped) administration was effective with IQs as low as 65 and reading levels as low as the third grade. *Id.* (citing Dahlstrom et al., 1972).

[96] *Id.*

[97] *Id.*; Hemphill & Hart, *supra* note 30, at 92.

[98] GREENE, *supra* note 48, at 29 (citing Brauer 1993).

[99] *Id.* at 30. Computer administration takes less time to complete, individuals are ranked similarly across procedures, and it may produce lower overall profiles. *Id.* (citing Honaker, 1988).

[100] *Id.* at 29. A standard administration of the MMPI-2 typically takes about 60-90 minutes, though some clients may take much longer. *Id.*; Hemphill & Hart, *supra* note 30, at 92.

[101] GREENE, *supra* note 48, at 30. Clients may be relieved to know they do not have to complete the entire test in one sitting. *Id.* When a test-taker needs more than one session to complete the test, it should be completed within a few days to minimize the chances of significant changes in the test-taker's mental status during the testing period. *Id.*

[102] *See, e.g.,* Philmore v. State, 820 So. 2d 919 (Fla. 2002) (holding that the trial court's rejection of the mitigator of "psychotic disturbance" for defendant, convicted of first-degree murder, because the prosecution revealed that the defense expert had used the original version of the MMPI, instead of the current version, the MMPI-2, was not improper).

age-appropriate version should be used.[103] For adult populations, the MMPI-2 should be used rather than the original out-of-date MMPI.[104] For test-takers under the age of 18, the MMPI-A should be used, as it is standardized for this particular age group.[105]

Finally, it is necessary to have the "proper conditions for administration."[106] Proper conditions include having the test-taker's cooperation.[107] This cooperation is evidenced as the willingness to complete the entire test with enough interest in the outcome to complete it accurately.[108] Also, the forensic psychologist should ensure the comfort of the test-taker and should provide pencils with erasers to allow for changes to any responses.[109]

B. SCORING

The MMPI-2 may be scored manually or by a computer using commercial scoring services.[110] When scoring manually, it is imperative that the correct templates be used and that they be gender-matched.[111] Hand-scoring can be quite time-intensive.[112] Computer scoring has become the more accepted way of scoring MMPI-2 measures, as it allows forensic psychologists to score additional content and supplementary scales without the added time requirement.[113] Additionally, computerized scoring has the lowest error rate.[114] Unfortunately, computerized scoring errors do occur.[115] Thus, psychologists should check with the computer scoring service used, to be certain that

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[103] GREENE, *supra* note 48, at 28.

[104] *See supra* note 102.

[105] GREENE, *supra* note 48, at 28. For those aged 18 years of age, "a suggested guideline would be to use the MMPI-A for those 18-year-olds who are in high school and the MMPI-2 for those in college, working, or otherwise living an independent adult lifestyle." *Id.* (citing BUTCHER ET AL., THE MMPI-A MANUAL 23 (1992)).

[106] *See id.* at 24, 27, 29.

[107] *Id.* at 27. Ensuring the test-taker is invested in the process as an active participant helps ensure cooperation and a valid profile. *Id.*

[108] *Id.*

[109] *Id.* at 29.

[110] *Id.* at 27, 32.

[111] *Id.* at 32.

[112] *See id* at 40. *See generally id.* at 32-9 (describing hand-scoring procedures).

[113] *Id.* at 40; *See also* POPE, *supra* note 35, at 33.

[114] *See* GREENE, *supra* note 48, at 40 (discussing that errors are usually the result of a clinician miscounting items).

[115] *Id.*

the correct software and versions, including any necessary updates, are being used.[116] In addition, the forensic psychologist should ensure that the correct answer form is used, as computer scoring forms vary depending on the service used.[117]

C. INTERPRETATION

The detailed interpretive procedure for the MMPI-2 is beyond the scope of this Comment. A few important points, however, regarding interpretation of the MMPI-2 deserve mention. First, the interpreting forensic psychologist or other mental health professional should have received formal training on the MMPI-2 and should be experienced in MMPI-2 interpretation.[118] Although the MMPI-2 is a standardized test, and despite the availability of computerized scoring, there is still clinical judgment involved in MMPI-2 interpretation.[119] Therefore, the interpreter must possess the requisite education, training, and experience with the MMPI-2 to accurately interpret the scores.[120]

Second, the interpretation of this test is a multistage process; thus, it is crucial that each step be completed sequentially.[121] Generally speaking, the interpreting forensic psychologist first looks to the validity scales to determine the validity of the administration.[122] If these scales identify the administration as valid, the forensic psychologist may move to the clinical scales.[123] Once the clinical scales have been interpreted, the forensic psychologist may analyze the content and supplementary scales, and then the individual items if necessary and

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[116] *Id.*

[117] *Id.*

[118] *See* POPE, *supra* note 35, at 64 (discussing the competency of psychologists with the MMPI-2).

[119] *Id.* at 34. (stating, "It is important to emphasize...that the MMPI, even when scored and interpreted by a computer, produces *hypotheses* that must be considered in light of other sources of information."). *See* case cited *infra* note 334 (describing misapplication of the MMPI-2 in a case by using a computer-generated interpretation). *See also infra* Part VI.A.3, p. 38 (discussing the misapplications of the MMPI-2 when interpreting).

[120] *See* POPE, *supra* note 35, at 64 (discussing the competency of psychologists with the MMPI-2).

[121] GREENE, *supra* note 48, at 24.

[122] *Id.*

[123] *Id.*

appropriate.[124] Finally, the forensic psychologist must consider whether demographic variables will alter the interpretation.[125]

D. TESTIMONY

A forensic psychologist must be qualified as an expert before giving testimony related to the MMPI-2 in court.[126] Ethically, psychologists may only work in areas in which they are competent, as set forth by the American Psychological Association (hereinafter "APA") in the Ethical Principles of Psychologists and Code of Conduct.[127] In addition, APA's Division 41, American Psychology-Law Society, adopted a set of guidelines specifically for psychologists working in forensic settings.[128] Competency is defined as having the necessary training, education, and experience in a particular area.[129]

In the legal arena, however, it is not difficult for licensed mental health professionals to qualify as experts, especially forensic psychologists who are trained in the administration, scoring, and interpretation of the MMPI-2.[130] For example, in *Rollins v. Commonwealth,*[131] a mental health professional with a master's degree, who was licensed to practice in the state of Virginia, was qualified as an expert witness.[132] The master's level psychologist had eleven years of experience and had testified as an expert in over forty cases.[133] The Supreme Court of Virginia held that the test to determine admission as an expert "must depend upon the nature and extent of his knowledge."[134]

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[124] *Id.*

[125] *Id.* Demographic variables that may have a potential effect on the interpretation of the MMPI-2 include age, gender, education, and ethnicity. *Id.* at 430.

[126] *See* FED. R. EVID. 702, 703 (describing how a witness is qualified as an expert).

[127] *See* ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, General Principles, Principle A: Competence (American Psychological Association 1992) (stating that psychologists "recognize the boundaries of their particular competencies and the limitations of their expertise" and that they "provide only those services and use only those techniques for which they are qualified by education, training, or experience.").

[128] *See* SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGISTS (Committee on Ethical Guidelines for Forensic Psychologists 1991).

[129] *See supra* note 127.

[130] JAMES R. P. OGLOFF, *The Legal Basis of Forensic Applications of the MMPI-2*, in 2 FORENSIC APPLICATIONS OF THE MMPI-2 27 (Yossef S. Ben-Porath et al. eds., 1995).

[131] Rollins v. Commonwealth, 151 S.E.2d 622 (Va. 1966).

[132] *Rollins*, 151 S.E.2d at 625.

[133] *Id.* at 625-6.

[134] *Id.* at 626.

In contrast, in *Landis v. Commonwealth*[135] a master's-level mental health professional with relatively little experience was not permitted to testify as an expert.[136] While there is no bright line as to who may testify as a mental health expert, *Rollins* and *Landis* provide a better understanding of where the boundaries lie.[137]

The relative ease with which clinical psychologists qualify as experts has emerged only over the last four decades.[138] In 1962, *Jenkins v. U.S.* was the first case in which a psychologist, as opposed to a psychiatrist, qualified as an expert to testify in court.[139] This case involved a defendant who was convicted of breaking and entering with intent to commit an assault, assault with a dangerous weapon, and assault with intent to rape.[140] The defendant relied exclusively upon the defense of insanity.[141] The seminal holding in this case for the psychological community was the determination that a psychologist is competent to "render an expert opinion based on his findings as to presence or absence of mental disease or defect" depending upon the "nature and extent of his knowledge," and "it does not depend upon his claim to the title 'psychologist.'"[142] Thus, it is the psychologist's training that enables him or her to qualify as an expert, and not simply educational credentials.[143]

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[135] Landis v. Commonwealth, 241 S.E.2d 749 (Va. 1978).

[136] *Id.* at 749-50. The master's level counselor had served as an "Intern School Psychologist" for a year, worked as a "Supervisor in Internship" at a California hospital, and as a counselor, yet had not testified as an expert witness before. *Id.* at 750. The court ruled that he did not have "sufficient experience and training to be able to diagnose mental illness in other persons." *Id.*

[137] *See supra* text accompanying notes 131-36.

[138] *See infra* text accompanying notes 139-43.

[139] Jenkins v. U.S., 307 F.2d 637, 645 (D.C. Cir., 1962).

[140] *Id.* at 637.

[141] *Id.*

[142] *Id.* at 645.

[143] *See id.*

III. HISTORICAL OVERVIEW OF THE MMPI-2 USED IN COURT

A. ATTITUDE TOWARD PSYCHOLOGY

The attitude toward psychology in the courts has fluctuated over the years.[144] There remains, however, a "longstanding skepticism about the ability of psychiatrists and psychologists to make sound clinical judgments."[145] Apparently, the court's skepticism about psychologists and psychiatrists stems from empirical studies that "questioned the ability of mental health professionals to make accurate diagnostic and treatment decisions."[146] Unlike the "hard sciences," the "soft sciences," like psychology, have been gaining acceptance in the courts more slowly.[147] Reservations regarding psychology in the courts have lessened, however, as psychologists, along with all the tests, theories, and opinions, have become increasingly more prevalent in court.[148]

B. PREVALENCE IN COURT

Not only is the MMPI-2 the most widely used assessment measure in the courts, but it may also be the most frequently misnamed measure.[149] Incorrect references to the MMPI-2 have ranged from minor errors to blatant mistakes.[150] Taking

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[144] Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329 (1992).

[145] *Id.*

[146] *Id.*

[147] Hard or physical sciences, such as biology, physiology, and chemistry, have been more readily accepted in the courts than soft sciences, such as psychology and sociology. *See, e.g., Jenkins,* 307 F.2d 637 (D.C. Cir., 1962) (holding for the first time that psychologists were qualified to give expert testimony, when psychiatrists had been qualifying as experts for two decades prior to this case).

[148] *See, e.g., infra* Part III.B, pp. 17-19 (discussing the increasing prevalence of the MMPI/MMPI-2 in court).

[149] *See infra* note 150.

[150] This information is based on a Westlaw database search which revealed the following errors in referencing the MMPI/MMPI-2 in court opinions: often hyphenated, such as "Multi-phasic" or "Multi-Phasic;" sometimes referred to as "Multiphases," "Multiphase," or "Multi-phasing;" also referred to as "Multiplasic," "Multiphastic," "Multibasic," "Multistate," and "Multiaxial; " "Multi-facet," "Multifacet," or "Multifaceted; " one case referred to it as the MMFI (Minnesota Multi-Faceted Inventory); the "Minnesota Multi-faceted Personal Inventory test," "Minnesota Multifaceted Personality Profile Test," and "Minnesota Multiple Personality Index." *See* Westlaw, at

into consideration the varied references to the MMPI-2, the total number of reported cases in which the MMPI-2 was used in court at the time of this writing is 1,700.[151]

The first reported case in which the MMPI appeared in court was in 1948.[152] In this case, *People v. Martin*, the defendant was charged with the shooting death of a man and pled not guilty by reason of insanity.[153] The defense expert employed the MMPI along with the Rorschach and sodium pentothal to assess Martin's sanity.[154] Despite the defense expert's findings to the contrary, the defendant was found guilty of murder in the first degree and sentenced to life imprisonment.[155] On appeal, the court affirmed the finding of his sanity and thus his conviction and sentence.[156] Since *People v. Martin* in 1948, the use of the MMPI-2 in court has rapidly increased.[157]

The MMPI appeared in only one reported case in the 1940's and one case in the 1950's.[158] That number increased only slightly, to sixteen reported cases, in the 1960's.[159] By the 1960's, the MMPI had been in existence for almost twenty years and had widespread uses.[160] This low number is likely due to the courts' negative attitude toward psychology in the courtroom.[161] It may also be due to the lack of awareness of the many forensic applications and, therefore, a hesitancy to use the measure in that capacity.[162] In the 1970's, 54 cases em-

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http://www.westlaw.com (using search terms "MMPI" or "M.M.P.I." or "Minnesota Multi!" and updated March 19, 2004).

[151] *See id.*

[152] People v. Martin, 87 Cal. App. 2d 581 (1948). This case is frequently overlooked as a case employing the MMPI because the court erroneously referred to the measure as the "Minnesota multibasic personality test." *Id.* at 588.

[153] *Id.* at 583, 586.

[154] *Id.* at 588. Sodium pentothal is an injectible drug that is also referred to as "truth serum." *Id.* The Rorschach is a projective psychological test comprised of a set of ten cards with inkblots on them. GARY GROTH-MARNAT, HANDBOOK OF PSYCHOLOGICAL ASSESSMENT 393 (3d ed. 1997).

[155] *Martin*, 87 Cal. App. 2d at 584.

[156] *Id.* at 591.

[157] *See infra* text accompanying notes 158-70.

[158] *See* Westlaw, *supra* note 150.

[159] *Id.*

[160] *See id.* and accompanying text.

[161] *See supra* Part III.A, pp. 16-17 (discussing the courts' attitude toward psychology).

[162] *See infra* Part III.C, pp. 19-21 (discussing forensic applications of the MMPI-2).

ployed the MMPI.[163] Since 1979, however, the United States Supreme Court has "shown a decided preference for professional, rather than judicial, decision making in cases concerning the evaluation and treatment of those designated as mentally disabled."[164] This "preference for professional judgment" can be seen in the tremendous increase in the number of cases in which the MMPI-2 has been used.[165] Between 1980 and 1990, 337 reported cases used the MMPI-2.[166] This increase reveals that the MMPI-2 was used in court six times more frequently than in the previous decade.[167] Growth continued between 1990 and 2000, with a total of 816 cases, more than double the number of the previous decade.[168] Although 475 cases have used the MMPI-2 in the current decade, the number of cases in which the MMPI is used appears to be leveling out.[169] In the past, as psychology in the courts became more accepted, large increases were seen that will likely not occur again. It is likely, however, that the number of cases in which the MMPI-2 is used will continue to increase slightly as psychologists find new applications for its use and the courts continue to accept its importance as an assessment tool.[170]

C. APPLICATIONS IN COURT

A review of state and federal cases reveals the multitude of applications for which the MMPI-2 is used in court.[171] The

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[163] *See* Westlaw, *supra* note 150.

[164] Bersoff, *supra* note 144, at 329.

[165] *See infra* text accompanying notes 166-70.

[166] *See* Westlaw, *supra* note 150.

[167] *Id.*

[168] *Id.*

[169] *Id.* Based on the 475 cases reported in this decade so far, if the number of cases continues to increase proportionally, there will likely be approximately 1,130 cases utilizing the MMPI-2 reported by the end of this decade. *Id.*

[170] The MMPI-2 "has become the preferred personality assessment instrument for evaluating individuals in forensic settings." POPE, *supra* note 35, at 9. Thus, as new forensic applications emerge, it is likely that the numbers of reported cases will continue to increase. *See infra* Part III.C, pp. 19-20 (describing various applications of the MMPI-2).

[171] Tracy O'Connor Pennuto, Roger L. Greene, Wendy L. Packman, Monic Behnken, Grace P. Lee, Efi Rubinstein, & Nicole Yell, Forensic Uses of the MMPI-2: Revisited (March 2004) (Poster presented at the Society for Personality Assessment Midwinter Meeting, Miami) (reporting preliminary results of an ongoing research study analyzing the use of the MMPI-2 in courts by the Psychology and Law Research Group at Pacific Graduate School of Psychology, Palo Alto, CA).

MMPI-2 is used in both civil and criminal cases.[172] The MMPI-2 is frequently used in cases involving child custody, disability, competency to stand trial, criminal responsibility, insanity defense, employment, discrimination, sexual offenses, and murder.[173] Other common types of cases in which the MMPI is used involve personal injury, emotional distress, child abuse, dangerousness, transfer of juvenile cases to adult court, and sentencing issues.[174] The MMPI-2 is employed in many other less-common types of cases as well.[175]

The majority of the cases in which the MMPI-2 was employed "did not explicitly address either the admissibility of the MMPI[-2] or the extent to which the courts relied – or failed to rely – on the information provided from the MMPI[-2]."[176] Often, the court simply mentioned that the MMPI-2 had been administered and the results presented by an expert witness.[177] The information is still valuable, however, in determining the nature of the cases in which the MMPI-2 is commonly employed.[178]

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[172] *Id.*

[173] *Id. See also*, OGLOFF, *supra* note 130, at 19-20.

[174] *See* OGLOFF, *supra* note 130, at 19-20.

[175] *Id.* Some less common types of cases include post-traumatic stress disorder, civil commitment, revocation of professional licenses, medical malpractice, police brutality, substance abuse, wrongful death, and competency to be executed. *Id.* In addition, the MMPI-2 is sometimes used in court for purposes of showing that a "defendant does or does not meet the "profile" of a particular type of offender." *Id.* at 31. In People v. Stoll, 783 P.2d 698 (1989), the Supreme Court of California allowed the expert to testify that, based on the MMPI and MCMI, the defendant showed no signs of "deviance" or "abnormality" and was, therefore, falsely charged. *Id.* at 32. "In deciding whether such testimony should be admissible at trial, the court distinguished expert testimony using tests, such as the MMPI and MCMI, that were reasonably relied on by psychologists, from expert testimony based on new or novel scientific evidence." *Id.* at 33. Many courts have not allowed such profile evidence based on the MMPI-2. *Id.* at 35. In State v. Byrd, 593 N.E.2d 1183 (Ind. 1992), in refusing to allow MMPI-2 evidence showing that the "defendant's character is inconsistent with committing intentional murder," the court stated "this type of testimony comes cloaked with an aura of scientific reliability that certain individuals are or are not predisposed to commit a particular crime." *Id.* at 31-2. Lawyers will continue to attempt to have experts proffer such evidence until the courts have addressed the issue of the admissibility of MMPI-2 evidence for purposes of "profiling." *See id.* at 31.

[176] *Id.* at 19.

[177] *Id.*

[178] *Id.*

D. WHY USE THE MMPI-2?

The reasons for using the MMPI-2 in court are abundant and varied. These reasons mainly involve the ease of administration and scoring.[179] Psychological researchers have identified six main reasons for the wide applicability of the MMPI-2 in forensic settings.[180] First, the validity scales address the credibility of the individual's test-taking attitudes.[181] Second, the MMPI-2 is interpreted objectively, using external, empirically based correlates.[182] Third, the MMPI-2 has high test-retest reliability, and fourth, it has high inter-rater reliability.[183] Fifth, the extensive research on the MMPI-2 is published in peer-reviewed journals.[184] Finally, the results of the MMPI-2 are easy to communicate to non-psychologists, such as those involved in the judicial process.[185] Thus, researchers have found that the ease of communication of MMPI-2 results, along with its validity, objectivity, and reliability, make it an ideal tool for use in forensic settings, such as the courts.

IV. STANDARDS OF ADMISSIBILITY OF SCIENTIFIC EVIDENCE

Any discussion of the use of psychological assessments in court deserves a thorough explanation of the legal standards of admissibility of scientific evidence. "Scientific evidence" includes psychological evidence, such as psychometric measures and testimony related to their administration, scoring, and interpretation.[186] The legal evidentiary standard used depends upon the jurisdiction in which the case is heard.[187] The discussion below will examine the three basic legal standards of admissibility, which have evolved into what is now the current federal standard.[188] In addition, state standards will be briefly

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[179] POPE, *supra* note 35, at 19.

[180] *Id.* at 18-19 (providing chart outlining reasons for using the MMPI/MMPI-2/MMPI-A in court, Exhibit 2-1, p. 19).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *See* Saccuzzo, *supra* note 47, at 384; OGLOFF, *supra* note 130, at 18, 21.

[187] *See infra* text accompanying notes 231-34 (discussing evidentiary standards in different jurisdictions).

[188] *See infra* Parts IV.A-C, pp. 22-27 (discussing evolution of current federal evidentiary standard).

addressed, using the current state standard in California as an example. Finally, these standards will be discussed in terms of how they affect the admissibility of the MMPI-2.

A. THE FRYE TEST

In 1923, in *Frye v United States,*[189] the United States Court of Appeals for the District of Columbia Circuit developed a test to determine the admissibility of scientific evidence in court.[190] In *Frye*, the defendant attempted to introduce into evidence the results of his polygraph test.[191] The *Frye* court held that for scientific evidence to be admissible in court, it must have been obtained as the result of a procedure that was "sufficiently established to have gained general acceptance in the particular field in which it belongs."[192] The court also held that polygraph evidence did not meet this standard, as it had not gained general acceptance in the field.[193] The *Frye* test, as it became known, affects the admissibility of psychological evidence, including psychological tests.[194] Federal courts and most state courts used this standard until the adoption of the Federal Rules of Evidence in 1976.[195]

B. FEDERAL RULES OF EVIDENCE

Congress adopted the Federal Rules of Evidence in 1976.[196] The admissibility of expert evidence is now primarily delineated by Evidence Rules 401 through 404, 702, and 703.[197] Rule 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[198] Rule 402 states that all relevant evidence is generally admissible, and con-

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[189] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[190] *Id.*

[191] *Id.* The device sought to be admitted was actually a precursor to the polygraph called a "systolic blood pressure deception test." *Id.*

[192] *Id.* at 1014.

[193] *Id.*

[194] *See* Saccuzzo, *supra* note 47, at 384.

[195] *Id.*

[196] *Id.* at 385.

[197] *See* FED. R. EVID. 401-404, 702, 703. *See also* Saccuzzo, *supra* note 47, at 385.

[198] FED. R. EVID. 401.

versely, that nonrelevant evidence is inadmissible.[199] Rule 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[200] Rule 404 provides the general rule that character evidence is inadmissible unless it relates to the character of the accused, the alleged victim, or a witness.[201] These rules are important in that they govern the admissibility of evidence in court.[202]

Rule 702 addresses testimony by experts in three important ways.[203] First, the rule defines an expert as a witness who is qualified by knowledge, skill, experience, training, or education.[204] Second, Rule 702 provides that an expert may testify "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue...."[205] Finally, Rule 702 provides that the expert may testify if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[206] Rule 703 limits the admissibility of expert opinion testimony to information reasonably relied upon by the experts.[207] Evidence Rules 702 and 703 are important in that they govern the admissibility of expert testimony.

Although the adoption of the Federal Rules of Evidence clarified the admissibility of evidence in general, the admissi-

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[199] FED. R. EVID. 402.

[200] FED. R. EVID. 403.

[201] FED. R. EVID. 404. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same... (2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; (3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609." FED. R. EVID. 404 (a).

[202] *See supra* note 197 and accompanying text.

[203] *See* FED. R. EVID. 702.

[204] FED. R. EVID. 702.

[205] *Id.*

[206] *Id.*

[207] FED. R. EVID. 703.

bility of *scientific evidence* remained unclear.[208] Courts continued to apply the *Frye* test in an attempt to interpret the general admissibility provision of Evidence Rule 402.[209] Varying decisions resulted, however, because courts differed in how they applied *Frye*.[210] Thus, this ambiguous *Frye*/Evidence Rules standard remained regarding the admissibility of scientific evidence until the *Daubert* decision in 1993.[211]

C. DAUBERT AND ITS PROGENY[212]

In *Daubert v. Merrell Dow Pharmaceuticals*,[213] the United States Supreme Court resolved the *Frye*/Evidence Rules ambiguity.[214] In *Daubert*, a family alleged that the mother's ingestion of Bendectin caused their two infants to develop serious birth defects.[215] The trial and appellate courts excluded the scientific evidence introduced by the plaintiffs, based on the *Frye* standard.[216] The Supreme Court reversed, holding that the *Frye* general acceptance requirement "is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence."[217] Further, the Court noted

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[208] *See* Saccuzzo, *supra* note 47, at 385.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] General Electric Co. v. Joiner, 118 S. Ct. 5122 (1997) is another case among the progeny of *Daubert*. Though not directly relevant to the subject of this Comment, *Joiner* deserves mention, as it elaborated on how courts should be conducting a *Daubert* analysis: it clarified that the Court intended to give more flexibility to the trial courts in admitting scientific evidence, though it did not address whether the *Daubert* analysis applied to psychologists testifying as expert witnesses. *Id.*

[213] Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

[214] *See* Saccuzzo, *supra* note 47, at 385. *See also*, OGLOFF, *supra* note 130, at 22.

[215] *Daubert*, 509 U.S. at 582. Bendectin is a prescription anti-nausea medication marketed by Merrell Dow Pharmaceuticals. *See* Saccuzzo, *supra* note 47, at 386 n.61.

[216] *Daubert*, 509 U.S. at 583-84. *See also* Saccuzzo, *supra* note 47, at 386 n.63 (stating "In *Daubert*, respondent, Merrell Dow Pharmaceuticals, submitted an affidavit by an expert who concluded that based on a review of 30 published studies involving over 130,000 patients, Bendectin was not a risk factor for human births. Petitioners, Jason Daubert and Eric Schuller, were minor children born with birth defects. Petitioners and their parents responded with the testimony of eight experts who had conducted both their own studies and a reanalysis of the 30 studies. At issue was the admissibility of petitioners' scientific evidence. *See id.* 582-84. In granting respondent's motion for summary judgment, the district court found that petitioners' experts' reanalysis was not "sufficiently established to have general acceptance in the field to which it belongs." *Id.* at 583 (quoting Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 572 (S.D. Cal. 1989)). The court of appeals affirmed. *See id.* at 582.").

[217] *Daubert*, 509 U.S. at 597.

that a "rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their general approach of relaxing the traditional barriers to 'opinion' testimony."[218]

The Supreme Court in *Daubert* offered a new formula to replace the *Frye* test.[219] The *Daubert* decision identified judges as the evidentiary gatekeepers[220] and developed a four-part test to employ when determining the admissibility of scientific evidence: (1) whether the underlying theory or technique can and has been tested, (2) whether the methodology employed has been subjected to scrutiny via peer review and publication, (3) whether rates of error and classification obtained when using the technique are known and acceptable, and (4) the degree to which the technique is accepted within the scientific community.[221]

After the *Daubert* decision, there remained some uncertainty about whether the *Daubert* criteria applied only to "hard" science or to expert evidence generally.[222] The Supreme Court resolved this issue in *Kumho Tire Co., Ltd. v. Carmichael*.[223] *Kumho* was a products liability action against a tire manufacturer and distributor for injuries sustained in a car accident.[224] A tire on the vehicle blew out, the vehicle overturned, one passenger died, and the others were injured.[225] The survivors and the decedent's representative brought suit against Kumho Tire, claiming that the tire that failed was defective.[226] The trial court, in applying the *Daubert* criteria, excluded the tire analyst's expert testimony that the particular

[218] *Id.* at 588. *See also,* OGLOFF, *supra* note 130, at 22.
[219] *See infra* notes 220-21 and accompanying text.
[220] *Daubert*, 509 U.S. at 579.
[221] *Id.* at 592-94.
[222] *See infra* notes 223-30.
[223] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).
[224] *Id.*
[225] *Id.*
[226] *Id.*

tire failed due to a manufacturing or design defect.[227] The court of appeals reversed and remanded, holding that the trial court had abused its discretion in its application of *Daubert* to exclude the tire analyst's expert testimony.[228] The Supreme Court reversed the appellate court's judgment and held that *Daubert* applied to all expert evidence: "*Daubert*'s general holding...applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge."[229] Furthermore, the Court affirmed that "the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."[230] Thus, *Daubert* criteria clearly apply not only to hard science, but to expert evidence generally, which includes psychological evidence.

The United States Supreme Court's rejection of the "general acceptance test" of *Frye* and the development of the *Daubert* criteria apply to all federal courts.[231] Although state courts are not bound by the federal rules, most states follow either the Federal Rules of Evidence or the *Frye* test.[232] Several states, however, rely on their own rules of evidence and apply a variation of the *Daubert* or *Frye* test.[233] For example, Texas uses a *Daubert*-like test, Florida uses a *Frye*-like test, and California uses the *Frye-Kelly* test described below.[234]

D. THE FRYE-KELLY TEST

California follows a variation of the *Frye* test, known as the *Frye-Kelly* test, as announced in 1976 in *People v. Kelly*.[235] The admissibility of voice-print analysis evidence was at issue in *Kelly* because it was scientific evidence that was new to the field.[236] The *Kelly* court developed a variation of the *Frye* test,

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[227] *Id.*
[228] *Id.* at 137-38.
[229] *Id.* at 141.
[230] *Id.*
[231] Charles P. Ewing, *The Law of Expert Testimony*, *in* HANDBOOK OF PSYCHOLOGY: VOLUME 11, FORENSIC PSYCHOLOGY, 59 (Alan M. Goldstein, ed., 2003).
[232] *See* Saccuzzo, *supra* note 47, at 386.
[233] *See id.*; *See also infra* note 234 and accompanying text.
[234] *See infra* notes 235-42 (describing the California State standard).
[235] People v. Kelly, 549 P.2d 1240 (Cal. 1976). *See also,* Saccuzzo, *supra* note 47, at 386.
[236] *Kelly*, 549 P.2d at 1242.

requiring a two-step process.[237] First, reliability of the method must be established, which is usually accomplished through expert testimony.[238] Second, the witness furnishing the expert testimony must be properly qualified as an expert in order to give an opinion on the subject.[239] Further, "the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case."[240] In *Kelly*, the voice-print analysis was deemed to be a new technology that was not yet an established method.[241] Thus, the voice-print analysis was inadmissible, because it failed to meet the reliability requirement of the first prong of the test.[242] California now follows this two-prong test in determining the admissibility of scientific evidence, including psychological evidence.

E. THE ADMISSIBILITY OF THE MMPI-2

When subjected to the above federal evidentiary standards, the MMPI-2 fares well.[243] In jurisdictions employing the *Frye* "general acceptance" test, the courts largely defer to the scientific and professional community.[244] The MMPI-2 is an instrument that is generally accepted by the psychological community as a valid measure of psychopathology, behavioral styles, and response styles.[245] Therefore, testimony regarding the MMPI-2 is usually easily admitted under the *Frye* standard.[246] Similarly, under the Federal Rules of Evidence, the MMPI-2 should fare well and be admissible as evidence.[247] Provided the witness is qualified as an expert, and the MMPI-2

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[237] *Id.* at 1244.

[238] *Id.*

[239] *Id.*

[240] *Id. See also* Saccuzzo, *supra* note 47, at 386 n.71 (stating "The expert must persuade the jury that the expert's techniques were those generally used by experts in the particular field. In terms of the MMPI, issues of correct procedures would include whether the test was properly administered and scored.").

[241] *Kelly*, 549 P.2d at 1251.

[242] *Id.*

[243] *See infra* notes 244-56. It should be noted that regardless of the standard, the specific use of the MMPI-2 will be at issue, and if the MMPI-2 was used inappropriately or inaccurately, it is much more likely to be found inadmissible. *See infra* Part VI, pp. 36-42.

[244] *See supra* text accompanying note 192.

[245] OGLOFF, *supra* note 130, at 26.

[246] *See supra* notes 244-45.

[247] *See infra* note 248 and accompanying text.

testimony is relevant to the issues at bar without being prejudicial, confusing, or misleading, the MMPI-2 evidence should stand up well to the requirements of the Federal Rules of Evidence.[248]

In a *Daubert* jurisdiction, however, admissibility of MMPI-2 testimony is less clear, because the judge serves as the gatekeeper.[249] As judges may lack the technical knowledge to assess MMPI-2 evidence, decisions of admissibility are not as predictable.[250] Challenges to the admissibility of the MMPI-2 will rarely prove successful, however, as the MMPI-2 fares well against *Daubert's* four criteria due to the development and research literature of the MMPI-2.[251]

As discussed above, state courts are not bound by federal rules.[252] Therefore, the admissibility of the MMPI-2 in a state court may vary by jurisdiction.[253] In jurisdictions using a variation of the *Frye* or *Daubert* standards, the MMPI-2 will likely be admitted similarly to a *Frye* or *Daubert* jurisdiction. For example, in the *Frye-Kelly* jurisdiction of California, the MMPI-2 is readily admissible.[254] Under the first prong of the *Frye-Kelly* test, the reliability of the MMPI-2 can be easily established; and as long as the testifying witness is qualified as an expert, the second prong is met.[255] Therefore, the MMPI-2 is usually readily admissible under California's *Frye-Kelly* standard.[256] In conclusion, regardless of the jurisdiction, the MMPI-2 generally easily gains admission as evidence into court.

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[248] *See* Fed. R. Evid. 401-404, 702, 703.

[249] *See Daubert*, 509 U.S. at 579; *See also supra* text accompanying note 220.

[250] *Id.*

[251] *Id.; See also supra* Part I.B, pp. 8-10 (describing the reliability and validity of the MMPI-2).

[252] *See supra* text accompanying note 232.

[253] *See supra* text accompanying notes 231-34.

[254] *See supra* text accompanying notes 238-40.

[255] *Id.*

[256] *Id.*

V. MMPI-2 IN MURDER CASES

A. WHAT IS MURDER?

In order to discuss the use of the MMPI-2 in murder cases, it is important to define "murder." Murder is "the unlawful killing of a human being with malice aforethought."[257] "Malice aforethought" is the "requisite mental state for common-law murder."[258] The crime of murder was not subdivided at common law, but many states have since adopted the degree structure.[259] In the legal system, murder involves two distinct elements, the *actus reus* and the *mens rea.*[260] Actus reus can be defined as the "guilty act."[261] Thus, the actus reus of murder is the act of causing the death of another human being.[262] The mens rea element is not always associated by the lay public as a necessary criterion for the crime of murder.[263] Mens rea can be defined as the "guilty mind" and is also commonly referred to as the mental element, the guilty state of mind, or the crimi-

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[257] BLACK'S LAW DICTIONARY 428 (Pocket ed. 1996). Therefore, any discussion of manslaughter is necessarily excluded from this Comment, as it is defined as "the unlawful killing of a human being *without* malice aforethought." (emphasis added). *Id.* at 402.

[258] *Id.* at 400. "The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a felony (which leads to culpability under the felony-murder rule)." *Id.*

[259] *Id.* at 428. The degree structure refers to the differentiation between first- and second-degree murder. *Id.* First-degree murder is "murder that is willful, deliberate, or premeditated, or that is committed during the course of another serious felony (often limited to rape, kidnapping, robbery, burglary, or arson)." *Id.* at 428-29. Second-degree murder is "murder that is not aggravated by any of the elements of first-degree murder." *Id.* at 429.

[260] *See, e.g.,* CAL. PENAL CODE § 187(a) (defining the two elements of murder in California). *See also,* SHATZ, *supra* note 31, at 95 (stating, "As a general rule crimes are defined to require proof of both an act and a culpable mental state.").

[261] BLACK'S LAW, *supra* note 257, at 14.

[262] *See, e.g.,* CAL. PENAL CODE § 187(a) (defining murder in the state of California, the first element of which is the actus reus: "the unlawful killing of a human being, or fetus").

[263] *See, e.g.,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2003) (stating one definition of the verb "murder" as "To kill (another human) unlawfully" thereby describing only the actus reus with no mental element), *available at* http://www.guru.net; *See also, e.g.,* NEW WEBSTER'S DICTIONARY AND THESAURUS & MEDICAL DICTIONARY 253 (Ottenheimer 1991) (defining the verb "murder" as "to commit a murder; to kill..." again with no mental element).

nal intent.[264] The mental element is what distinguishes first-degree murder from second-degree murder in jurisdictions that employ the degree structure.[265] The mens rea element is the element for which the MMPI-2 is used in murder cases.

B. PREVALENCE IN MURDER CASES

Of the 1,700 reported cases employing the MMPI-2 in court, over a quarter are murder cases.[266] There have been 435 reported cases involving murder in which the MMPI-2 was employed.[267] The prevalence of the MMPI-2 in reported murder cases has increased proportionally to the total number of reported cases employing the MMPI-2.[268] The percentage of murder cases employing the MMPI-2 is consistently between 22-31 percent of the total reported cases utilizing the MMPI-2.[269] Only one case involving murder was reported in the 1940's, and one in the 1950's.[270] The 1960's saw an increase to five reported murder cases, which rose to sixteen in the 1970's.[271] In the 1980's that number increased by six times to ninety reported murder cases utilizing the MMPI-2.[272] In the 1990's, there were 181 reported murder cases, and so far this decade, there are 141 reported murder cases employing the MMPI-2.[273] At this rate of increase, the total number of reported murder cases employing the MMPI-2 will likely reach 350 cases by the end of the decade.[274]

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[264] BLACK'S LAW, *supra* note 257, at 412; *See also* SHATZ, *supra* note 31, at 129 (referring to mens rea as the culpable mental state, scienter, or criminal intent).

[265] SHATZ, *supra* note 31, at 210.

[266] *See* Westlaw, *supra* note 150.

[267] *Id.*

[268] *Id.*

[269] *Id.* The only exceptions to this statement are the 1940's and the 1950's in which there was only one total reported case utilizing the MMPI in each decade, and each was a murder case. *Id.* Therefore, the percentage of cases employing the MMPI and involving murder for those decades was 100%. *Id.*

[270] *Id.* In the 1940's, the only reported case was a murder case: People v. Martin, 87 Cal. App. 2d 581 (1948). *See supra* text accompanying notes 152-56 (discussing the *Martin* case). In the 1950's, the only reported case was also a murder case: U.S. v. Covert, 16 C.M.R. 465 (1954).

[271] *See* Westlaw, *supra* note 150.

[272] *Id.*

[273] *Id.*

[274] *Id.*

C. APPLICATIONS OF THE MMPI-2 IN MURDER CASES

The most common application of the MMPI-2 in murder cases is to determine mental competence.[275] There can be great discrepancy, however, between the legal and the psychological standards for mental competence.[276] A person may be severely mentally disordered and still be considered mentally competent under the law.[277] The legal standard used depends on the point in the criminal process at which the defendant's competency is at issue.[278]

Mental competence is relevant at three main points in the criminal process.[279] The first point is the time of the murder, at which time the issue is the defendant's criminal responsibility or insanity.[280] The second point in the criminal process at which mental competence is relevant is the time of trial.[281] The issue at this second point is the defendant's competence to stand trial.[282] The third point is the time of execution, at which time the issue is the defendant's competence to be executed.[283]

1. Criminal Responsibility / Insanity Defense

Mental incompetence at the time of the murder is by far the most common competence issue for which the MMPI-2 is used.[284] The mens rea element is important at this point in the criminal process, as it helps determine the mental competence of the defendant.[285] If the defendant did not form the mental state required for murder, the defendant may lack criminal

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[275] O'Connor Pennuto, et al., *supra* note 171.

[276] *See, e.g.*, POPE, *supra* note 35, at 45 (stating that "insanity is a legal term that is not equivalent to a psychotic state").

[277] *Id.*

[278] *See infra* text accompanying notes 279-83.

[279] SHATZ, *supra* note 31, at 614.

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] O'Connor Pennuto, et al., *supra* note 171.

[285] *See, e.g.*, OGLOFF, *supra* note 130, at 29 (stating, "Not surprisingly, the MMPI has been used quite extensively in assessments of defendants' criminal responsibility.... Indeed, to the extent that mental illness or disorder is required for all insanity defense standards, a finding of mental illness is a necessary condition of the insanity defense. Given the MMPI's utility in identifying mental illness, it has been found useful in cases where the question of the existence of a mental disorder is at issue.").

responsibility.[286] If, however, the defendant *could not* form the mental state required by the murder, it may amount to legal insanity.[287] In California, the legal standard for insanity is a return to the original version of the old M'Naghten test.[288] It is a two-prong test that determines whether the person knew the nature and quality of the act or whether the person knew right from wrong.[289] Forensic psychologists may employ the MMPI-2 to help make this determination about whether the person was competent at the time the murder was committed.[290] That is, the MMPI-2 may be used for the determination of criminal responsibility.[291]

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[286] As murder requires both the actus reus and the mens rea elements, if the defendant did not form the mental state required, the defendant may lack criminal responsibility for the murder. *See, e.g.*, SHATZ, *supra* note 31, at 211 (describing circumstances under which murder is differentiated from manslaughter based on the mens rea element).

[287] Insanity "prevents one from having legal capacity." BLACK'S LAW, *supra* note 257, at 319. However, the inability to form the requisite mental state for murder may also be due to other mental defects, such as diminished capacity, which may be a mitigating factor. *See id.* at 79 (defining diminished capacity as "an impaired mental condition – short of insanity – that is caused by intoxication, trauma, or disease and that prevents the person from having the specific mental state necessary to be held responsible for a crime...").

[288] People v. Skinner, 704 P.2d 752, 782 (Cal. 1985). The California Penal Code states that in order to assert the insanity defense, an accused must prove by a preponderance of the evidence "that he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense (emphasis added)." CAL. PENAL CODE § 25(b). The issue has been whether the two prongs of the insanity test are interpreted to mean "and" or "or." *Skinner*, 704 P.2d at 769, 775. In 1984, the court held that the statute should be interpreted as written, that is, with the conjunctive "and" and not the disjunctive "or." *Id.* at 486. In so doing, the sanity of the defendant in that case was affirmed because it was found that he knew and understood the nature and quality of his act, despite his inability to distinguish right from wrong. *Id.* He failed to prove both prongs of the insanity test by a preponderance of the evidence. *Id.* Then, in 1985 that case was appealed to the California Supreme Court. People v. Skinner, 704 P.2d 752 (Cal. 1985). The California Supreme Court held that the effect of the statute was to restore the traditional M'Naghten test of insanity. *Id.* at 765. In so doing, the appellant was found to be insane because he met one prong, as he could not distinguish right from wrong. *Id.* Therefore, despite the statutory change in the connector between the two prongs of the insanity test from "or" to "and," the statute is still interpreted as the traditional M'Naghten test: disjunctively. *Id.*

[289] *See supra* note 288 (discussing evolution of the current insanity test in California).

[290] POPE, *supra* note 35, at 45-46. The MMPI is particularly helpful in identifying those who are feigning mental illness to avoid prosecution of a crime. Id. at 46. But, "It is important to keep in mind that when the MMPI is administered at some point after the crime, the results, if valid, reflect the individual's current...mental status, which may or may not be similar to the individual's mental status at the time that the crime was committed." Id.

[291] Id.; Ogloff, supra note 130, at 29.

2. *Competency to Stand Trial*

The second point in the criminal process at which mental competence is relevant is the time of the trial.[292] The United States Supreme Court has held that the standard for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him."[293] This two-prong test remains the legal standard in determining a defendant's competency to stand trial.[294]

Some debate exists over whether the MMPI-2 is appropriate for use in helping to determine the accused's competence at this point in the criminal process.[295] Some psychologists argue that "using the MMPI as an aid in determining whether an individual is psychologically able to stand trial is consistent with one of the main purposes of the original instrument."[296] Other psychologists disagree, however, because the focus of a competency evaluation is not on the defendant's mental state or personality.[297] These psychologists argue that the MMPI-2 results have limited utility in this context.[298] Further, the functional nature of the two-prong test of competency to stand trial causes them to assert that the MMPI-2 does not stand up well in this assessment.[299]

3. *Competency to Be Executed*

The third and final point in the criminal process at which mental competence is an issue is the time of execution.[300] Determining competency at the time of execution occurs much less commonly than assessing the accused's mental state at the

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[292] See supra text accompanying notes 279, 281-82.
[293] Dusky v. United States, 362 U.S. 402 (1960).
[294] See Ogloff, supra note 130, at 30-31; Alan M. Goldstein, Overview of Forensic Psychology, in Handbook of Psychology: Volume 11, Forensic Psychology, 14-15 (Alan M. Goldstein, ed., 2003).
[295] See supra text accompanying notes 296-99.
[296] Pope, supra note 35, at 45.
[297] Ogloff, supra note 130, at 31.
[298] Id.
[299] Id.
[300] See supra text accompanying notes 279, 283.

time of the murder or at the time of trial.[301] A state is prohibited from proceeding with the execution of an "insane" person by the Eighth Amendment of the United States Constitution.[302] Therefore, the MMPI-2 is used to determine whether the individual is "sane" or "competent."[303] The United States Supreme Court, in *Ford v. Wainwright*, stated that the test of competence to be executed is whether the prisoner is "aware of his impending execution and of the reason for it."[304] Because the MMPI-2 is used to determine one's mental state, it can be employed as a tool to assess whether a defendant is competent in order to be executed.[305]

VI. MISAPPLICATIONS OF THE MMPI-2 IN MURDER CASES

The increasing prevalence of the MMPI-2 in murder cases also brings an increase in the misapplications of this instrument.[306] Just as it is important to know the proper applications of the MMPI-2, it is equally important to recognize the many misapplications, in order to avoid and remedy errors.[307] Although mental health professionals are the primary users of the MMPI-2, they are not the only ones who misuse the MMPI-2.[308] Those in the legal arena, including lawyers and judges, also misuse the MMPI-2 in criminal court.[309] The major categories of misuses of the MMPI-2 in murder cases along with legal case examples illustrate these misapplications.

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[301] O'Connor Pennuto, et al., supra note 171. But see Personal Communication with Roger L. Greene, MMPI-2 expert (March 2004) (stating, "I have several hundred cases from these evaluations," and "These evaluations were not questioned and thus were not a basis for an appeal so they would be not seen.").

[302] The Eighth Amendment prohibits the execution of insane persons under its ban against cruel and unusual punishment. See U.S. Const. amend. VIII.

[303] Ogloff, supra note 130, at 35.

[304] Ford v. Wainwright, 477 U.S. 399, 400 (1986).

[305] Ogloff, supra note 130, at 35.

[306] See supra Part V.B, pp. 31-32 (discussing the increasing prevalence of the MMPI-2 in murder cases).

[307] See infra Parts VI.A-C, pp. 36-43 (discussing the misapplications of the MMPI-2 in murder cases).

[308] See infra Parts VI.B & C, pp. 39-43 (describing misapplications of the MMPI-2 by legal professionals).

[309] Id.

A. MENTAL HEALTH PROFESSIONALS

Mental health professionals include psychologists, psychiatrists, and other licensed mental health workers who are qualified in the administration, scoring and interpretation of the MMPI-2.[310] Because mental health professionals are the primary users of the MMPI-2, it follows that their use would account for the majority of the misapplications.[311] Misapplications of the MMPI-2 by mental health professionals fall into 4 main categories: administration, scoring, interpretation, and testimony.[312]

1. Administration

There are many possible misapplications in the administration of the MMPI-2 by mental health professionals in murder cases.[313] Basing testimony solely on the MMPI-2 instead of using a full battery of assessments constitutes a misuse.[314] Using an inappropriate version of the test, such as an outdated version, or a non-age-appropriate version, also constitutes a misuse.[315] Failing to supervise the administration of the MMPI-2 constitutes a misapplication, as does administering the instrument to an individual unable to complete the measure due to insufficient reading skills or low IQ.[316]

A legal case example to illustrate the misapplication of the MMPI-2 based on an inappropriate version is *Philmore v. State*.[317] In *Philmore*, the defendant was accused of first-degree murder, carjacking with a deadly weapon, robbery, kidnapping, and third-degree grand theft.[318] He attempted to present an

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[310] See Ethical Principles of Psychologists and Code of Conduct, General Principles, Principle A: Competence, supra note 127. A mental health professional must be qualified to administer, score, interpret, and testify about the MMPI-2 through education, training, and experience with the MMPI-2; usage of the measure by an unqualified person would constitute a misapplication. See id.

[311] See infra Parts VI.A.1-4, pp. 36-39 (describing misapplications by mental health professionals in these four areas).

[312] Id.

[313] See supra text accompanying notes 314-22.

[314] Pope, supra note 35, at 85 (emphasizing the need to ensure "that inferences are based on an adequate array of data and are placed in proper context.").

[315] See supra Part II.A, pp. 10-13 (describing correct administrative procedures).

[316] Id.

[317] Philmore v. State, 820 So. 2d 919 (Fla. 2002).

[318] Id.

mental defect defense.[319] His expert witness testified to Philmore's "psychotic disturbance" and that the MMPI had played a significant role in his evaluation of Philmore.[320] On cross-examination, however, the expert witness conceded that he employed the original version of the MMPI, rather than the current version.[321] Consequently, his testimony was discredited and Philmore's mental defense failed.[322]

2. *Scoring*

Common misapplications of the MMPI-2 during scoring include incorrectly scoring the test.[323] This error usually occurs when the MMPI-2 is scored manually.[324] It may also occur when using the incorrect answer forms or software version, or not using updates when using commercial computer scoring services. Dr. Roger Greene, a well-known MMPI-2 expert, is often called as an expert witness in cases in which the MMPI-2 is at issue.[325] He is often asked to evaluate the administration, scoring, and interpretation of the MMPI-2 by other psychologists.[326] Dr. Greene reports that he has never evaluated an MMPI-2 in court that was scored correctly.[327] Incorrectly scored MMPI-2 tests may result in inaccurate findings.[328] These findings are often very important in the outcome of court cases.[329] Thus, incorrect scoring of the MMPI-2 is a problem and an obvious misapplication of the MMPI-2 in court.

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[319] Id. at 935-36.

[320] Id. at 936.

[321] Id. at 937. He utilized the original version of the MMPI, which was approximately ten years out-of-date at the time of testing. Id.

[322] Id. at 936-37.

[323] See supra note 114 (discussing that errors are usually the result of a clinician miscounting items).

[324] Id.

[325] Personal Communication with Roger L. Greene, MMPI-2 expert (2003).

[326] Id.

[327] Id.; See, e.g., Depew v. Anderson, 104 F. Supp. 2d 879 (Ohio, 2000) (asserting ineffective assistance of counsel, because his trial counsel retained an expert who committed malpractice: he erroneously scored the MMPI test he had given).

328 See Greene, supra note 48, at 40 (stating that minor errors generally "have a negligible effect on the interpretation of the profile," and that "when clinicians exercise reasonable care...few substantial errors in scoring occur").

[329] See Pope, supra note 35, at 3 (stating that "those who testify can profoundly affect the lives of the others involved in the case").

3. *Interpretation*

Simply quoting a computer-generated printout of MMPI-2 results constitutes a common misapplication.[330] If using a computer-generated printout of MMPI-2 results, the forensic psychologist should use information gathered from all sources and clinical judgment in interpreting the results.[331] Computer-generated results provide hypotheses about the individual based on the profile of scores.[332] Not all hypotheses apply to every individual.[333] In other words, the forensic psychologist must actually use clinical judgment in interpreting the results of an individual's MMPI-2.[334] Simply quoting the computerized interpretation constitutes a misapplication of the MMPI-2.

4. *Testimony*

An expert witness must first qualify as an expert before being permitted to testify.[335] Misapplications of the MMPI-2 during testimony may include having a non-qualified person testify.[336] A non-qualified person may be someone who is not licensed or who has inadequate training, experience, or education to testify about the MMPI-2.[337] Testimony that misrepresents the results of the MMPI-2, including codetype or profile

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[330] See id. at 34; See also supra note 119, and accompanying text.

[331] Id.

[332] Id.

[333] Id.

[334] Id.; See, e.g., Krill v. Metropolitan Life Ins. Co., 2000 WL 190256 (Pa., 2000) (stating that "the MMPI summary was not a summary of Ms. Krill's performance on that test and was thus in no way specific to Ms. Krill. Instead...the summary was a profile of characteristics exhibited by persons with MMPI results similar to those of Ms. Krill," indicating that the psychologist submitted a computer interpretation, which is a generic profile interpretation and not specific to the patient).

[335] Fed. R. Evid. 702, 703.

[336] See Ethical Principles of Psychologists and Code of Conduct, General Principles, Principle A: Competence, supra note 127 (providing requirements of competency).

[337] See id. Courts may sometimes erroneously allow non-qualified persons to testify regarding the MMPI-2. See e.g., Bussell v. Leat, 781 S.W.2d 97 (Mo. App. 1989) (allowing a physician, who was not trained in psychiatry, to administer and testify as an expert witness regarding several tests including the MMPI, when her only training included "some psychiatry rotations," a bachelor's degree in clinical psychology, and an undergraduate course that included study of the MMPI).

evidence, or the utility of the results, constitutes another misapplication of the MMPI-2.[338]

B. LAWYERS

Lawyers may also misuse the MMPI-2 in murder cases.[339] Lawyers may use the results of the MMPI-2 to advance their clients' causes.[340] When MMPI-2 results, or the lack thereof, are used in ways that are inconsistent with the proper use of the instrument, this constitutes a misapplication.[341] Lawyers may also misuse the MMPI-2 by not recognizing its importance and failing to bring it into trial.[342] Misapplications by lawyers may border on ethical violations by reason of the lawyers not zealously representing the interests of their clients.[343] Misapplications of the MMPI-2 by lawyers are also often grounds for appeal based on ineffective assistance of counsel, among other grounds.[344]

In *Walker v Kernan*,[345] Walker was convicted of first-degree murder for the death of his wife.[346] In his petition for a writ of habeas corpus, Walker claimed ineffective assistance of counsel for failing to raise a diminished-capacity defense, among other claims.[347] A psychologist had administered the MMPI to Walker, the report from which would have supported a dimin-

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[338] See, e.g., Krill, 2000 WL 190256, supra note 334 (illustrating that using a generic computer interpretation is a misapplication, as would be testifying regarding such an interpretation).

[339] See infra text accompanying notes 340-58.

[340] See supra text accompanying notes 171-75 (describing applications of the MMPI-2 in court).

[341] See, e.g., infra text accompanying notes 351-58 (discussing case involving the misuse of the MMPI despite it not being used).

[342] See, e.g., infra text accompanying notes 345-50 (discussing case in which counsel failed to bring MMPI into trial).

[343] See Model Code of Prof'l Responsibility Canon 7, supra note 30 (discussing the responsibility of counsel to provide zealous representation).

[344] See, e.g., Lockett v. Anderson, 230 F.3d 695 (Miss., 2000) (holding that counsel was ineffective for failing to investigate mitigating psychological evidence and stating that "counsel's inquiry fell below the minimum investigation recommended by the American Bar Association. Counsel has no notes of the results of any investigatory work with respect to sentencing. Counsel's testimony at the evidentiary hearing also demonstrates a basic lack of familiarity with the psychological tests that were performed on Lockett," thus, indicating the need for legal professionals to be knowledgeable about the tests commonly administered to their clients, such as the MMPI-2).

[345] Walker v. Kernan, 1997 WL 168557 (Cal. 1997).

[346] Id.

[347] Id. at 5.

ished-capacity defense.[348] Yet, his trial counsel refused to obtain the MMPI results and failed to present this defense.[349] It was in Walker's best interest to use the results of the MMPI.[350] Thus, the failure of this lawyer to utilize the MMPI constituted a misuse of the MMPI.

Similarly, in *State v. Kleypas*, a lawyer misused the MMPI-2 in a murder case.[351] In *Kleypas*, the defendant admitted to the brutal murder of a young college woman but claimed he was incompetent to stand trial.[352] He underwent extensive psychological testing by both the defense and prosecution experts.[353] The MMPI-2 was *not* administered.[354] In court, however, the prosecution insinuated that the defense experts were trying to hide information from the jury by stating that the defense did not use the MMPI-2 "because they were afraid of the validity scales."[355] The weight given to the prosecution's remarks by the jury is unclear; however, the prosecution prevailed.[356] Kleypas was convicted and sentenced to death.[357] The MMPI-2 was not even employed in this case, yet it was still misused by the prosecuting attorneys to wrongfully impeach the defense experts.[358] The use of the MMPI-2 by this prosecuting attorney constitutes an illustration of the misuse of the MMPI-2 to advance the cause of the prosecution by means that are inconsistent with the use of the MMPI-2.

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[348] Id. The original version of the MMPI was administered to Walker because it had been administered to him in 1981, before the MMPI-2 was published. Id.

[349] Id.

[350] See id. This is the basis of Walker's claim of ineffective assistance of counsel based on counsel's refusal to argue the defense of diminished capacity. Id. The court dismissed his claims, however, holding that "there is no constitutional violation where an attorney and petitioner have a difference of opinion as to a tactical decision." Id. Further, "Walker discussed the diminished capacity defense with his attorney; tactical disagreement on this point does not establish cause for these purposes." Id.

[351] State v. Kleypas, 40 P.3d 139, 171 (Kan. 2001).

[352] Id. at 173, 213.

[353] Id. at 213.

[354] Id. at 283-85.

[355] Id. at 283-84.

[356] Id. at 216.

[357] Id. at 139.

[358] See supra text accompanying notes 354-55.

C. JUDGES

Finally, judges have also misused the MMPI-2.[359] Misuse can occur when the judge erroneously admits the MMPI-2 into evidence or excludes the MMPI-2 from admission into evidence.[360] In *State v. Gardner*[361] the defendant was convicted of kidnapping, burglary, first-degree sexual assault, assault with a dangerous weapon, possession of a stolen vehicle, driving to elude a police vehicle, carrying a concealed weapon, and second-degree sexual assault.[362] Gardner claimed he was not criminally responsible for his crimes.[363] The MMPI-2 was given by his defense expert and showed that he was suffering from a mental defect.[364] The trial judge, however, excluded the testimony because he, the judge, misinterpreted one of the responses on Gardner's MMPI-2.[365]

The judge's decision was premised on an error concerning the interpretation of one of the MMPI items. Somehow, the trial court judge believed erroneously that the defendant had answered "true" to item number 137 ("I believe my home life is as pleasant as most people I know"), when, in fact, the defendant had responded "false" to the item. Based on his misunderstanding of the answer to the item, the judge wrote that he "could not conceive how a happy home life could result from alcoholism." As a result of this confusion, the judge "concluded that the MMPI report was totally unreliable and excluded testimony regarding the report from evidence.[366]

The Rhode Island Supreme Court reversed the trial court's judgment.[367] The exclusion of the test and the psychologist's testimony ruined the defendant's ability to prove his defense of

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[359] See infra text accompanying notes 362-70 (describing misapplication of the MMPI by a judge).

[360] See, e.g., id;. See also, e.g., Goodin v. State, 856 So. 2d 267 (Miss., 2003) (illustrating judge's misuse of the MMPI-2 by ordering that the MMPI-2 be administered, despite the defendant having a 2nd grade reading level and an IQ of 60).

[361] State v. Gardner, 616 A.2d 1124 (R.I. 1992).

[362] Id.

[363] Id. at 1125.

[364] Id. at 1126. The defense expert testified that the defendant suffered from schizotypal personality disorder, but the trial judge refused to allow him to answer the question about whether defendant suffered from this at the time of the crimes. Id.

[365] Id. at 1130.

[366] Ogloff, supra note 130, at 30.

[367] Gardner, 616 A.2d at 1130.

lack of responsibility.[368] Furthermore, testimony regarding the MMPI-2 should have been admitted.[369] The trial judge's misuse of the MMPI-2 in this case was a misapplication of the MMPI-2, in that the judge excluded MMPI-2 evidence that was clearly relevant and appropriate to be admitted into trial.

VII. RECOMMENDATIONS

Not every attorney can be an expert of every facet of the law. On the other hand, attorneys must be competent in the areas of law in which they practice.[370] The frequency with which the MMPI-2 is employed in cases of murder necessitates that those specializing in this area of law be not just familiar, but knowledgeable, about the MMPI-2. This knowledge includes much more than just understanding the purpose of the MMPI-2. Legal professionals must know the correct administration, scoring, and interpretive procedures in order to effectively question their own and opposing expert witnesses.

Several solutions exist for the issues raised by the use or misuse of the MMPI-2 generally in court and specifically in murder cases. It is imperative that those in the legal profession have access to the necessary information regarding such measures as the MMPI-2. Practically speaking, how is this best accomplished? There are several ways to ensure that the necessary education is acquired. First, law schools could require a course in mental health law. Second, continuing legal education courses (hereinafter "CLE"s) specific to the interface of psycholegal issues could be offered. Third, education of the legal profession could be accomplished through publications in law reviews and journals.

1. Mental Health Law Courses

One possible solution is to require a course in Mental Health Law in law schools, to ensure that law students acquire the necessary knowledge to be functionally aware of the admin-

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[368] Id. at 1129.

[369] Id. at 1131.

[370] See Model Rules of Prof'l Conduct, Rule 1.1: Competence (1998) (stating "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

istrative procedure of the MMPI-2. This solution may appear to be a bit overbroad. It is true that not every area of law frequently encounters the need for psychological assessments. Psychological assessments are, however, quickly becoming common in many areas of law.[371] Mental health issues emerge in so many different areas of law, from child custody, to worker's compensation, to personal injury, to sexual violence, to murder.[372] The interface of psychology and the law is rapidly merging.[373] Psychologists are being trained in forensic psychology, ethics, and other areas of law that relate to their practice. Attorneys, judges, and others involved in the judicial process should also increase their competence in the areas of psycholegal importance. Some law schools already offer courses on mental health law.[374] If not required for all law students, it may be offered as a core course in certificate programs in which mental health evaluations are particularly relevant.

2. *Continuing Legal Education Courses*

A second solution, especially relevant to attorneys and judges who have been out of law school and in practice for some time, would be to require CLEs specific to the interface of psycholegal issues for those in certain practice areas, such as capital murder cases. A CLE requirement would ensure continuing competence in areas crucial to the practice of those frequently involved in such cases. It would also ensure that lawyers remain on the forefront of this constantly changing and emerging area of law. Currently, the State Bar of California requires that each active member of the State Bar complete at least twenty-five hours of legal education approved by the State Bar or offered by a State Bar-approved provider within the thirty-

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[371] See, e.g., supra Part III.C, pp.19-21 (describing varied forensic applications of the MMPI-2).

[372] Id.

[373] See generally Packer & Borum, supra note 33, at 21 (describing the growth of the field of forensic psychology).

[374] E.g., Golden Gate University School of Law offers a course on Mental Disorders and the Law, and several other courses that involve mental health indirectly, though none familiarize students with commonly used assessment measures. Golden Gate University School of Law, Course Descriptions (2003-04), available at http://www.ggu.edu/schedule/descriptions.do?subject=LAW#LAW3.

six-month periods designated by the State Bar.[375] There are twenty-five total hours required every thirty-six months, with a maximum of twelve and a half hours of self-study.[376] Of these twenty-five hours, four hours of legal ethics is required, one hour of detection/prevention of substance abuse is required, and one hour of "Elimination of Bias in the Legal Profession" is required.[377] Mental health law is related to substance abuse, and it is arguably more important. If "bias" courses and substance abuse courses can be required, mental health law can also be required.

3. Law Reviews and Journals

Finally, a third solution is to educate the legal profession through publications in law reviews and journals. These articles are easily accessible to many by Westlaw, Lexis, and other online legal databases. This type of teaching reaches many and educates those in the legal profession. This solution can be accomplished in several ways. Writers interested and knowledgeable in the area of mental health law should write and submit law review articles for publication more often. Special issues could also be arranged inviting articles with topics relevant to mental health law. Also, symposiums could be arranged with a mental health law theme to encourage writers to submit, present, and publish articles with relevant mental health topics.

VIII. CONCLUSION

It is common for those accused of murder to be subjected to extensive psychological evaluations.[378] The MMPI-2 is by far the most common of all the psychological assessments employed.[379] The MMPI-2 is used frequently in the courts and in murder cases specifically.[380] Therefore, those involved in the

[375] Cal.R.Ct. 958 (2004) (providing the minimum continuing legal education requirements), available at http://www.courtinfo.ca.gov/rules/titlethree/title3-51.htm.

[376] Id.

[377] Id.

[378] See supra note 34, and accompanying text.

[379] See supra note 35, and accompanying text.

[380] See supra Part III.B, pp. 17-19 (describing prevalence of the MMPI-2 in court generally) and Part V.B, p. 31 (describing the prevalence of the MMPI-2 in court cases involving murder).

judicial process need to understand its basic structure, purpose, and administrative process. Knowledge and understanding of the MMPI-2 will enable counsel to retain and effectively question expert witnesses, to understand the implications of their testimony, and to interpret these findings to the jury. Furthermore, it is essential for those involved in the judicial process, including attorneys and judges, to be aware of the correct applications of the MMPI-2 as well as the misapplications. The legal profession can be educated about this important assessment tool in several ways: mental health law courses in law school, required mental health law CLEs, and through publications in law reviews and journals, such as this one.

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