

# **DELUSIONS AND FALSE MEMORIES: ROADBLOCKS TO COMPETENCY TO STAND TRIAL**

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## **I. FALSE MEMORIES: ROADBLOCK TO MENTAL COMPETENCY**

### **A. Introduction**

This article begins with a brief description of schizophrenia and considers its prevalence in the criminal justice system. It focuses on the role of episodic memory failures and false memory in people with schizophrenia. It compares how amnesia and delusions impact competency to stand trial and how doctors and attorneys approach the evaluation of defendants with amnesia and delusions. Two case studies are used to reveal how very different the impact of amnesia and delusions can be on competency to stand trial and to demonstrate why the “amnesia rule” is generally inappropriate for application to defendants with episodic memory failures or false memory. The article concludes with a brief discussion of key considerations for both doctors and attorneys in handling cases where a defendant with schizophrenia may be suffering from episodic memory failures or false memory.

## **II. WHAT IS SCHIZOPHRENIA AND HOW PREVALENT IS IT IN THE CRIMINAL JUSTICE SYSTEM?**

The National Institute of Mental Health’s website describes schizophrenia as follows:

Schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history. People with the disorder may hear voices other people don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated. People with schizophrenia may not make sense when they talk.

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They may sit for hours without moving or talking. Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking.<sup>1</sup>

“The characteristic symptoms of schizophrenia involve a range of cognitive, behavioral, and emotional dysfunctions, but no single symptom is pathognomonic of the disorder.”<sup>2</sup> The diagnostic criteria require the subject to have at least two of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior and negative symptoms (i.e., diminished emotional expression or avolition).<sup>3</sup> Evaluating the competency of these individuals to stand trial is a challenging endeavor. Every case involving a person with schizophrenia presents its own complex combination of facts and symptomatology. In many cases where a defendant is diagnosed with schizophrenia, the competency examination is focused on the presence or absence of delusions (fixed false beliefs) and the extent to which any present delusions may interfere with competency to stand trial.

The United States Department of Justice is working to develop a system of mental health courts across the country.<sup>4</sup> This effort is long overdue. “[E]stimates of serious mental illness in jails range from seven to sixteen percent, or rates four times higher for men and eight times higher for women than found in the general population.”<sup>5</sup> Schizophrenia alone affects 2.4 million Americans.<sup>6</sup> A single criminal case involving a defendant who suffers from schizophrenia presents an enormous challenge to doctors, attorneys and the courts. It is

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<sup>1</sup> *Schizophrenia*, NAT’L INST. MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml> (last visited Oct. 23, 2013); NAT’L INST. OF MENTAL HEALTH, SCHIZOPHRENIA (NIH publication No. TR-09-3517), *available at* <http://www.nimh.nih.gov/health/publications/schizophrenia-easy-to-read/nimh-schizophrenia-quadfold.pdf> (this pamphlet provides an excellent overview of schizophrenia for attorneys and others who have no training in mental health).

<sup>2</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 100 (5<sup>th</sup> ed. 2013) [hereinafter DSM-5].

<sup>3</sup> *Id.* at 99.

<sup>4</sup> COUNCIL OF STATE GOV’TS JUSTICE CTR., MENTAL HEALTH COURTS: A PRIMER FOR POLICYMAKERS AND PRACTITIONERS (2008), *available at* <http://csgjusticecenter.org/courts/publications/mental-health-courts-a-primer-for-policymakers-and-practitioners/>.

<sup>5</sup> *Id.* at 2 (citing PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS I (Dept. of Justice 1999)); NAT’L GAINS CTR. FOR PEOPLE WITH CO-OCCURRING DISORDERS IN THE JUSTICE SYS., THE PREVALENCE OF CO-OCCURRING MENTAL AND SUBSTANCE USE DISORDERS IN JAILS (Spring/Winter 2004); Linda A. Teplin et al., *Prevalence of Psychiatric Disorders Among Incarcerated Women*, 53 ARCHIVES OF GEN. PSYCHIATRY 505, 505–12 (1996). A study released by the Bureau of Justice Statistics in 2006 found that more than half of all prison and jail inmates studied reported having mental health “problems,” a measure that had not been used previously. TINA DORSEY, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES I (2006).

<sup>6</sup> NAT’L INST. OF HEALTH, FACT SHEET – SCHIZOPHRENIA I (2010), *available at* <http://report.nih.gov/nihfactsheets/ViewFactSheet.aspx?csid=67&key=S#S>.

difficult to get precise numbers, but it seems clear that people with schizophrenia occupy most beds in restoration of competency units. One study found that sixty-five percent of defendants hospitalized for restoration of competency to stand trial had a diagnosis of schizophrenia.<sup>7</sup> Other studies have indicated that, of the defendants suffering from schizophrenia and evaluated for competency to stand trial,<sup>8</sup> approximately half are found fit to proceed without commitment for restoration.<sup>9</sup> In many cases, people with schizophrenia are found competent or to have been restored to competency when they are still suffering active delusions.<sup>10</sup> This occurs where the active delusions do not, in the opinion of the doctor and ultimately the court, directly impede competency to stand trial.

### III. WHAT IS EPISODIC MEMORY AND WHAT ROLE DOES IT PLAY IN DAY-TO-DAY LIFE AND IN OUR JUDICIAL SYSTEM?

Episodic memory (also termed autobiographical memory) “refers to the explicit and declarative memory system used to recall personal experiences [and specific events]. . . .”<sup>11</sup> Episodic memory permits people to recall such mundane things as what someone had for breakfast as well as life’s most important events, such as the birth of a child. Episodic memory is critical to everything people do in life.

Episodic memory failures can have a significant effect on competency to stand trial. Our criminal justice system is, after all, uniquely dependent on episodic memory. Crimes are episodes in the lives of everyone involved. The criminal trial itself is an exercise in historical reenactment. At a trial, the parties must use the testimony and descriptions of witnesses to paint a picture of what happened for the jury. The rules of evidence require that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”<sup>12</sup> That is, that he or she experienced it directly through one or more of his or her senses, and that he or she has sufficient recollection of the events to testify under oath as to what happened. Each and every witness must rely on his episodic or autobiographical

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<sup>7</sup> Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Diagnosis, Psychopathology, and Competence-Related Abilities*, 15 BEHAV. SCI. & L. 329 (1997); Douglas Mossman et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. Am. Acad. Psychiatry L. S3, S44 (Supp. 2007)).

<sup>8</sup> Some jurisdictions such as Arkansas have elected to refer to competency to stand trial as fitness to proceed to trial. See ARK. CODE ANN. § 5-2-305 (2013); see also 2013 ARK. ACTS 506. We have used competency to stand trial in this article because it was the language used by the U.S. Supreme Court in the landmark decision *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>9</sup> Mossman et al., *supra* note 7, at S44.

<sup>10</sup> *Id.* at S35.

<sup>11</sup> Andrew E. Budson & Bruce H. Price, *Memory Dysfunction*, 352 NEW ENG. J. MED. 692, 692 (2005); Endel Tulving, *Episodic and Semantic Memory*, in ORGANIZATION OF MEMORY 385-86 (Endel Tulving, Wayne Donaldson, Gordon H. Bower eds., 1972).

<sup>12</sup> FED. R. EVID. 602.

memory of the events in question. Attorneys work to recreate a crime or an episode sufficiently in the minds of jurors so they can decide beyond a reasonable doubt if, and how, the event occurred. This capacity of the human mind to reconstruct events from witnesses' testimony and physical evidence is at the heart of our idea of justice.

#### IV. EPISODIC MEMORY DEFICITS AND FALSE MEMORY IN PEOPLE WITH SCHIZOPHRENIA

Episodic memory deficits in people with schizophrenia are well-established.<sup>13</sup> Exactly why episodic memory failures occur or why they occur with such a high frequency in people with schizophrenia is the subject of a great deal of ongoing research.<sup>14</sup> Neuroimaging studies of memory in schizophrenia have shown abnormal encoding-related brain activity patterns during encoding.<sup>15</sup>

In addition to the large number of studies demonstrating general failures in episodic memory there is a large and growing body of evidence that people who suffer with schizophrenia have a high incidence of false memory.<sup>16</sup> Studies continue to show that false and distorted memory occurs at an elevated rate in schizophrenia patients, both with and without active delusions.<sup>17</sup> Regrettably, medications that may suppress acute, psychotic symptoms, including bizarre delusions, may have very limited effect on memory dysfunction.<sup>18</sup> Perhaps even more problematic to defense attorneys is the research indicating defendants with false memories often exhibit increased confidence in their false memories. Some studies have shown that patients with paranoid schizophrenia display a particularly stronger tendency to trust information that is actually incorrect.<sup>19</sup>

For many years a leading theory has been that false memory is the result of a failure in source monitoring. Dr. Marcia K. Johnson, Department of Psychology, of Yale University, is a leading proponent of the Source Monitoring Theory and what she has described as the Source Monitoring Framework.<sup>20</sup> The basic premise of Source Monitoring Theory is that our brain is not only constantly engaged in the collection of raw data but that there is an ongoing

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<sup>13</sup> Aaron Bonner-Jackson et al., *Episodic Memory in Schizophrenia: The Influence of Strategy use on Behavior and Brain Activation*, 164 PSYCHIATRY RES. NEUROIMAGING 1, 1 (2008).

<sup>14</sup> See, e.g., Karen J. Mitchell et al., *Source Monitoring 15 Years Later: What Have We Learned from MRI About the Neural Mechanisms of Source Memory?*, 135 PSYCHOL. BULL. 638 (2009); Charan Ranganath et al., *The Cognitive Neuroscience of Memory Function and Dysfunction in Schizophrenia*, 64 Soc'y of Biological Psychiatry 18 (2008).

<sup>15</sup> Bonner-Jackson et al., *supra* note 13, at 1.

<sup>16</sup> Ranganath et al., *supra* note 14, at 21; Sophia Vinogradov et al., *Deficit in a Neural Correlate of Reality Monitoring in Schizophrenia Patients*, 18 CEREBRAL CORTEX 2532, 2538 (2008).

<sup>17</sup> E.g., Reena Bhatt et al., *False Memory in Schizophrenia Patients with and Without Delusions.*, 178 PSYCHIATRY RES. 260 (2010).

<sup>18</sup> Ranganath et al., *supra* note 14, at 18.

<sup>19</sup> Bhatt, *supra* note 17, at 260.

<sup>20</sup> Marcia K. Johnson et al., *Source Monitoring: Psychological*, 114 PSYCHOL. BULL. 3, 4 (1993).

process of source monitoring. False or distorted memory occurs when our source monitoring system fails and the brain makes incorrect attributions as to the source or validity of a memory. For example, a person who has repeatedly seen video of an event such as the assassination of John F. Kennedy, and he comes to believe he actually witnessed the event. The complexities of source monitoring, the Source Monitoring Framework and the ongoing functional neuroimaging research are beyond the scope of this article.<sup>21</sup> The focus here will not be on the source of episodic memory failures and false memory but on the effect of false memory on competency to stand trial and how both doctors and attorneys should approach these complex cases.

#### **V. HOW HAVE DOCTORS AND ATTORNEYS APPROACHED THE EVALUATION OF COMPETENCY TO STAND TRIAL IN DEFENDANTS WITH FALSE MEMORY?**

In spite of the evidence that people who suffer with schizophrenia have serious deficits in their episodic memory and a high incidence of false memory<sup>22</sup> very little has been written on how failures in episodic memory and false memory may impact competency to stand trial. There has, however, been a great deal written concerning the effects of delusions and amnesia (loss of memory) on a defendant's competency to stand trial.<sup>23</sup> In most cases where false memory becomes an issue one of these approaches is typically applied.

##### **A. What is Amnesia and What is the Amnesia Rule? How do Doctors and Attorneys Approach the Evaluation of Competency to Stand Trial in Defendants with Amnesia?**

Amnesia or loss of memory concerning the events surrounding a crime can be caused by brain injury or damage, (i.e., neurological or organic amnesia) or by emotional shock or trauma, (i.e., psychogenic or dissociative amnesia).<sup>24</sup> The courts have generally been suspicious of claims of amnesia particularly in cases where the defendant has no disease or defect. The amnesia rule commonly associated with *Wilson v. United States*<sup>25</sup> states that amnesia (a loss of memory as to the circumstances surrounding an alleged crime) does not, in and of itself, render an otherwise mentally competent defendant mentally incompetent.<sup>26</sup>

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<sup>21</sup> For those interested in digging deeper, many of the writings of Dr. Johnson and her colleagues are available online at *Marcia K. Johnson*, YALE U., <http://memlab0.eng.yale.edu/mkj.html> (last visited Feb. 4, 2014).

<sup>22</sup> Ranganath et al., *supra* note 14, at 21.

<sup>23</sup> Mossman et al., *supra* note 7, at S16-17, S45-46.

<sup>24</sup> *Amnesia*, MAYO CLINIC (Oct. 11, 2011), <http://www.mayoclinic.com/health/amnesia/DS01041/DSECTION=causes>.

<sup>25</sup> *Wilson v. United States*, 391 F.2d 460, 463-64 (D.C. Cir. 1968).

<sup>26</sup> *United States v. Stevens*, 461 F.2d 317, 320 (7th Cir. 1972); Mossman et al., *supra* note 7, at

## B. What are Delusions and how do Doctors and Attorneys Approach the Evaluation of Competency to Stand Trial in Defendants with Delusions?

Delusions are the hallmark of schizophrenia,<sup>27</sup> and doctors, attorneys and the courts have long recognized that delusions can at times interfere with mental competency.<sup>28</sup> For the lawyer who is untrained in psychiatry and psychology delusions—defined as “fixed beliefs that are not amenable to change in light of conflicting evidence”<sup>29</sup>—would seem to encompass all false or distorted memories, at least where the defendant will not accept that his memory is false or distorted. In one sense that would be a correct assumption, but when mental health professionals speak of delusions they are normally talking about people who exhibit one of the five primary types of delusions specifically identified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).

1. Erotomantic type: This subtype applies when the central theme of the delusion is that another person is in love with the individual.
2. Grandiose type: This subtype applies when the central theme of the delusion is the conviction of having some great (but unrecognized) talent or insight or having made some important discovery.
3. Jealous type: This subtype applies when the central theme of the individual's delusion is that his or her spouse or lover is unfaithful.
4. Persecutory type: This subtype applies when the central theme of the delusion involves the individual's belief that he or she is being conspired against, cheated, spied on, followed, poisoned or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long-term goals.
5. Somatic type: This subtype applies when the central theme of the delusion involves bodily functions or sensations.<sup>30</sup>

The American Academy of Psychiatry and the Law's Practice Guidelines for the Forensic Psychiatric Evaluation of Competence to Stand Trial notes that “[p]sychiatrists should keep in mind that delusional beliefs may seriously influence a defendant's reasoning or appreciation of the situation, while leaving factual understanding and knowledge of the legal system unimpaired.”<sup>31</sup>

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S16-17.

<sup>27</sup> Bhatt, *supra* note 17, at 260.

<sup>28</sup> Mossman et al., *supra* note 7, at S34.

<sup>29</sup> DSM-5, *supra* note 2, at 87.

<sup>30</sup> *Id.* at 90-92. The DSM-5 includes two additional types of delusions. The Mixed Type applies when no one delusional theme predominates, and Unspecified Type for delusions that cannot be clearly determined or doesn't characterize in any of the categories in the specific types. *Id.*

<sup>31</sup> Mossman et al., *supra* note 7, at S35.

## VI. HOW IS THE IMPACT OF DELUSIONS ON COMPETENCY TO STAND TRIAL DIFFERENT FROM OR SIMILAR TO THE IMPACT OF AMNESIA ON COMPETENCY TO STAND TRIAL?

At the heart of competency to stand trial is a defendant's rational understanding of his situation and his ability to communicate effectively with his attorney. In 1960 the United States Supreme Court handed down their landmark decision, *Dusky v. United States*.<sup>32</sup> In *Dusky* the Supreme Court affirmed a defendant's right to have a competency evaluation before proceeding to trial and delineated the basic standards for competency. The Court held that the "test must be whether he [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>33</sup>

To understand the enormous difference between a client with amnesia, who is otherwise competent to stand trial, and a mentally ill client with false memory, one must explore the respective impact these conditions will likely have on attorney/client communications and trial preparation. Ultimately, understanding the impact false memory can have on competency to stand trial requires direct observation of the defendant's communications with his attorney. Of course, attorney/client confidentiality makes this problematic; to illustrate the problems false memory may cause, a dialogue has been created that is intended to reflect actual communication styles and abilities for two real clients.

### A. The Case of Mr. Thomas<sup>34</sup>

Mr. Thomas was involved in a vehicular homicide. Thomas lost control of his vehicle and went spinning into oncoming traffic, striking three vehicles and killing several people. Thomas was not wearing a seat belt; his body became airborne, flew through his vehicle and skidded down the highway before coming to rest. He suffered a head injury that left him with no memory of much of the day, including the accident. In Thomas's case, it was undisputed that the defendant had a complete loss of memory as to the accident, but otherwise possessed normal mental capacity.

Attorney: Do you have any recollection of the accident?

Defendant: No.

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<sup>32</sup> 362 U.S. 402 (1960).

<sup>33</sup> *Id.* at 403.

<sup>34</sup> The two case studies herein are based on actual clients but the names and some of the details have been modified to preserve the anonymity of the clients. The case studies are nevertheless intended to accurately reflect the true nature of the attorney/client communications and the situations faced by each of the defendants.

Attorney: What was the last thing you remember that day?

Defendant: Pulling out onto the highway leaving from work to go home.

Attorney: Have you had a chance to read the case file?

Defendant: Yes.

Attorney: You know that you passed several people and all of them will be called to testify for the state.

Defendant: Yes, I read their statements.

Attorney: They say you were going eighty miles an hour.

Defendant: I doubt that; I don't think my old vehicle would go that fast. It certainly would not accelerate to that speed the way they described in their statements. Is there a way we can prove I was not going that fast?

Attorney: I don't think you were going that fast either. We have developed a timeline from when they called 911 until the wreck and, with the help of the accident reconstruction expert, we hope to show your average speed during the time they were following you was closer to fifty miles per hour than eighty. Do you understand that your inability to remember makes it impossible for you to testify as to your speed? Are you sure you don't remember?

Defendant: Not a thing. I wish I did.

Attorney: The State is offering to let you plea to murder first and fifteen years.

Defendant: Can we get it down to something less?

Attorney: We could try to get a plea on manslaughter.

Defendant: What does that mean?

Attorney: On manslaughter you would only have to admit you were reckless and you would have to serve less time.

Defendant: I have read the file and it is pretty clear I was reckless, but I was not trying to kill anyone. Can we try to get probation?

Attorney: You have to understand several people are dead, and, under these circumstances, the prosecutor has made it clear he will not let you plea to the court on anything where you could get probation.

Defendant: Is there any way we could win?

Attorney: It is a long shot, but let's talk about a strategy I think might work.

Mr. Thomas was able to carefully weigh the evidence even when he believed it to be false. For example, he did not believe that his vehicle could accelerate to eighty miles per hour the way some witnesses described, but he was able to understand that, whether this was the truth or not, if a witness testified to that fact in court it would hurt his case. Thomas was able to rationally discuss ways to prove he was not going that fast, and he did not immediately assume the police were coordinating a conspiracy to get him. He responded intelligently and rationally to questions about things he could not remember even when he found it difficult to believe what he was being told.

Thomas reacts the way one would generally expect from a client who is "otherwise competent." Thomas will not be able to address key facts directly if he testifies, but he may be able to rationally, and perhaps even persuasively, explain that his vehicle was old and lacked the ability to accelerate the way other witnesses described. Moreover, if Thomas testifies, he is almost certain to express remorse, which can be a powerful mitigator in the minds of jurors. Thomas very much understands that he did something, whether he remembers it or not. He can weigh the pros and cons of possible plea negotiations versus the risk of a trial. Thomas has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and he has a rational as well as factual understanding of the proceedings against him. In spite of some disadvantages, there is no question Thomas is mentally competent to stand trial.

### **B. The Case of Mr. Green**

At this point one might make the assumption that if a total loss of memory does not make you incompetent, a merely distorted memory or even a completely false memory would not be any different. In the second case study we will explore this assumption and look at how episodic memory failures, false memories, and memory distortions working in combination with other common symptomatology of schizophrenia, may impede a defendant's mental competency to stand trial.

Mr. Green suffered with chronic schizophrenia and had a long history in the mental health system. He was under the supervision of the State from a previous mental commitment at the time of his alleged crime. Green lived in an apartment complex that was being used by the State to reintegrate former mental patients into the community. Green was accused of raping a neighbor who was herself a mental patient. In the alleged victim's statement, she repeatedly claimed "I was raped," but there was a noticeable lack of specifics in her recitation of the event. The victim's story was so strange that Green may never have been charged had he told the police any sort of believable story. Unfortunately for Green, the story he told was even stranger than the victim's. Green had never worked or traveled, but he told police he was on a business trip to California

when the alleged rape occurred. Green's story was filled with details—all of which the police quickly proved were false. Police assumed Green was lying to cover up his crime, and he was arrested and charged with rape.

To Green's court-appointed attorney, Green seemed profoundly ill. Doctors at the state hospital agreed that Green was mentally ill and presently symptomatic, but they opined that after being put on his medications, he had been sufficiently restored to mental competence and was fit to stand trial. Green exhibited a number of symptoms but the two primary problems for Green's attorney were Green's tendency to be paranoid and his insistence that he was in California on a business trip at the time of the crime. His attorney tried repeatedly to talk to Green about the facts of the case and to explore consent and other possible defenses, but each time Green insisted "I was in California." When Green was confronted with inculpatory evidence that he had not been in California, he rejected the evidence as a police-sponsored conspiracy.

Here is a dialogue intended to demonstrate what it was like to try to communicate with Mr. Green, and how false memories working in combination with the other common symptomatology of schizophrenia impaired Mr. Green's ability to rationally understand his situation and rationally communicate with his attorney.

Attorney: Have you had a chance to read your file?

Defendant: I read some of it. I don't read that good.

Attorney: Did you rape this lady?

Defendant: No, I was in California.

Attorney: Who can testify to that?

Defendant: Billy and Bobby.

Attorney: We have talked to them and they have never been to California.

Defendant: The cops are making them lie.

Attorney: This lady is saying she was in her nightgown and she invited you in . . . was there some kind of consensual relationship?

Defendant: I told you, you idiot, I was in California. I want another lawyer.

Attorney: The State is willing to let you plea to the Judge on a lesser charge.

Defendant: Why should I plea if I am not guilty? If you will just do your job you can prove that I was in California. Talk to my caseworker—he will tell you I was in California.

Attorney: I have talked to him and he says he saw you here in town that morning.

Defendant: They have gotten to him too.

Attorney: If we go to trial you don't need to testify.

Defendant: Why not?

Attorney: What will you say if you testify?

Defendant: I will tell them about my trip to California.

Attorney: The State can prove that isn't true.

Defendant: How can they prove something is not true, if it is true?

Given Green's fixed and genuine belief that there is a readily provable alibi defense to be made and his other symptomatology, that is, borderline intellectual functioning, paranoia and grandiosity, Green is unlikely to ever consider the possibility he may be convicted or to consider any defense other than alibi. He is likely to decide his public defender is either in on the conspiracy to railroad him or is just incompetent. From Green's perspective, he is telling the truth. Why shouldn't he testify, why shouldn't he go to trial, and why shouldn't he let the world know about his alibi? His responses are hopelessly distorted by his mental illness. If Green testifies, he will adamantly espouse and defend his false memory of a trip to California on the day in question. Green is likely to become very angry in front of the jury when confronted with evidence that he has never been to California, and the prosecutor will, in any case, prove these claims are false. Furthermore, he is almost certain to do everything he can to prevent his attorney from putting on any defense or evidence that is inconsistent with his California alibi. Finally, Green will adamantly deny provable facts and, rather than express remorse, he is likely to cause a jury to conclude that he is not only a rapist, but an unrepentant liar.

#### **VII. WHY THE “AMNESIA RULE” IS GENERALLY INAPPROPRIATE FOR APPLICATION TO DEFENDANTS WITH SCHIZOPHRENIA WHO HAVE EPISODIC MEMORY FAILURES AND FALSE MEMORY**

A fundamental part of the justice system is based on asking juries and judges to consider testimony and physical evidence from events they did not see or experience and to make rational decisions based on that evidence. Normal people (people who do not suffer from a mental disease or defect) can look at the

evidence in the typical case just like a jury can and make rational decisions about what to do. The amnesia rule is therefore an effective guide in the administration of justice when applied to “normal people” with a memory loss as to a single event. We see this in the dialogue between Thomas and his attorney, but when we compare the dialogue and facts in the case of Green, one significant distinction should be immediately apparent. Simply put, Green is mentally ill and Thomas is not. Green’s distorted memory is not limited to a single incident in his past that he and his attorney can rationally work through by closely examining the investigative file. Mr. Green’s episodic memory failures are part of the overall symptomatology associated with his schizophrenia, and it cannot simply be ignored or isolated from the rest of his disease. One can see how a single false memory or belief under the right circumstance can obstruct rational and meaningful attorney-client communications.

There are many ways that otherwise competent people with a memory loss like Thomas are different from Green and other defendants with false memory and other symptomatology associated with schizophrenia. There are two primary differences that exist in almost every case. The first difference is that normal people with memory loss know they don’t remember. Otherwise normal clients with a memory loss understand there is a gap in what they know, and they are willing to work with their attorney to try to figure out what happened. In many cases, these individuals are actually driven to discover what occurred. In contrast, clients with delusions, false or distorted memories almost always think they know the truth and believe they don’t need counsel’s help to figure it out. The total loss of memory does not interfere with or prevent considering and understanding new information the way a substituted false memory can and usually does. Consider how a man with average intelligence and without a mental illness would respond to being told he does not remember correctly some important event or fact in his life. Imagine him waking up and being greeted by a close family member who calls him by a name he never had been called before. How would a mentally healthy man respond? At first he might think it is a joke, but in time he would become frustrated or even angry. How long would it take for his friends and family to convince him that his memory was wrong—that his name was not Bob, it was Bill? Could they ever convince him? The false and distorted memories of the mentally ill are often as real to them as the accurate memories of other people.

The second major difference is that the mental illness of a mentally ill person will inevitably play some role in how he will respond to being told or confronted with evidence that he doesn’t remember or doesn’t remember correctly. For example, when Green is told he never went to California, he responds with the paranoia that is part of the basic symptomatology of his disease. He is paranoid and becomes immediately convinced there is a conspiracy against him. He is completely unable to rationally consider the possibility that his memory is wrong or that he can be found guilty of having committed a rape when he was not even in the state. He genuinely believes his only real problem is that he has an attorney who will not do his job. He rejects

evidence inconsistent with his memory and rejects any suggestion that a plea bargain may be in his interest.

The amnesia rule makes sense when applied correctly to individuals, like Mr. Thomas, who are otherwise mentally competent to stand trial. It does not make sense when applied to defendants, like Mr. Green, who are struggling with a serious mental illness. One should question whether the amnesia rule should be applied in any case involving a symptomatic person with schizophrenia.

### VIII. EXAMINATIONS OF COMPETENCY TO STAND TRIAL IN DEFENDANTS WITH SCHIZOPHRENIA, EPISODIC MEMORY FAILURES AND FALSE MEMORY.

The case studies used herein were selected in part because of the relative simplicity and undisputed nature of the key facts. Most cases present a far more complicated fact pattern than the cases of Thomas and Green. In many cases involving a reported false memory, the state may dispute the claim,<sup>35</sup> and doctors must always be vigilant to the possibility of malingering.<sup>36</sup> Some defendants referred for evaluations of competence to stand trial are found to be malingering.<sup>37</sup> While all of the doctors who evaluated Green opined that he really believed he had been to California, one must consider the possibility that Green's claimed California alibi is a really bad lie that lacks credibility because of his impaired executive functions.<sup>38</sup>

Cognitive deficits in schizophrenia are common and are strongly linked to vocational and functional impairments. These deficits can include decrements in declarative memory, working memory, language function, and other executive functions, as well as slower processing speed. Abnormalities in sensory processing and inhibitory capacity, as well as reduction in attention, are also found. Some individuals with schizophrenia show social cognition deficits, including deficits in the ability to infer the intentions of other people (theory of mind), and may

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<sup>35</sup> The Court in *Wilson v. United States* began its opinion by noting that claims of amnesia are "usually hotly contested." 391 F.2d 460, 461 (D.C. 1968). In our experience prosecutors are no more willing to accept claims of false memory.

<sup>36</sup> Mossman et al., *supra* note 7, at S19-21.

<sup>37</sup> See, e.g., Richard Rogers, Kenneth W. Sewell & Alan M. Goldstein, *Explanatory Models of Malingering: A Prototypical Analysis*, 18 L. & HUM. BEHAV. 543 (1994); Shayna Gothard, Richard Rogers & Kenneth W. Sewell, *Feigning Incompetency to Stand Trial: An Investigation of the Georgia Court Competency Test*, 19 L. & HUM. BEHAV. 363 (1995).

<sup>38</sup> Executive function is the cognitive process that regulates an individual's ability to organize thoughts and activities, prioritize tasks, manage time efficiently, and make decisions. Impairment of executive function is seen in a range of disorders, including some pervasive developmental disorders and nonverbal learning disabilities. *What Is Executive Function?* NAT'L CTR. FOR LEARNING DISABILITIES, <http://www.ncl.org/types-learning-disabilities/executive-functiondisorders/what-is-executive-function> (last visited Dec. 6, 2013).

attend to and then interpret irrelevant events or stimuli as meaningful, perhaps leading to the generation of explanatory delusions. These impairments frequently persist during symptomatic remission.<sup>39</sup>

If one assumes Green was just sticking with a ridiculously bad lie that no normal person would have used or believed, could that not call into question his ability to rationally understand his situation? The work of forensic doctors is not easy, and one should avoid oversimplification of these complex and multifaceted issues. In fact, the inherent danger in the amnesia rule is the temptation to give it too broad an application because it will permit us to avoid more complex and challenging questions of law and science.

Obviously, the mere existence of false memories, like delusions, will not necessarily render a defendant mentally incompetent.<sup>40</sup> There are many cases where tangential false memories do not interfere with a defendant's competency to stand trial. For example, had Green merely believed that he had been to California in the past at a time that was completely unrelated to the incident in question, that false memory would not have had any impact on his competence to stand trial. There are, however, cases where false memory blocks the defendant's ability to rationally assist his attorney or to rationally understand the proceedings. A doctor must determine if there is a connection between false memory and the defendant's possible lack of mental competence in a particular case. The question is whether the false memory—in light of other symptomatology—will interfere with the client's ability to consult with his lawyer with a reasonable degree of rational understanding and to rationally and factually understand the proceedings against him.<sup>41</sup>

It is critical that doctors and attorneys remember that they may not be able to trust the personal history provided by persons with any condition known to cause memory dysfunction, including schizophrenia.<sup>42</sup> People with false memories may inaccurately describe their personal history, education, and background. At times, they can relate events that never happened with great detail, and be quite persuasive. There are times when false memories are obviously false, and like bizarre delusions, they are easily identified, but this is not always the case. False memories can be coherent, internally consistent, and sound like the truth even to a trained professional. Studies have shown that professionals overestimate their ability to tell when people are telling the truth,<sup>43</sup> and the challenge here is even more difficult. People with legitimate false

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<sup>39</sup> DSM-5, *supra* note 2, at 101 (internal citations omitted).

<sup>40</sup> Mossman et al., *supra* note 7, at S46.

<sup>41</sup> *Dusky*, 362 U.S. at 402-03.

<sup>42</sup> Budson & Price, *supra* note 11, at 694.

<sup>43</sup> E.g., Bella M. DePaulo & Roger L. Pfeifer, *On-the-Job Experience and Skill at Detecting Deception*, 16 J. APPLIED SOC. PSYCHOL. 249 (1986); Saul M. Kassin, Christian A. Meissner, & Rebecca J. Norwick "I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators, 29 Law & Hum. Behav. 211, 212 (2005).

memories are, at least in their own minds, telling the truth. Mentally ill people with false memory or other episodic memory failures have no intent to deceive, and, therefore, they will exhibit no tales or clues that might indicate deception. Making the detection of false memory even harder is the fact that the false memories are often not completely false; they are distortions of the truth, a blend of truth and memory distortion, a confabulation.

If a doctor is not careful to verify, with collateral sources, information provided by a person suffering with schizophrenia, false information provided can contaminate the examiner's report and opinion. Collateral data includes "information about the defendant that comes from sources other than the defendant's statements during the psychiatrist's interview. Such sources include police reports, medical records, statements by the defendant's attorney, and reports from the defendant's family members."<sup>44</sup> Given what is known about people with schizophrenia, neither doctors nor attorneys should exclusively rely on the history provided by patients suffering or possibly suffering from schizophrenia without verifying the historical information through collateral data or sources.<sup>45</sup> Attorneys must take a doctor's report and verify every historical detail provided by a client during the competency examination, paying particular attention to those key facts that form the basis of the doctor's opinion.

The authors have documented numerous examples of false information making its way into doctor's reports since 2007. Perhaps the most embarrassing example was a client who reported to the doctor that he was on his anti-psychotic medications at the time of the crime. It sounds like the truth. Why after all would a defendant say he was medicated if he wasn't? The doctor accepted the historical information as accurate and reported and relied upon this key fact in her opinion. The defendant was in fact not diagnosed with schizophrenia until a week after the alleged crime and was not on any anti-psychotic medication at the time in question.<sup>46</sup>

## IX. RESTORATION

Cases where episodic memory failures or false memory alone result in incompetence are probably relatively rare, but episodic memory failures and false memory will often be part of the overall symptomatology of a defendant who is incompetent. Where false memories are found to directly affect competency, restoration may be difficult and, in some cases, impossible. Once a memory is formed—however distorted—one cannot simply go back and fix it by telling a defendant he has it wrong.

To borrow computer terminology, "garbage in equals garbage out." That is, as with computers, information that can be retrieved from the mind is no better

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<sup>44</sup> Mossman et al., *supra* note 7, at S4.

<sup>45</sup> *Id.* at S37.

<sup>46</sup> State v. Harold Charles, CR 2009-3157 (Pulaski Cnty. Cir. Ct.).

than the memory or data that was originally stored there. So, if the original “data” was false, a person with schizophrenia can never retrieve a memory of what truly occurred. Likewise, once a false memory forms, a person may cling to it just as strongly as they would an accurate memory.

Consider again how a man with average intelligence and without a mental illness would respond to being told he does not remember correctly some important event or fact in his life. In some cases, it may be impossible to change his mind, and, in a case where the facts in question are anything other than absolutely certain, there are serious ethical implications to even attempting to help a defendant recall a particular version of events. There are immense ethical questions for both attorneys and hospital staff charged with restoration in how to approach these people. It would be unethical for either medical treatment staff or a defense attorney to try to, in effect, teach defendants to “recall” a particular version of an event.<sup>47</sup> While some people are highly resistant to being told their memory is wrong, some people with schizophrenia are highly susceptible to suggestion and may be quick to adopt a suggested version of events, even if the version is completely false.

The restoration effort must not focus on getting the defendant to recall or accept and report as truth a particular version of events that was never stored in his memory. The goal is to get the person with schizophrenia to a point where he is sufficiently asymptomatic that he can develop insight into his illness and come to recognize that a section of his memory is flawed and has, in effect, been lost. That is, in order for a defendant like Green to be restored, he is not taught a particular version of events, but brought to a place where he has insight into his flawed memory, and, when confronted with facts from the state’s case file, he responds by rationally working through the evidence like Thomas.

## X. CONCLUSION

This article has focused on episodic memory failures related to schizophrenia, but it is important to note that there are a number of other processes that can be responsible for distortions in episodic memory including strokes, Korsakoff’s syndrome, traumatic brain injury, hypoxic or ischemic brain injury, dementias, and tumors.<sup>48</sup> A comprehensive discussion of these disorders is beyond the scope of this article; that said, it stands to reason that a defendant who suffers episodic memory distortions related to an alleged crime as a result of any disease or defect, should be examined closely for memory loss and distortions that may impact his competency to stand trial.

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<sup>47</sup> We have been involved in a case where it appears to us a social worker was, in effect, teaching a defendant committed for restoration to accept the version of events depicted in the police case file when those facts were very much in question.

<sup>48</sup> Budson & Price, *supra* note 11, at 694.

When a defendant is mentally ill and has episodic memory failures or false memories, the challenge for doctors, attorneys and the courts is to fully explore the effects the episodic memory failures and, in particular, false memory have on competency to stand trial and to do so in light of the defendant's illness and all other symptomatology. Failing to do so may result in people with schizophrenia being found competent to stand trial, facing prosecution, and possible incarceration when they are unable to rationally understand the proceedings against them or to rationally communicate with their attorneys in any meaningful way.

