

## Admissibility of Expert Testimony Based on the Grisso and Gudjonsson Scales in Disputed Confession Cases

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**Abstract:** Although Grisso's scales for the measurement of competency to waive Miranda rights were originally developed in the late 1970s and early 1980s, they were published for commercial use in 1998. Similarly, the Gudjonsson scale for the measurement of interrogative suggestibility was developed in the late 1970s and early 1980s, but published for commercial use in 1997. Since that time, psychologists have sought to use these scales as the basis for expert testimony in cases involving a defendant's competency to waive Miranda rights, and in cases involving a defendant's confession in which the defense is based on the argument that the defendant was suggestible and therefore may have given a false confession. Such cases are beginning to be reported, as the use of the scales becomes more common, and as they are challenged under Daubert or Frye standards of admissibility. This paper looks at the emerging case law in this area.

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One reasonably common role for forensic psychologists in "disputed confession" cases is the pretrial assessment of a criminal defendant's competency to waive his Miranda rights (CWMR) and thus to knowingly, intelligently, and voluntarily relinquish his right to an attorney before being questioned by the police. Frumkin (2000) has suggested a

model and comprehensive clinical evaluation format for assessing a defendant's CWMR.

As forensic psychologists recognized the dangers and limitations of relying only on interview data or clinical judgment alone in making such determinations (see e.g., Dawes, Faust, & Meehl, 1989), psychologists began working on more objective actuarial-type measures that could assist in the clinical evaluation and determination of CWMR. Two of the scales that have emerged as generally accepted in such evaluations are the Gudjonsson Suggestibility Scales and the Grisso instruments for the measurement of CWMR (see Frumkin, 2000; Frumkin & Garcia, 2003; Grisso, 1986; Melton, Petrila, Poythress & Slobogin, 2007).

### **The admissibility of expert testimony: Frye and Daubert**

Psychologists who use the Grisso and Gudjonsson scales as part of the basis of their opinion may be, and often are, challenged under Daubert and Frye admissibility standards. The *Frye* standard focuses on the concept of general acceptance: "The thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." The *Daubert* decision broadened and in theory liberalized the test for allowing expert testimony. Clearly, judges are the gatekeepers, and should be given wide latitude in determining the admissibility of scientific testimony. But the *Daubert* court set forth a set of factors to help guide judges in their admissibility decisions. These include (a) whether or not the methodology has been/could be tested, (b) whether the methodology has been published and peer reviewed in scientific publications, (c) the known degree of error, and (d) whether the methodology and/or principle has gained general acceptance in the scientific community.

Some states still use Frye (e.g., New York; Illinois), but most others use Daubert or a version thereof, though there is increasing empirical evidence that there is little practical difference between the two in terms of what happens in admissibility hearings (see Cheng & Yoon, 2005, and the other empirical studies cited therein).

It is difficult to know how to quantify "general acceptance" under either of the two standards, though one could provide evidence of this in several ways. First, there are surveys of experts in the field about what is typically used in such evaluations. Second, there is the coverage of the tests in forensic-psychology textbooks and in texts used in other courses (e.g., forensic assessment, etc.). Third, there is the coverage of or training in these tests in graduate training programs (on this one we need more data). Fourth, there is the coverage of the tests in major sources such as books on forensic assessment. Finally, there are the scientific citations in peer-reviewed articles, for which one can check various indexes.

In all of those ways, it would appear that both tests should pass the general acceptance criterion. So, in a recent survey of forensic practitioners, Lally (2003) found that 88% of forensic diplomates considered the Grisso scales "acceptable" in an evaluation of a

defendant's competency to waive Miranda rights, and 55% considered the scales "recommended." More recently, a survey study by Ryba, Brodsky and Schlosberg (2007) found that, of their 401 psychologist respondents, 26% had conducted evaluations of one's capacity to waive Miranda rights. Of those conducting Miranda evaluations, 44% had used Grisso's Miranda instruments. Frumkin (2000) sets forth a template for clinical evaluation of CWMR; it includes use of the instruments.

The fact that the Grisso and Gudjonsson instruments are mentioned in basic forensic psychology textbooks is yet another indicator of their general acceptance. Both Fulero and Wrightsman (2008) and Barthol and Barthol (2004) specifically mention the instruments.

Finally, there is the matter of citations of the instruments in published and peer-reviewed work. As to the GSS, research studies and articles that either use or discuss the scales include Endres (1997), Scullin, Kanaya, & Ceci (2002), Wakefield & Underwager (1998, and research cited therein), Greenfield and Witt (2005), Blagrove, Cole-Martin & Lambe (1994), Blagrove (1996), as well as the numerous research studies referenced in Gudjonsson (2003). As to the Grisso scales, there are Cloud et al. (2002), Greenfield and Witt (2005), Fulero and Everington (1995), and Everington and Fulero (1999). It is worth noting that the latter two empirical studies were cited in a footnote in the majority opinion of the United States Supreme Court opinion of *Atkins v. Virginia* (2005). Finally, both instruments are recommended for use by practitioners in "how to" manuals (e.g., DeClue, 2005a), articles (e.g., DeClue, 2005b; Frumkin, 2000), and workshops (e.g., DeClue, 2008).

### **Case law: Grisso instruments**

There are a number of published cases that mention the Grisso instruments as a basis of a psychologist's testimony in a case involving a defendant's competency to waive Miranda rights. In such cases, it seems clear that no formal challenge was made to the test as a basis of testimony. For example, in *People v. Wroten* (2007), a California appellate court upheld a trial court determination that a defendant knowingly and intelligently waived his Miranda rights. Nonetheless, the Grisso scales were used by the psychologist, and are specifically mentioned in the opinion. Another such California case is *People v. Jenkins* (2004).

In *T.S.D. v. State* (1999), Dr. Bruce Frumkin testified for the defense based in part on the Grisso scales, as did the prosecution expert, Dr. Leonard Haber. This appears to be the first reported case in which the prosecution—which is usually in the position of challenging the use of the Grisso scales—was in the position of offering it as well. This is a significant case for that reason; where the prosecution challenges the Grisso scales, the defense attorney can and should point out that, where the results suit the prosecution, they appear willing to use them without challenge to their validity. A more recent example of the same is *Robinson v. United States* (2007), where Dr. David Shapiro testified for the government to his conclusion that a defendant was competent to waive his *Miranda* rights based on his high scores on the Grisso scales.

In an Oklahoma case, *Smith v. Mullin* (2004), a habeas case, an evidentiary hearing was granted by the federal court, and during that hearing a psychologist testified about the defendant's competency to waive Miranda rights. The psychologist used the Grisso scales. Habeas was granted in part. The conviction was upheld, but the death sentence was vacated.

In an unpublished Illinois appellate case, *People v. Carroll* (2001), a psychologist testified at trial using the Grisso scales, and the confession was suppressed. The state appealed, and the appellate court affirmed the trial court suppression. Other cases in which psychologists have testified on the issue of CWMR using the Grisso scales are *State v. Caldwell* (1993), and *People v. Phillips* (1992), *State v. Bumgardner* (2008), *United States v. Jackson* (2006), and *Martin v. State* (2004).

In the most recent and most significant of these cases, an Ohio case, *Garner v. Mitchell* (2007), Mr. Garner was convicted of five counts of aggravated murder among other charges, and sentenced to death. Part of the evidence against him was a confession, with a waiver of Miranda rights. The case proceeded through years of appeal, into federal court on a habeas petition. After an evidentiary hearing, the federal district court reversed and remanded the case, ruling that he did not knowingly and intelligently waive his Miranda rights. As part of the hearing, Dr. Caroline Everington submitted an affidavit and report that contained a number of psychological test results and expert opinions, and which included the results of her administration of the Grisso scales. The scales are discussed at length in the opinion, and were clearly a large part of the federal appellate court's decision sending the case back for re-trial without the defendant's statement.

There are also several cases in which the admissibility of the Grisso instruments was expressly challenged. In a New York case using the Frye standard, some courts have also held that testimony regarding the Grisso scales was not admissible (*People v. Rogers*, 1998). Two other New York cases that did the same are *People v. Cole* (2005) and *People v. Hernandez* (2007). A recent Florida case (*State v. Carter*, 1997) also upheld a trial court's exclusion of testimony based on the Grisso scales, but ruled that the trial court had erred in excluding test results from the I.Q., personality, verbal reasoning skills, achievement and diagnostic examinations. The court ruled that the exclusion of this testimony deprived the jury of relevant information that would have aided in assessing the defendant's credibility and determining whether he had the competence to waive both his *Miranda* rights and his right to counsel.

In a Connecticut case, *State v. Griffin* (2003, 2005), the State filed a motion in limine to preclude any testimony based on Grisso scales. Using the Daubert standard, the trial court granted the motion. The defendant was convicted, and appealed. In its memorandum of decision concerning the state's motion in limine, the trial court concluded that the defendant had failed to establish "that the Grisso test has sufficient scientific validity . . . for the court to accept it as reliable evidence." The trial court further found that the methodology underlying the Grisso test had not been subject either to sufficient testing

since its development in 1981 or to adequate peer review and publication. In addition, the trial court concluded that the defendant had failed to demonstrate that the Grisso test is generally accepted in the relevant scientific community. With this record, the appellate court held that it was not an abuse of discretion to have granted the State's motion. It is worth mentioning that this ruling does not mean that such testimony is inadmissible, and the court took pains to mention, "Of course, we do not foreclose the possibility that, in a future case, sufficient evidence regarding the reliability of the Grisso test will be presented such that it may be found to pass muster under *Porter*. We conclude today only that the trial court in the present case reasonably determined, in light of the particular evidence adduced, that the defendant had failed to meet his burden, under *Porter*, of demonstrating the threshold reliability of the Grisso test."

### **Case law: Gudjonsson Suggestibility Scale (GSS)**

In *State v. Romero* (2003), a psychologist was to testify that the defendant was more susceptible to suggestion in a police interrogation setting than an average member of the population, based on GSS. "Ms. Romero was administered the Gudjonsson Suggestibility Scale, which is a standardized and normed instrument developed to evaluate suggestibility during police interrogation. Her responses reflect a tendency to respond affirmatively in situations where she does not know the answer; even when she is clear that she does not know the answer, when pressed she will provide an incorrect answer regardless. Her performance also demonstrates a pronounced tendency to shift her responses in the face of negative feedback. Essentially, when told by the examiner that some of her responses are inaccurate, she changes several of her responses, even those which she had previously answered correctly. She obtained a total score of 17 on this instrument, which is approximately one standard deviation above the mean for both forensic patients and normal controls, and this suggests significant suggestibility during interrogative questioning."

The court ruled that exclusion of this testimony was error, and that defendant, "sought to demonstrate to the jury with Kolbell's testimony that people with her psychological profile sometimes make statements that appear to be voluntary but that are in fact the product of suggestion. Kolbell's testimony thus went to the heart of her defense that her confession was involuntary and that her son had slapped the child. Given that the voluntariness of defendant's statement may have been essential to the jury's verdict, we cannot say that there is little likelihood that the exclusion of Kolbell's testimony affected the jury's verdict." Indeed, the court specifically ruled that the GSS did pass the threshold for admissibility, and said that, had the judge excluded it on the basis of lack of scientific reliability, it would have been error.

In accord with this is *United States v. Raposo* (1998), in which a federal district court allowed expert testimony based on the GSS because it was relevant to the factual question of both the falsity and the voluntariness of the defendant's statement. Similarly, the psychologist in *Canady v. State* (2002) specifically used the GSS and testified to conclusions based on it, apparently without challenge.

On the other hand, in *People v. Bennett* (2007), Dr. Bruce Frumkin was prepared to offer testimony about the defendant's suggestibility, based in part on the results of the administration of the GSS. The State filed a motion in limine to prevent such testimony under the Frye standard. The trial judge granted state's motion, without a Frye hearing. The defendant was convicted, and no expert testimony was presented at trial. The appellate court upheld the exclusion of the expert testimony, finding that it was not an abuse of discretion, would not aid the trier of fact, and was not beyond the common knowledge of laypersons. It seems unusual that a trial court would grant such a motion without an admissibility hearing; other courts have required such hearings before excluding expert testimony (see e.g., *United States v. Smithers* (2000), a case involving expert testimony on eyewitness reliability). A similar result was found in *Commonwealth v. Soames* (2001). A forensic psychologist apparently testified at a motion to suppress hearing that the defendant was highly suggestible, based on his administration of the GSS. This testimony was not objected to by the prosecution. However, the trial court either "disregarded" or "discounted" (both words are used in the opinion) the expert testimony, and went on to say that there was no evidence in the record that the GSS is a scientifically valid and reliable measure. This is a puzzling result. Because the prosecution did not object to or challenge the testimony, it is hard to understand how the defense would know that it needed to defend the use of the GSS. It does suggest, however, that in direct examination of the expert, it would be wise to ask the expert a question about the general acceptance and reliability and validity of the test regardless of any challenge. Indeed, in the *Romero* case discussed above, that is exactly what was done.

In *United States v. Mister* (2008), Dr. Frumkin administered the GSS and was prepared to testify as to the defendant's suggestibility in a bribery case. The Court ruled that testimony inadmissible, based not on the use of the test, but because of its lack of relevancy to the issue of whether or not the defendant knew that payments that had been accepted were a bribe or not, which was the central issue in the case.

In *State v. King* (2006), a New Jersey case, a psychiatrist testified at a suppression hearing at length about the defendant's personality disorder and suggestibility based in part on the GSS. The prosecution moved to have the psychiatrist's testimony excluded. The Court overruled the motion, and the appellate court upheld the trial court. In a footnote, the Court noted, "due to insufficient proofs, the defense no longer intends to offer Dr. Harris' testimony concerning the GSS scales or the principles underlying them.... Dr. Harris testified that the GSS tests 'echoed [his] clinical assessment.' We are satisfied Dr. Harris' clinical assessment itself provides an independent basis for his opinion that defendant's claim of false confession is consistent with the nature and characteristics of his personality disorder" (footnote 5). This case is particularly significant since, in a prior case, the New Jersey courts had disallowed expert testimony on false confessions (*State v. Free*, 2002). That case involved Dr. Saul Kassin, and the Court in *King* took great pains to distinguish social psychological expert testimony about false confessions "in general" from clinical psychological testimony linking it to a specific defendant with a specific diagnosed disorder. In this case, it would appear that the court misunderstood the nature of the social psychological expert testimony commonly

admitted in false confession cases (see Fulero, 2004; Fulero, in press). Specifically, the court appears to be subscribing to the myth that only people who are mentally retarded or mentally ill would confess falsely, an idea that has long been shown to lack merit (see e.g., Kassin and Gudjonsson, 2004).

In *Pritchett v. Commonwealth* (2002), the Virginia Supreme Court reversed a trial court for failing to allow expert testimony on a defendant's mental retardation as it related to a claim of false confession. A second expert was proffered to testify about suggestibility, based on his administration of the GSS. The exclusion of that testimony was upheld, but unfortunately the expert testified that the defendant "just went along with what they said," and the court ruled that such testimony was an inadmissible statement about the veracity of the defendant and therefore invaded the province of the jury. As noted in Fulero (2004), while general testimony about the relation between suggestibility and false confession is appropriate, such a specific statement about a particular defendant should not be made, and is likely to lead to exclusion. Nonetheless, the GSS itself formed the basis of the expert's decision, and its use was not challenged.

In Great Britain, use of the GSS and expert testimony relying on it seems a settled issue by now. Dr. Gudjonsson himself has testified more than 100 times, and there is language in cases that is quite supportive: "since 1982 there has been much research and learning applied to the psychology of interrogation, and the phenomenon of false confessions. Particularly significant in that regard are the psychometric tests pioneered by Dr. Gudjonsson, which the medical profession (and latterly the courts) today accepts as capable of providing a measure of the suggestibility and/or compliance of the accused such as might lead him to make a false and unreliable confession." *R. v. Roberts* (1998) at 15-16. Other similar cases in Great Britain can be found (see e.g., *R. v. Ward* (1992); *R. v. Ashley King* (1999); *R. v. Fell*, (2001); and *R. v. Smith* (2003)). Canadian cases are mixed; in one, *R. v. Warren* (1997), the examining psychologist wanted to testify regarding suggestibility, based on Gudjonsson scale results. The Court did not allow it, ruling that the Gudjonsson scale was not generally accepted. On the other hand, in *R. v. L.* (1998), the testimony based on GSS results was ruled admissible.

## Summary

Clearly, cases involving both the Grisso instruments and the GSS are beginning to emerge. Where the use of the scales is not challenged by direct motions, testimony is of course admitted with no difficulty. It is important to realize that, as with other forms of psychological expert testimony, if the testimony is admitted at trial, it rarely creates a record (see Fulero, 2004; Fulero, in press). Only where the testimony is disallowed, and the defendant is convicted, will the issue become viable on appeal. Thus, for example, there are numerous cases in which eyewitness reliability experts and false-confession experts have testified in trials for which no published case record exists.

But where the testimony and use of the scales are directly challenged, such a record will be created, at least where the testimony is not allowed by the trial judge and the defendant is convicted. It is clear that, where such challenges are made, the forensic

psychologist must be prepared to defend the use of the scales or instruments under the relevant standard for the admissibility of expert testimony (typically the Daubert or Frye standard, or the equivalent state rule). Some of the things that are relevant to the argument for admissibility are discussed in this article. As with any such test, scale or instrument, as the literature expands, additional research is conducted, and the use of the instrument becomes even more common than it is already, it will be easier to make the case for its admissibility.

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