Indiana Law Journal

Volume 44 | Issue 1 Article 8

Fall 1968

Psychiatric Examination of Victim-Witnesses of Sexual Offenses

Edward L. Volk
Indiana University School of Law

RECENT DECISION

RECENT DECISION
PSYCHIATRIC EXAMINATION OF VICTIM-WITNESSES OF SEX OFFENSES

The recent case of *Binder v. State*[1] reveals a problem in the administration of criminal law which merits serious attention. In *Binder,* the defendant was convicted of sodomy and sentenced to a term of two to fourteen years in the Indiana State Prison, wholly upon the uncorroborated testimony of the "victim," a fifteen year old girl who had a history of mental instability and moral depravity. The defendant had made a motion to the court requesting that it order a psychiatric examination of this sole witness against him to determine her capacity to tell the truth, the result of the examination to be presented in evidence for the jury's consideration. The trial court denied the motion, and on appeal the Supreme Court of Indiana affirmed the conviction and the denial of the defendant's motion for psychiatric examination. Even the Supreme Court recognized that its decision precluded the jury from hearing and utilizing relevant information about the credibility of the witness and the possible influence of sex-oriented psychiatric disturbances on her credibility.

Psychic Disorders and Credibility in Sex Offense Cases

Our adversary system of justice is based upon a fundamental belief in the jury's ability to discover the truth despite conflicting testimony. A serious obstacle, however, is presented to the fact-finding process when a legally competent but mentally abnormal witness takes the stand.[2] This difficulty is particularly serious in certain kinds of sex cases where the uncorroborated testimony of the complaining witness is sufficient to convict a defendant.[3] The emotive impact of sex cases was recognized long ago when Lord Chief Justice Hale wrote that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."[4] The public's reaction to sex

1. Binder v. State, ——Ind. ——, 221 N.E.2d 886 (1967).

2. Mental abnormality is used to designate the class of psychobiological disturbances not caused by any specific bodily organ. See Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness,* 59 Yale L.J. 1324 (1950) and G. Zilboorg, Mind, Medicine, and Man 51-65 (1943).

3. Indiana has long followed the non-corroboration rule. See Bramlett v. State, 227 Ind. 662, 87 N.E.2d 880 (1949) and Chesterfield v. State, 194 Ind. 282, 141 N.E. 632 (1924).

4. 1 M. Hale, The History of the Pleas of the Crown 635 (1736).

charges has changed remarkably little in the past two hundred years.[5]

It is becoming increasingly well recognized that those who suffer from certain kinds of psychoses or neuroses are especially prone to manufacturing a charge of a sex offense.[6] Usually these false charges are not based upon any overt desire to do harm to a given person. Instead, they are often the product of deepseated personality disturbances.[7] In their book *Handbook of Psychiatry,* Overholser and Richmond discuss paranoia, which, they explain, is a mental disorder that does not distort the outward appearance of personality: "No matter how absurd or unfounded the delusions, the person entertaining them is still able to appear normal and to react in normal fashion to matters outside his delusional system."[8] They explain the recognized interpretation of paranoia and its effect on those who suffer from it in the following way:

> [Paranoia is attributed to] some defect or deficiency in the sexual sphere, and it is true, as all observers agree, that sexual delusions are to be found in many, perhaps a majority, of the cases of paranoia. . . Thus, men fear homosexual assaults, or believe that other men accuse them of being 'fairies' or perverts. Women believe themselves married to famous persons or to have numerous lovers or to be the victims of sexual persecution.[9]

The problem confronting our legal system is that the members of the jury simply cannot be expected to recognize or evaluate the effect of these psychic disorders when the seemingly normal witness appears before them. Professional diagnosis of these traits is often the only way in which one can discover any abnormality. Dr. Overholser, a past president of the American Psychiatric Association, states:

> It is a further fact that in some of these cases [alleged sex

---

5. "Public sentiment seems inclined to believe a man guilty of any illicit sexual offense he may be charged with, and it seems to matter little what his previous reputation has been." Roberts v. State, 106 Neb. 360, 183 N.W. 555, 557 (1921).

6. See 3 J. WIGMORE, WIGMORE ON EVIDENCE § 924a (1940) (hereinafter cited as WIGMORE):

> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroin or victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

7. Dr. W. F. Lorenz in 3 WIGMORE § 924a: "We, who have extensive criminal experience among the mentally ill, know how frequently sexual assault is charged or claimed with nothing more substantial supporting this belief than an unrealized wish or unconscious, deeply suppressed sex-longing or thwarting."

8. W. OVERHOLSER AND W. RICHMOND, HANDBOOK OF PSYCHIATRY 150 (1947).

9. *Id.* 152-53.

> offenses] the personality disturbance which lies at the basis of the accusation would not be discernible to laymen, but that the psychiatrist can in many cases give a definite opinion as to the witness' mental state after he has made an examination.[10]

Thus, unless the jury have been aided by the opinion evidence of a psychiatrist who has personally examined the complaining witness in a sex case, they might well make a determination of defendant's guilt incognizant of any possibility that the complaining and sole witness to the offense charged suffers from a mental disorder or of what form such a disorder would assume. Whenever the entire case centers around credibility (both of the prosecuting witness and the defendant), any aid to the jury seems highly advisable.

A psychiatric examination with testimony by the psychiatrist concerning the witness' mental capacity is presently the best tool to provide such an aid to the jury. That a psychiatrist under proper circumstances is capable of fulfilling such a function cannot be seriously questioned. Dr. Henry A. Davidson makes the following comment:

> If the psychiatrist were given all the facts about the witness' background; if he were given time to do a thorough physical and mental examination; if he could take a psychiatric history on the witness, he could give the trial lawyer a solid opinion about testimonial capacity.[11]

There have been many suggestions, however, that allowing a psychiatrist to testify on the credibility of a witness would invade the province of the jury, who alone are entrusted with the responsibility of ascertaining the facts.[12] Edwin Conrad offers a convincing response:

> The argument that the use of such expert psychiatric testimony does not fall within the traditional pattern of impeachment implies that law is static and not flexible enough to meet important developments in the field. Moreover, the credibility of a witness never raises a collateral issue because credibility is one of the main issues in any case. Since even insane persons may be found to be competent as witnesses under the relaxed modern rule, there should be a more liberal admission of evidence relating to such witness' defective mental condition

10. W. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 54 (1953).
11. Davidson, *Testimonial Capacity*, 39 BOSTON U.L. REV. 172 (1959).
12. See State v. Walgraeve, 243 Ore. 328, 412 P.2d 23, *reh. denied*, 413 P.2d 609 (1966).

as it affects his power to tell the truth.[13]

James Richardson, in his work on Scientific Evidence, agrees with Conrad and makes the observation that:

> [E]xperts can give credible evidence on the personality structures of individuals, including their propensities to prevaricate. Further, such expert opinion does not invade the jury's province. It serves a well-established function in an area where laymen are uninformed, and the ultimate decision is with the jury.[14]

That the jury is not intimidated by the testimony of the psychiatrist and is indeed the finder of fact was vividly demonstrated in the Alger Hiss case.[15] There the government's case rested principally upon the testimony of one witness, Whittaker Chambers. The defense was allowed to submit in evidence psychiatric testimony on the issue of the witness' credibility. This evidence indicated that the witness was a psychopath with a tendency toward making false accusations. The jury apparently found this testimony unconvincing and found the defendant guilty. Many similar instances have occurred in the state courts.[16]

One valid objection to the use of psychiatric examinations of complaining witnesses is that such examinations are invasions of privacy. Nevertheless it would seem that this objection is overcome by the need for placing this testimony before the fact-finders.

> [T]he individual's right to privacy is outweighed by the need for getting at the truth, especially if the fate of the defendant hangs in the balance. And if the witness is normal, his privacy will remain intact. . . .[17]

Professor Wigmore in his treatise on evidence gave specific attention to the problem of the mentally abnormal witness, and his research lead him to declare:

> No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.[18]

---

13. Conrad, *Psychiatric Lie Detection; The Federal Courts Break with Tradition*, 21 F.R.D. 199, 215 (1957).

14. J. RICHARDSON, MODERN SCIENTIFIC EVIDENCE § 8.34 at 263 (1961).

15. United States v. Hiss, 88 F. Supp. 599 (S.D.N.Y. 1950).

16. *Cf.* State v. Wesler 137 N.J.L. 311, 59 A.2d 834 (1948); People v. Cowles, 246 Mich. 429, 224 N.W. 387 (1929).

17. Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324, 1341 (1950).

18. 3 WIGMORE § 924a.

INDIANA CASES

With the case of *Burton v. State*[19] it appeared that Indiana was to be among the first to follow Professor Wigmore's admonition. In that case the defendant had been convicted of sodomy with his daughter. Her testimony was completely uncorroborated and evidenced considerable coaching by her mother. The court reversed the conviction on the grounds of insufficient evidence to sustain the conviction, stating:

> The prosecutrix was ten years old at the time she testified, and *without her testimony the charge was not proved under any view.* This record is wholly silent that the state took any steps whatever to determine the prosecutrix was not a fantast,[20] or was not under the compelling domination of her mother. Since the record is silent on this safeguard, we must presume the state did not heed the warning contained in Dean Wigmore's treatise on Evidence. . . .[21]

Thus, the Indiana Supreme Court made it clear in 1953 that there should be an examination of the victim-witness, where guilt will turn upon her uncorroborated testimony since the chances of injustice are substantial. This chance is especially great in sex cases where the emotive impact of the charge alone is strong and the uncorroborated testimony of the complaining witness is sufficient for conviction of the defendant.

It is notable that the defendant in the *Burton* case never made a formal motion for a court order directing examination of the prosecutrix. The court, piercing any procedural problems, simply recognized that it is often necessary and always highly desirable that the jury have the aid of the psychiatrist when determining the witness' credibility, especially in light of the character of the offense, the response it usually evokes, and the difficulty of demonstrating the existence of psychic disorders negating credibility by the usual forms of impeachment.

In *Wedmore v. State*[22] the defendant, charged with having carnal knowledge of a female child under the age of sixteen years, was found guilty of assault and battery. The facts substantiating the charge in this case, however, were clearer than the facts in *Burton*. The prosecutrix

---

19. 232 Ind. 246, 111 N.E.2d 892 (1953).

20. "Pseudologica phantastica is a mixture of lies with imagination. Not infrequently, this is the basis of alleged sexual assault. Girls assert they have been raped, sometimes recounting as true a story they have heard, falsely naming individuals or describing them." Burton v. State, 232 Ind. 246, 251 n.2, 111 N.E.2d 892, 894 n.2 (1953).

21. Burton v. State, 232 Ind. 246, 250, 111 N.E.2d 892, 894 (1953). (Emphasis added.).

22. 237 Ind. 212, 143 N.E.2d 649 (1957).

complained to her sister-in-law on the morning after the alleged act, and also told two friends of the incident.[23] On appeal the defendant, as in the *Burton* case, assigned as error the insufficiency of the evidence to support the jury's verdict. As was true in the *Burton* case, no motion had been made for a psychiatric examination of the victim-witness; and on appeal the defendant relied upon *Burton* to assert that the state failed in its duty because it did not present psychiatric evidence to prove her credibility. The Court in *Burton* had stated clearly:

> By this decision we do not hold that in every case where a sexual offense is charged there should be a psychiatric examination of the prosecutrix. There are many cases where the facts and circumstances leave no doubt of the guilt of the accused. . . .[24]

Nevertheless, the Court in *Wedmore* found it necessary to expressly overrule *Burton,* stating:

> In so far as *Burton v. State, supra,* (1953) 232 Ind. 246, 111 N.E.2d 892, purports to require that in any sex case the complaining witness be required to be examined, before testifying, by a psychiatrist for the purpose of examining her social history and ascertaining her probable credibility, the report of such examination to be presented in evidence, it is disapproved and overruled.[25]

The language of the *Wedmore* decision merely frees the State from the affirmative duty of determining the credibility of the complaining witness by a psychiatric examination as a condition precedent to establishing sufficient evidence for a conviction where the evidence of the complaining witness is otherwise uncorroborated. Although the *Wedmore* decision is not nearly as liberal as Professor Wigmore's admonition to judges, it is not unduly restrictive because the possibility is left open for the defendant to request such an examination, the decision on this matter resting within the discretion of the trial court.

> If the court, within its sound discretion on request of the defendant-appellant herein, had ordered such an examination appellant would thereby have waived the right to object to the

23. *Id.* at 217, 143 N.E.2d at 651.

24. Burton v. State, 232 Ind. 246, 255, 111 N.E.2d 892, 896 (1953). This part of the decision had been recognized and applied in Harvey v. State, 232 Ind. 574, 114 N.E.2d 457 (1953). In *Harvey,* no examination was ordered by the Court because of the absence of any indication of abnormality and the presence of some corrobrating evidence.

25. Wedmore v. State, 237 Ind. 212, 223, 143 N.E.2d 649, 654 (1957).

> report of the examining physician if it was adverse to him, and at the same time he would have been given all the protection against fantasy and fabrication on the part of the prosecuting witness as proposed by Professor Wigmore.[26]

It is proper to note here that the Court in *Wedmore* placed no definite limitation upon the extent of the trial court's discretion when a motion for psychiatric examination is made by the defendant. In other words, *Wedmore* permits the court to entertain a motion for psychiatric examination for determining either the competency or credibility of the witness—which is extremely important since the issues of credibility and competency are separate and distinct. A witness is competent to testify if the judge finds he is sensible to the obligations of an oath and has sufficient powers of observation, recollection and communication to be of aid to the jury in determining the truth.[27] Whether or not the witness is competent to testify is determined solely by the court after minimal inquiry and represents at best a very low threshold test.[28] The issue of credibility, on the other hand, is for the jury to decide. It amounts simply to whether or not the jury will or can believe the testimony of a given witness.[29] Though separate and distinct, the close relationship between the two issues is obvious. Guttmacher and Weihofen have suggested the following approach to the two issues:

> Any doubt of the witness' competency should be resolved in favor of letting him testify and letting the jury determine the value of his testimony.[30]

> But it should always be open on the other side to present evidence of mental abnormality (or any other trait) tending to show that the witness' powers of observation, recollection, or communication were not normal even though the defect may not be so extreme as to render him wholly incompetent to testify.[31]

The injustice which could flow from a confusion of the two concepts is patent, especially in sex offense cases.

---

26. *Id.* at 224, 143 N.E.2d at 654.
27. 58 AM. JUR. *Witnesses* § 102 (1948).
28. Modern relaxation of competency requirements for witnesses has increased the need for psychiatry in the courtroom. Formerly the deranged and defective were deemed incompetent. Today a sense of duty to speak the truth and a bare minimum of ability to observe, remember and recount qualify a witness to give testimony. As a consequence, more and more people with personality disorders and defects now testify in criminal and civil trials. Comment, *supra* note 2, at 1325.
29. 58 AM. JUR. *Witnesses* §§ 860, 862 (1948).
30. M. GUTTMACHER AND H. WEIHOFEN, PSYCHIATRY AND THE LAW, 362 (1952).
31. *Id.* 363.

The Indiana Supreme Court again faced the issue of examining the complaining witness in *Lamar v. State*,[32] in which the defendant had been charged and convicted of sodomy upon the uncorroborated testimony of a fifteen year old boy. The case had been tried without a jury. In contrast to *Burton* and *Wedmore*, the defendant had made a motion to the court for a psychiatric examination of the complaining witness. The defendant had been specific in his motion and directed it toward the issue of competency.[33] This motion was denied by the trial court and the defendant appealed. The Supreme Court first explained that *Wedmore* overruled *Burton* thus not placing upon the State the affirmative duty of examining the witness. The court then quoted from the trial court to show that no error and hence no abuse of the discretionary power mentioned in *Wedmore* had occurred in denying the defendant's motion for a psychiatric examination of the complaining witness:

> . . . In view of the motion made at the beginning of trial, that the prosecuting witness be examined, the Court has paid particular attention to the demeanor and the testimony of the prosecuting witness and the Court is of the opinion that the witness made a straightforward witness. . . .[34]

Had the motion in *Lamar* sought a psychiatric examination of the witness on the issue of his credibility, in a jury trial, one might have argued that the trial court could not rule on such a motion merely by itself observing the demeanor of the witness, for the determination of credibility is a jury function. However, where the motion is directed toward competency and the judge is the trier of fact, it is precisely within the judge's discretion to determine if any examination is needed to aid the court in performing its duty of determining the competency of the witness. It would be difficult to find the judge had abused his discretion in such a situation.

When the recent case of *Binder v. State*[35] came before the Indiana Supreme Court, it appeared the proper set of facts had been presented for granting a motion by the defendant to examine the prosecuting witness. The defendant was charged and convicted of sodomy. As related

32. 245 Ind. 104, 195 N.E.2d 98 (1964).

33. "Comes now the defendant, Loyce Lamar, and respectfully petitions the court to order Roger Sitcler to submit to and undergo a psychiatric examination . . . and in support of said petition says:

1. That said Roger Sitcler is *mentally incompetent*. . . ." Brief for Appellant at 7, Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964). (Emphasis added.).

34. 245 Ind. at 108, 195 N.E.2d at 100.

35. ——Ind.——, 221 N.E.2d 886 (1967).

in the vigorous dissenting opinion, the defendant made a motion at the close of the State's case to have the prosecuting witness examined specifically with regard to her credibility as a witness. Her credibility was clearly in doubt. She admitted on the stand that she had been having sexual intercourse since the age of eleven; that she was a highly nervous person; that she had received medical treatment for that condition prior to the alleged offense; that she was undergoing such treatment at the time of the trial; that she had been confined in the Juvenile Detention Home; that she was then a resident of the Indiana Girls School; and that a member of her family had been a patient at a state mental institution.[36] Nevertheless, the Supreme Court disregarded the fact that the motion had been directed to the issue of credibility and ruled only on the issue of competency, stating:

> Appellant's motion was not timely filed and an objection to the *competency* of a witness must be made before the witness is permitted to testify.[37]

Using the *Wedmore* case as authority, the court, in the last paragraph of its opinion, declared:

> On the issue of the right to a psychiatric examination in cases involving sex crimes, we have more recently reaffirmed our position taken in the *Wedmore* case, supra, by the opinion in *Lamar v. State*. . . .[38]

As noted, *Wedmore* and *Lamar* basically contain two points: that the State is not required to have a psychiatrist examine the complaining witness in sex cases as a condition precedent to her testifying at trial, and that it is within the discretion of the trial court to order a psychiatric examination of the complaining witness on the issue of credibility upon the defendant's request. Certainly the decision in *Binder* does not logically follow from these two points, despite the court's insistence that *Wedmore* and *Lamar* are the basis of its decision.

The door may not be altogether shut against psychiatric examinations of prosecuting witnesses in sex cases, particularly where motion is made by the defendant to probe the issue of credibility. That issue was not directly ruled upon in *Binder*. Had the issues of competency and credibility not been confused, the facts of *Binder* would have clearly justified a ruling that the trial court abused its discretion in not ordering a psychiatric examination on the issue of credibility.

---

36. *Id.* at 890 (Dissenting opinion).
37. *Id.* at 887. (Emphasis added.).
38. *Id.*

POWER OF COURTS TO ORDER EXAMINATIONS OF WITNESSES

The Indiana Supreme Court has indicated in *Wedmore, Lamar,* and *Binder* a doubt of its power to order a psychiatric examination of a complaining witness in a sex case in the absence of a statute so providing. In the absence of a statute to the contrary, however, the Court's inherent power would seemingly enable it to make such an order. The inherent power of the trial courts to order psychiatric examinations of prosecuting witnesses in sex offense cases has been recognized in several states,[39] and the federal courts recognized a similar power in the trial of Alger Hiss for treason.[40] The New Jersey Court has held that because the trial court unquestionably has jurisdiction over the witness when he is produced to testify, it has power to compel the examination.[41] The California Supreme Court has also acknowledged the power of the trial court:

> Rather than formulate a fixed rule in this matter we believe that discretion should repose in the trial judge to order a psychiatric examination of the complaining witness in a case involving a sex violation if the defendant presents a compelling reason for such an examination.[42]

With respect to what criteria should be utilized in assessing when a sufficiently cogent reason has been presented, the Court averred:

> Such necessity would generally arise only if little or no corroboration supported the charge and if the defense raised the issue of the effect of the complaining witness' mental or emotional condition upon her veracity.[43]

Professor Wigmore has made the following comment on judicial power:

> [T]he general judicial power itself, expressly allotted in every State Constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses. . . .[44]

---

39. *Cf.* Ballard v. Superior Ct. of San Diego Co., 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); People v. Kemp, 139 Cal. App. 48, 34 P.2d 502 (1934); State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958); State v. Klueber, 81 S.D. 223, 132 N.W.2d 847 (1965).

40. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1959).

41. State v. Butler, 27 N.J. 560, 143 A.2d 530 (1958).

42. Ballard v. Superior Ct. of San Diego Co., 64 Cal. 2d 159, 176, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966).

43. *Id.*

44. 9 WIGMORE § 2484.

One reason sustaining a belief that Indiana courts have the inherent power to order the examination of a prosecuting witness in criminal trials even in the absence of a statute is that Indiana courts have long recognized an inherent power to order the physical examination of a party in civil actions when timely demand is made by the defendant.[45] The fact that in criminal prosecutions the person to be examined is called a witness instead of a party surely presents no real obstacle to the court's power; nor does a psychiatric examination necessarily represent a greater invasion of one's privacy than does an intimate physical examination.[46] Suppose a civil suit for seduction contrasted with a criminal prosecution for rape of a minor child: in both cases the jury is presented with a situation where the victim and the defendant are the only witnesses. Certainly the defendant's interest in the criminal case where deprivation of life or liberty may result cannot be less than in a civil case. Yet, it is the civil case where the courts have recognized their inherent power to grant a physical examination of the individual making the accusation. The language of the New Jersey court is particularly apt:

> The trial for a criminal cause is a quest for truth and justice, not merely a contest for a tactical advantage over an adversary or for a favorable verdict irrespective of its relation to the basic objective of the proceedings. When reasonable grounds for doubt as to a person's mental capacity become known to the parties and to the court and lives may depend upon his testimony, the proper administration of justice in the public interest ought to stimulate a cooperative voluntary effort to establish a means of mutual solution of the problem.[47]

Granting that the trial court lacks power to *compel* a witness to submit to a psychiatric examination, the Wisconsin Supreme Court has developed an alternative method for securing the interest of the defendant. In Wisconsin the judge can, in the exercise of his sound discretion, order the witness to submit to a psychiatric examination as a condition of allowing the witness to testify.[48] The Indiana courts could profitably use such an approach.

---

45. See South Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901); and Valparaiso v. Kinney, 75 Ind. App. 660, 131 N.E. 237 (1921).

46. In Templin v. Erekedis, 119 Ind. App. 171, 84 N.E.2d 728 (1948), it was ruled error not to order the physical examination of the plaintiff charging a physican with malpractice for rupturing her hymen during his examination of her as a patient. Clearly an order for a psychiatric examination in a criminal case should not require more power than an order in a civil case to make the intimate determination of whether the hymen is intact.

47. State v. Butler, 27 N.J. 560, 599-600, 143 A.2d 530, 553 (1958).

48. State v. Miller, 35 Wis. 2d 454, 151 N.W.2d 157 (1957); Goodwin v. State 114 Wis. 318, 90 N.W. 170 (1902).

If the Indiana Supreme Court is truly concerned about the problem of power to order a witness to submit to a psychiatric examination and yet wants to protect the defendant from the dangers outlined by Professor Wigmore, it might well re-examine the approach taken in *Burton*. A rule increasing the requirement for evidence sufficient to sustain a conviction could easily get around the power problem and protect the defendant.

Indiana needs an enlightened rule that will protect the defendant against the false charges of a mentally abnormal witness. Because of the hazy application of *Wedmore* in the *Binder* decision, the law in Indiana is not clear. The Court first re-affirmed *Wedmore,* and, necessarily, its approval of the discretion of the trial court to order an examination, and then it denied the motion for such an examination with language that implies no examination is possible. When this issue is again presented to the Indiana Supreme Court, it must at least make its position clear. The more enlightened rule would permit the defendant to examine the prosecuting witness and submit to the jury evidence of the witness' incapacity for telling the truth.

Edward L. Volk