

Sleepwalking Used as a Defense in Criminal Cases and the Evolution of the Ambien Defense

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I. INTRODUCTION

Sleepwalking is a parasomnia¹ that affects as much as twenty percent of the population during their lives.² Most of these occurrences happen in childhood and typically only involve the act of sitting up in bed.³ Sleepwalking is most common among children between the ages of four to twelve.⁴ After puberty, children normally begin to outgrow their tendency to sleepwalk. However, in some cases, sleepwalking can continue into adulthood.⁵ When adults are afflicted by sleepwalking, men are far more likely to be aggressive in their behavior during sleepwalking events.⁶

Possible causes for sleepwalking include a chemical imbalance, genetic tendencies, increased fatigue, stress, alcohol, or drug abuse.⁷ Medical evidence indicates that people that sleepwalk can reduce or eliminate episodes through lifestyle changes, including a reductions in alcohol consumption and stress, as well as the institution of regular sleep schedules and drug monitoring.⁸

Sleepwalking typically occurs during the first three hours of sleep, with episodes usually lasting less than ten minutes.⁹ Sleepwalking occurs during the deepest levels of sleep, known as stages three and four.¹⁰ Sleep studies reveal that while the brainwaves are that of a deep sleep, sleepwalkers move as though they are awake.¹¹ Typically, a sleepwalker will have no recollection of the sleepwalking event upon awakening.¹²

1. A parasomnia is “an undesirable and/or distressing sleep behavior, other than insomnia and hypersomnia, that occur exclusively during sleep or that are exacerbated by sleep.” While parasomnias may eventually disappear without treatment, some are dangerous and may even be deadly. Stephen F. Davis & Joseph J. Palladino, *Psychology Media and Research Update* 207 (3d ed. 2002).

2. See Davis and Palladino, *supra* note 1, at 208.

3. *Id.*

4. *Id.*

5. Discovery Health, *Sleep Disorders Primer* (2009), <http://healthdiscovery.com/centers/sleepdreams/sleepdisorders/sleepdisorders.html> (last visited May 20, 2009).

6. David Kuhlmann, M.D., *Sleepwalking* (updated Aug. 31, 2007), <http://www.sleepeducation.com/Disorder.aspx?id=14> (last visited May 20, 2009).

7. *Sleepwalking*, *supra* note 6.

8. Mike Horn, Note, *A Rude Awakening: What to do with the Sleepwalking Defense?*, 46 B.C.L. Rev. 149, 173 (2004).

9. See *Sleep Disorders Primer*, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

Even though the defense of sleepwalking is rarely asserted in criminal cases, its use has been effective due to the unconscious state the sleepwalker was in when criminal acts have occurred. All crimes have basic common elements, and if one is lacking, a criminal charge cannot stand against the accused.¹³ The use of the sleepwalking defense may work to eliminate the *actus reus*¹⁴ of the crime because the actor was unconscious at the time of the sleepwalking event, rendering her acts involuntary.¹⁵ Alternatively, the use of the sleepwalking defense can eliminate the *mens rea*¹⁶ of the crime; thus, because the actor was unconscious at the time of the sleepwalking event, her acts could not have been made with the necessary culpable state of mind.¹⁷ “Unconsciousness is a complete defense to a criminal charge, because unconsciousness not only excludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.”¹⁸

Based on the same argument of unconsciousness and involuntary action used in the sleepwalking defense, the Ambien defense was born following the auto accident of Rhode Island Representative Patrick Kennedy in May 2006.¹⁹ Representative Kennedy claimed that he had no memory of the accident as he was disoriented due to two prescription medications he had taken, specifically Ambien²⁰ and Phenergan, which is used to treat nausea.²¹

Following the accident, the public, through the media, called for stronger warnings to be placed on sleep aids like Ambien.²² By 2008, stronger warning labels were included with prescriptions for Ambien that stated:

After taking AMBIEN, you may get up out of bed while not being fully awake and do an activity that you do not know you are doing . . . Reported activities include:

- Driving a car (sleep driving)
- Making and eating food
- Talking on the phone
- Having sex
- Sleepwalking

13. *In re Winship*, 397 U.S. 358, 361-64 (1970).

14. *Actus reus* is defined as the “wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability.” BLACK’S LAW DICTIONARY 33 (8th ed. 2005).

15. *See* MODEL PENAL CODE § 2.01 (1981).

16. *Mens rea* is defined as the “state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.” BLACK’S LAW DICTIONARY 824 (8th ed., 2005).

17. *See* MODEL PENAL CODE § 2.02.

18. Eunice A. Eichelberger, J.D., Annotation, *Automatism or unconsciousness as defense to criminal charge*, 27 A.L.R. 4th 1067, §3a (2009) (citing *State v. Tyson*, 672 S.E.2d 700 (N.C. App. 2009)). *See also* *State v. Bush*, 595 S.E.2d 715 (N.C. App. 2004).

19. ABC News, *Kennedy’s Crash Highlights Dangers of Ambien* (May 5, 2006), <http://abcnews.go.com/print?id=1927026> (last visited June 10, 2009).

20. Ambien, also known as Zolpidem tartrate tablets, is made by Sanofi-Aventis, and has been approved for prescription/distribution to the U.S. population since 1992. *See Highlights of Prescribing Information, Zolpidem Tartrate tablets*, rev. 4 (revised Aug. 2008).

21. *Kennedy’s Crash Highlights Dangers of Ambien*, *supra* note 17. *See also* *FDA warns of rare, odd reactions to sleep drugs*, Phila. Inquirer, Mar. 15, 2007, at A02.

22. Stephanie Saul, *U.S. Calls for Strong Warnings on Sleep Aids’ Strange Effects*, N.Y. Times (Late Ed. Final), Mar. 15, 2007, at A1.

Call your doctor right away if you find out that you have done any of the above activities after taking AMBIEN.²³

As a result of this strong media and public attention, criminal defendants began to use Ambien-induced amnesic sleep disorder²⁴ as a defense. Further, the use of the Ambien defense continues to expand through the present date.

Historically, courts have been unprepared to face the medical complexities that revolve around sleepwalking defense cases. Even though sleepwalking is a medical phenomenon that remains unexplained, sleep specialists have identified triggers that can cause sleepwalking events.²⁵ As such, legal scholars have suggested that sleepwalkers “have the ability to mitigate sleepwalking violence.”²⁶ Therefore, a known sleepwalker has a duty to take precautions to keep others safe from harm. This duty must be required of defendants claiming the sleepwalking defense if a predisposition for sleepwalking existed. Further, the same duty must apply to any defendant claiming the Ambien defense, because the side effects of this medication are common knowledge and it follows the same policy that underlies voluntary intoxication.

This Comment will review the history of the sleepwalking defense in criminal cases. It will also discuss the evolution of the Ambien defense and how United States federal and state courts have addressed it to date. Further, it will investigate the proper burden that should be placed upon a defendant when claiming the sleepwalking defense and contemplate how the Ambien defense should be approached by our court systems. Finally, this Comment will address other protective measures that chronic sleepwalkers or individuals that use Ambien should take to protect the general population from their unconscious acts.

II. THE HISTORY OF SLEEPWALKING USED AS A DEFENSE IN CRIMINAL CASES

Records reveal that common law jurisdictions have accepted sleepwalking as a defense in criminal cases for almost 700 years.²⁷ United States courts were first tested with the sleepwalking defense in the 1846 Massachusetts case of Albert Tirrell (“Tirrell”).²⁸ Tirrell was tried for the murder of his mistress, Maria Ann Bickford.²⁹ Ms. Bickford was a prostitute and refused to give up her profession to be with Tirrell.³⁰ On October 27, 1845, she was found with

23. See *Highlights of Prescribing Information, Zolpidem Tartrate tablets*, *supra* note 20. See also *Medication Guide for Ambien Tablets*, <http://www.fda.gov/medwatch> (last visited May 15, 2009).

24. See *Sleep Forensics Associates*, <http://www.sleepforensics.org/sleepDisorders/index.php?id=12> (last visited May 20, 2009).

25. *A Rude Awakening: What to do with the Sleepwalking Defense?*, *supra* note 8 at 173.

26. *Id.* See also Lawrence Martin, MD, *Can Sleepwalking be a murder defense?* (2009), <http://www.lakesidepress.com/pulmonary/Sleep/sleep-murder.htm> (last visited June 23, 2009).

27. *A Rude Awakening: What to do with the Sleepwalking Defense?*, *supra* Note 8 at 160 ((citing Alexander Bonako, *Impulsive Acts and Confusional States During Incomplete Arousal from Sleep: Criminological and Forensic Implications*, 28 *PSYCHIATRIC Q.* 400, 401 (1974)) (tracing the roots of the sleepwalking defense back as far as 1313 when the Council of Vienne declared that if a sleepwalking person killed or wounded someone, he was held not culpable.) See also Peter Fenwick, *Somnambulism and the Law: A Review*, 5 *BEHAV. SCI. & L.* 343, 351 (1987) (noting the 1686 English case of Colonel Culpepper that, while sleepwalking, shot a guardsman and his horse on night patrol; Colonel Culpepper was later convicted of manslaughter while insane).

28. See *SleepForensics.org, Case Studies*, <http://www.sleepforensics.org/caseStudies> (last visited May 20, 2009) (itemizing high-profile criminal cases that have used sleepwalking as a defense). See also Law Buzz, *Sleepwalking, a Defense to Murder First Used in 1846* (2009), <http://www.lawbuz.com/didyou/sleepwalking/sleepwalking.htm> (last visited June 15, 2009).

29. *Sleepwalking, a Defense to Murder First Used in 1846*, *supra* note 28.

30. *Id.*

her throat cut so deeply that she was nearly beheaded.³¹ Rufus Choate, Tirrell's attorney, claimed that Tirrell could not be responsible as he was sleepwalking when he committed the crime.³² The jury returned a not guilty verdict in less than two hours.³³ Later, Tirrell was acquitted of arson for setting fire to the building where Bickford was killed.³⁴

Since *Tirrell*, the sleepwalking defense has been used successfully in several cases. In *Fain v. Commonwealth* in 1879, defendant Fain's manslaughter conviction was reversed and remanded for a new trial because he was not permitted to introduce evidence to the jury of his history of sleepwalking.³⁵ Fain and his friend fell asleep in a public room of the Veranda Hotel.³⁶ Fain claimed that he was asleep at the time he shot a hotel porter, and he attempted to introduce evidence at trial that he had been a sleepwalker since childhood.³⁷ Fain's conviction was reversed and remanded so that he would be allowed to present this evidence at a new trial.³⁸

In the 1925 case of *Bradley v. State*, Isom Bradley ("Bradley") expressed concerns that Lawrence Williams had made threats against him.³⁹ Fearing for his safety, Bradley placed a pistol under his pillow before he went to sleep.⁴⁰ After falling asleep, he was startled by a noise in his house, which caused him to jump out of bed and fire three shots.⁴¹ Unfortunately, he shot and killed his girlfriend, Ada Jenkins.⁴² Upon review, the Texas appeals court reversed Bradley's murder conviction due to the fact that the court had refused to give a special charge of sleepwalking, or somnambulism, to the jury.⁴³ Based on *Fain*,⁴⁴ the court opined that a "somnambulist [sleepwalker] does not enjoy the free and rational exercise of his understandings and is more or less unconscious of his outward relations, none of his acts during the paroxysm can rightfully be imputed to him as crimes."⁴⁵

The most famous successful sleepwalking defense case to date is the 1987 Canadian case of *R. v. Parks*.⁴⁶ Throughout 1987, Kenneth Parks ("Parks") suffered from severe insomnia due to his unemployment and overwhelming gambling debts.⁴⁷ On May 23, 1987, Parks drove twenty-five kilometers to his in-law's home, where he attacked both of them while they slept.⁴⁸

31. *Id.*

32. *Id.*

33. *Id.*

34. *Sleepwalking, a Defense to Murder first used in 1846, supra note 28.*

35. *Fain v. Commonwealth*, 78 Ky. 183 (Ky. App. 1879).

36. *Fain*, 78 Ky. at 184. *See also Sleep Forensics Associates, supra note 24.*

37. *Fain*, 78 Ky. at 185.

38. *Id.* at 193.

39. *Bradley v. State*, 277 S.W. 147, 148 (Tex. Crim. App. 1925).

40. *Bradley*, 277 S.W. at 148.

41. *Id.* at 149.

42. *Id.*

43. *Id.* at 150.

44. *Fain*, 78 Ky. at 183.

45. *Bradley*, 277 S.W. at 148 (citing *Ray's Medical Jurisprudence*, Sect. 508).

Another successful sleepwalking defense case was the 1981 Steven Steinberg ("Steinberg") case. *See Can Sleepwalking be a murder defense, supra note 26.* Steinberg murdered his wife by stabbing her twenty-six times. *Id.* Steinberg didn't deny that he killed his wife, but claimed that he could not remember the event because he had been sleepwalking. *Id.* The jury found Steinberg innocent, holding that he was temporarily insane at the time the stabbing event occurred. *Id.*

46. *R. v. Parks*, [1992] 2 S.C.R. 871 (Can.). *See also Sleep Forensics Associates, supra note 24.*

47. *Can Sleepwalking be a murder defense, supra note 26.*

48. Decision at 2, *Parks*, 2 S.C.R. 871, available at <http://www.wikipedia.com>. *See also Can Sleepwalking be a murder defense, supra note 26.*

Ultimately, his father-in-law survived the attack, but his mother-in-law did not.⁴⁹ Following the events that occurred at his in-law's residence, Parks drove to the police station and reported that he thought he had killed some people because he had blood on his hands.⁵⁰ Parks claimed that there was no obvious familial turmoil that would have consciously triggered this attack.⁵¹

Because Parks could not recall the murder or assault and had a history of sleepwalking, his lawyers raised the sleepwalking defense.⁵² Testimony of five expert witnesses was provided, concluding that Parks "was sleepwalking and that sleepwalking was not a neurological, psychiatric, or other illness."⁵³ The trial judge instructed the jury as to the automatism, or sleepwalking, defense.⁵⁴ The jury acquitted Parks of the murder and attempted murder charges and the court of appeals unanimously upheld the acquittal.⁵⁵ Upon the 1992 final review by the Supreme Court of Canada, Parks' acquittal was upheld.⁵⁶ The court concluded that sleepwalking is a parasomnia resulting from noninsane automatism and, therefore, Parks could not be held liable for the harmful acts he committed.⁵⁷

The sleepwalking defense has been successful in other types of criminal actions. For example, Richard Overton's conviction for second-degree endangering the welfare of a child was reversed and the case was remanded for further hearing because the trial court did not allow evidence of defendant's sleepwalking condition.⁵⁸ In support of the reversal, the court noted that "[t]o support criminal liability, that act had to be voluntary. If the act was committed by the defendant in a sleepwalking state, it was not voluntary, and cannot underpin convictions of these offenses."⁵⁹

In several cases, the sleepwalking defense has not been successful, typically because the defendant has been unable to meet her burden of proof. One example of an instance where the defendant could not meet his burden is the 1997 high-profile case of *State v. Falater*.⁶⁰ On January 17, 1997, Falater stabbed his wife, Yarmila, forty-four times, put gloves on, dragged her into their swimming pool and drowned her, all while giving his dog orders to be quiet.⁶¹ The drowning was witnessed by Falater's neighbor, who heard the commotion and looked over the

49. See Parks Decision, *supra* note 48, at 2. See also *Can Sleepwalking be a murder defense*, *supra* note 26.

50. Parks Decision, *supra* note 48, at 2.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Parks Decision, *supra* note 48, at 2.

56. *Id.* at 48.

57. *Id.* at 44-45.

58. *State v. Overton*, 815 A.2d 517 (N.J., Super. Ct. 2003).

59. *Overton*, 815 A.2d at 522. See *A Rude Awakening: What to do with the Sleepwalking Defense?*, *supra* note 8, at n.60.

See also BusinessWest, *Open and Shut* (Feb. 1, 2003), <http://www.allbusiness.com/legal/1160001-1.html> (last visited June 23, 2009) for a discussion of the 2001 case of Adam Kierczykowski. Kierczykowski was visiting the Amberst campus of the University of Massachusetts and was accused of entering unlocked rooms of ten women students. *Id.* The indictment against him included twenty-two charges ranging from breaking and entering to assault with the intent to rape. *Id.* As a defense to these charges, Kierczykowski's parents testified that he had a history of sleepwalking. *Id.* The jury found Kierczykowski not guilty of all charges. *Id.*

60. *State v. Falater*, No. CR1997-000928-A (Ariz. App. Jul. 26, 1994).

61. *Falater*, No. CR1997-000928-A. See also Paul Rubin, *Wake-Up Call. That's what the jury gave Scott Falater convicted of killing his wife in the Sleepwalker Murder Case* (July 1, 1999), available at <http://www.phoenixnewstimes.com/content/printVersion/166276> (last visited June 23, 2009).

fence into Falater's back yard.⁶² The neighbor called the police and reported what he had witnessed.⁶³ Before the police arrived at the scene, Falater went back into his house, took off the bloody clothes and gloves and disposed of them, along with a knife, in a trash bag, placed the bag in a Tupperware container, and concealed the container in the wheel well of one of his cars.⁶⁴ When Falater was questioned by the police, he said that he was unaware of the events of the killing because he must have been sleepwalking at the time.⁶⁵

At trial, the defense provided the jury with the testimony of two expert witnesses, who testified that habitual sleepwalkers, like Falater, are able to perform complex tasks during their spells of sleepwalking.⁶⁶ Falater's family members also testified that there was a history of Falater sleepwalking prior to the night in question.⁶⁷

However, the prosecution provided the Falater jury with information that assisted in understanding the sleepwalking defense and its reasonableness. Specifically, the prosecution provided expert testimony that the forty-five minute episode Falater claimed he experienced, during which he completed the stabbing, drowning, and disposing of the clothes and murder weapon, was unusually long. Most sleepwalking spells only last from ten minutes to a maximum of twenty minutes.⁶⁸ On June 25, 1999, Falater was found guilty of first degree murder and sentenced to life in prison; further, on January 17, 2002, the conviction was upheld on appeal.⁶⁹

III. THE EVOLUTION OF THE AMBIEN DEFENSE

As previously noted, the May 2006, auto accident of Rhode Island Representative Patrick Kennedy brought Ambien's side effects to the attention of the media and the public.⁷⁰ Criminal defendants and their attorneys seized upon the rare, but serious, side effects and raised the Ambien defense, claiming that, like sleepwalking, the defendants were not aware of their acts

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Falater, supra* note 58. *See also Wake-Up Call. That's what the jury gave Scott Falater convicted of killing his wife in the Sleepwalker Murder Case, supra* note 61.

67. *Id.*

68. *Id.*

69. *Id.* *See also* Paul Rubin, *The Big Sleep. Court of Appeals upholds conviction of 'Sleepwalking Murderer* (Feb. 14, 2002), available at <http://www.phoenixnewstimes.com/content/printVersion/17053.2> (last visited June 23, 2009).

Another criminal case that unsuccessfully raised the sleepwalking defense is *Commonwealth v. Ricksgers*, No. 153 of 1994 (Pa. Ct. Com. Pl. 1993). *See* Byron Spice, *When dreams become a real-life nightmare* (Dec. 10, 2003), available at <http://www.post.gazette.com/pg/03344/240468.115.htm> (last visited June 15, 2009). *See also* <http://www.sleepforensics.org/caseStudies/index.php?id=8> (last visited May 20, 2009). Ricksgers shot his wife on Christmas night in 1993. *Id.* He claimed that this occurred while he was in a semi-awake state. *Id.* However, the prosecution provided evidence at the trial that there was marital discord between the defendant and the victim. *Id.* The jury found Ricksgers guilty of first degree murder and he was sentenced to life imprisonment. *Id.*

Finally, there is the unsuccessful sleepwalking defense case of Stephen Reitz ("Reitz"). In October, 2001, Reitz killed his girlfriend, Eva Marie Weinfurter, and claimed that the events occurred while he was acting out a dream. Nikki Usher, *Sleepwalking Defense in Killing Doesn't Sway Jury* (June 25, 2004), <http://articles.latimes.com/2004/jun/25/local/me-sleepwalker25> (last visited June 15, 2009). *See also* <http://www.sleepforensics.org/caseStudies/Index.php?id=10> (last visited May 20, 2009). His attack on Weinfurter included smashing a flowerpot against her head, and then stabbing her in the neck. *Id.* The jury was not convinced of the sleepwalking defense and he was convicted of first-degree murder in June, 2004. *Id.*

70. *Kennedy's Crash Highlights Dangers of Ambien, supra* note 19.

and that their acts were involuntary. Since that time, there has been an increase in the use of the Ambien defense, typically being raised in one of two different forms.

The first form includes defendants' claims that their prior statements were made either unknowingly or involuntarily as a result of their use of Ambien. For example, a defendant claimed that his use of Ambien blocked his mind, left him confused, and that the statements he made to the authorities in his statutory rape case were not made voluntarily.⁷¹ The court rejected this defendant's assertions and held that defendant's Ambien intoxication did not render his confession inadmissible.⁷²

The second form is similar to the sleepwalking defense as the defendants claim that they were not conscious of their acts at the time of the crime; therefore, their acts were involuntary. One example is the 2006 case of *Davidson v. Indiana*.⁷³ The defendant Davidson ingested Ambien and Zoloft.⁷⁴ After sleeping for a brief period, Davidson drove to the victim's house and shot and killed him.⁷⁵ Davidson offered expert testimony at trial, claiming the combination of Ambien and Zoloft could adversely affect an individual's impulse control, and therefore his actions on the night of the murder were involuntary.⁷⁶ The jury found Davidson guilty of murder and sentenced him to fifty-five years in prison.⁷⁷ However, the appeals court reversed the conviction, finding that the trial court should have defined "voluntary" and included voluntariness as an element of the crime.⁷⁸ The Supreme Court of Indiana found that the trial court had sufficiently instructed the jury on the elements of voluntariness; therefore Davidson's conviction was upheld, as the court essentially held that his acts were voluntary.⁷⁹

Another defendant claiming this form of Ambien defense was Donald Slagle, Jr. ("Slagle").⁸⁰ Slagle proposed to the court that his use of Ambien induced him to involuntarily drink and drive, and therefore, he could not be found guilty of driving under the influence.⁸¹ The court rejected this argument found Slagle guilty of driving under the influence of alcohol.⁸²

71. *State v. Gray*, No. COA06-754, 2007 N.C. App. LEXIS 825 (N.C. App. May 1, 2007).

72. *Gray*, 2007 N.C. App. LEXIS 825 at *10.

In another case, a defendant claimed that his use of Ambien made him incompetent to stand trial; the court held that the defendant was a malingerer and was competent – use of Ambien was irrelevant. *Houston v. State*, Nos. 01-06-01000-CR, 01-06-01001-CR, 2008 Tex. App. LEXIS 1612 (Tex. App. Mar. 6, 2008).

See also *Shockley v. State*, No. M2008-00143-CCA-R3-PC, 2009 Tenn. Crim. App. LEXIS 239 (Tenn. App. Mar. 31, 2009), where the defendant alleged that he did not knowingly and voluntarily enter his guilty plea because he was taking Ambien at the time and therefore his decision-making ability was compromised. The court rejected this defense and ruled that the guilty plea held. *Shockley*, 2009 Tenn. Crim. App. LEXIS 239 at *20.

Finally, in *United States v. Holbrook*, No. 2:01CR10023, 2009 U.S. Dist. LEXIS 39737 (W.D. Va. May 11, 2009), defendant raised the argument that she could not be bound by her statements made during her guilty plea hearing as the use of Ambien left her involuntarily intoxicated. Once again, the court rejected this claim and held that the defendant should be bound to her statements. *Holbrook*, 2009 U.S. Dist. LEXIS 39737 at *61.

73. *Davidson v. Indiana*, 849 N.E.2d 591 (Ind. 2006).

74. *Davidson*, 849 N.E.2d at 592.

75. *Id.*

76. *Id.* at 593.

77. *Id.*

78. *Id.*

79. *Davidson*, 849 N.E.2d at 595.

80. *State v. Slagle*, No. E2005-02884-CCa-R3-CD, 2006 Tenn. Crim. App. LEXIS 822 (Tenn. App. Oct. 24, 2006).

81. *Slagle*, 2006 Tenn. Crim. App. LEXIS 822 at *13.

82. *Id.*

A highly publicized Ambien defense case resulted both in civil and criminal liability in 2006 when Brian Patrick Riley struck Paris Gebrekidan with his vehicle while she was loading her son's birthday presents into a car in Alexandria, Virginia.⁸³ Riley set forth a defense of unconsciousness based on his use of Ambien at the time of the accident.⁸⁴ The Virginia Supreme Court was unconvinced by Riley's assertions and his convictions for driving under the influence and maiming of another person while intoxicated were upheld.⁸⁵

The previously reviewed cases indicate that the Ambien defense is not nearly as successful as the sleepwalking defense. However, the Ambien defense was successful for Marie Connelly ("Connelly") of Hillsborough, New Jersey, who escaped a driving under the influence charge by claiming that she was sleep-driving at the time of her arrest on September 10, 2006.⁸⁶ Initially, Connelly pled guilty to driving while intoxicated.⁸⁷ Thereafter, her attorney filed a motion to vacate Connelly's guilty plea when he and the defendant became aware of the adverse side effects that could occur from Ambien use.⁸⁸ In this municipal appeal, the court found Connelly not guilty of driving while intoxicated.⁸⁹ The judge believed that the Legislature never intended for a driving while intoxicated conviction to stand against someone taking a sleep medication that would produce the unlikely side-effect of sleep driving.⁹⁰

IV. THE BURDEN OF PROOF FOR THE SLEEPWALKING DEFENSE IN CRIMINAL CASES

The sleepwalking defense has caused the court systems of the United States great difficulty because the burden of proof is not uniformly placed upon the defendant.⁹¹ For example, courts that use the Model Penal Code approach place the burden of proof on the prosecution by requiring it to prove defendant's voluntary act for criminal culpability to apply.⁹² Other courts require the defendant to raise the sleepwalking defense as an affirmative defense. Accordingly, when the defendant raises the defense in its case in chief, she must then carry the burden of proof beyond a reasonable doubt that she was, in fact, chronically afflicted with sleepwalking throughout her life.⁹³

Treating the sleepwalking defense as an affirmative defense, thus placing the burden on the defendant, is the proper procedure which should be followed by all United States federal and

83. Jerry Markon, *Sleeping Va. Driver Convicted in Crash; Man Had Taken Too Much Ambien*, Wash. Post (Final ed.), Aug. 2, 2006, at B01. See *Riley v. Virginia*, 675 S.E.2d 168 (Va. 2009). See also *Gebrekidan v. Riley*, No. 74 Va. Cir. 215, 2007 Va. Cir. LEXIS 254 (Va. Cir. Oct. 1, 2007).

84. *Riley*, 675 S.E.2d at 173.

85. *Id.* at 178.

Two other interesting, but unsuccessful, Ambien defense cases are *United States v. Froula*, No. 07-mj-01179-MJW, 2007 U.S. Dist. LEXIS 87497 (D.Colo. Nov. 28, 2007) and *United States v. Nichols*, No. 1:02-CR-0228-JOF, 2008 U.S. Dist. LEXIS 3913 (N.D.Ga. Jan. 18, 2008).

86. Matt Rainey, *Hillsborough woman acquitted of drunken driving based on sleep-pill defense*, Star-Ledger (Newark, N.J.), Mar. 11, 2009, at 011. See Municipal Appeal filed at *State v. Connelly*, No. 24-08-C-T-13 (N.J. Super. Ct. Mar. 11, 2009), available at www.muni-mail.com/pdf/State_v_Marie_Connelly2Appeal_Decision.Doc (last visited June 15, 2009).

87. *Hillsborough woman acquitted of drunken driving based on sleep-pill defense*, *supra* note 86.

88. *Id.* See also *Connelly* Municipal Appeal, *supra* note 86.

89. See *Connelly* Municipal Appeal, *supra* note 86.

90. *Hillsborough woman acquitted of drunken driving based on sleep-pill defense*, *supra* note 86.

91. *A Rude Awakening: What to do with the Sleepwalking Defense?*, *supra* note 8, at 151.

92. *Id.*, *supra* Note 8 at 169. See MODEL PENAL CODE §2.01 (1981).

93. *A Rude Awakening: What to do with the Sleepwalking Defense?*, *supra* note 8, at 167.

state courts. It is both fair and reasonable to place the burden upon the defendant to prove that she suffers from sleepwalking events as the defendant has better access to evidence of sleepwalking through the testimony of family members, medical doctors, and experts that had an opportunity to study the defendant.⁹⁴

A balancing test of medical and legal evidence has been suggested to the courts in determining the credibility of the sleepwalking defense by the court and the jury.⁹⁵ The elements of this balancing test include: (1) evidence of sleepwalking at the time of the crime; (2) elapsed time between falling asleep and the criminal act; (3) medical factors; (4) trigger factors; and, (5) circumstantial evidence.⁹⁶

Specifically, sleep specialist, Dalva Poyares, recommends that expert medical testimony be provided after a general evaluation of the sleepwalker has been performed.⁹⁷ The recommended medical history should include:

A detailed description of the event and degree of amnesia that occurred during the sleepwalking episode;

Current, past, or family sleep disorders;

Current, past, or family medical record;

Social habits;

Drug, medication, and alcohol intake information;

Employment records and difficulties possibly related to sleep disorders; and

Determination of the frequency of violence and its nature.⁹⁸

Other evidence to be secured from the spouse or family members will include:

The event in question and prior events;

Timing of the event during the sleep/wake cycle;

Frequency of events over time;

Age of onset and associated life events and traumas;

Degree of amnesia noted for the event in question and prior events; and

Attitude of the sleepwalker when fully awake following the event in question.⁹⁹

The appropriate burden of proof is met when the defendant is required to produce medical evidence of her sleepwalking activities. If the requirements of balancing test, the expert medical, and familial testimony are met, the defendant should have sufficient evidence to support her claim of sleepwalking as a defense in criminal cases.

As with other medical disorders, chronic sleepwalkers must be held responsible for their actions while experiencing an episode of sleepwalking. A person that knowingly suffers from a sleepwalking disorder should carry the same legal responsibility as a person that knowingly suffers from a seizure disorder. “[A]n operator of a motor vehicle, unconscious from [an epileptic seizure] at the time of the accident, may nonetheless be found guilty of criminal negligence in having undertaken to drive the vehicle if he knew at the time that he might black out or lose consciousness while doing so.”¹⁰⁰

94. *Id.* at 181.

95. *Id.*

96. *Id.*

97. Dalva Poyares, et al., *Violent Behavior During Sleep* (2005), http://www.scielo.br/pdf/rbp/v27s1/en_24472.pdf (last visited July 27, 2009).

98. *Violent Behavior During Sleep*, *supra* note 97, at 2.

99. *Id.*

100. *Virgin Islands v. Smith*, 278 F.2d 169, 175 (3d Cir. 1960).

For example, in *Commonwealth v. Cheatham*,¹⁰¹ defendant Cheatham was being treated by a physician and taking medication for the treatment of his epileptic seizures.¹⁰² He had been notified by the Commonwealth of Pennsylvania that his driver's license was suspended because he had not been seizure-free for a period of one year.¹⁰³ While his license was suspended, defendant Cheatham continued to operate a motor vehicle, and on August 3, 1990, he had an epileptic seizure while driving that resulted in the accidental killing of one child and injury to two other persons.¹⁰⁴ He was convicted of homicide by vehicle because his act of driving while not seizure-free was the direct and substantial cause of the accident.¹⁰⁵ Therefore, it was the defendant's act of driving when he knew he could lose consciousness that resulted in his conviction of homicide by vehicle, not the seizure itself.

Similarly, even though a sleepwalker may not have conscious awareness during a sleepwalking episode, an individual that sleepwalks on a regular basis is aware that she suffers from a sleep disorder and needs to take precautions to protect herself and others from injury. It is reasonable to expect a sleepwalker to have a duty or obligation to the general public to seek necessary medical attention and take other precautions to protect the general population at large.

As such, a defendant that sleepwalks regularly and claims the sleepwalking defense in a criminal case should have to prove that additional protective measures were taken to protect herself and others. These precautions include:

- (1) Remov[ing] hazardous items from the bedroom where the sleepwalker sleeps;
- (2) Locat[ing] the bedroom on the ground floor of the house, if possible;
- (3) Lock[ing] all doors and windows. In special cases, additional deadbolts may be installed;
- (4) Cover[ing] glass windows with heavy drapes;
- (5) Plac[ing] an alarm system or loud bell on the bedroom door and/or doors leading outside;
- (6) Plac[ing] motion detectors with an alarm in the immediate vicinity of doors leading outside;
- (7) When traveling, stay[ing] on the first floor of a hotel;
- (8) Consider placement of the mattress on the floor of the bedroom;
- (9) Safety measures may include erecting gates in the bedroom entryway;
- (10) Sleeping with a "Magic" bean blanket (a weighted blanket used by individuals with autism or ADHD) may assist in restraining a sleepwalker;
- (11) Behavioral treatments, including reinforcement and hypnosis, can be successful;
- (12) Medications, including a bedtime dose of benzodiazepine or tricyclic antidepressant, can be helpful in decreasing deep sleep, which is when sleepwalking events occur;
- (13) Discontinuance of sleep aids such as Ambien if sleepwalking has occurred.¹⁰⁶

101. *Commonwealth v. Cheatham*, 615 A.2d 802 (Pa. Super. Ct. 1992).

102. *Cheatham*, 615 A.2d at 803.

103. *Id.* at 804.

104. *Id.* at 803.

105. *Id.* at 812.

106. Letter about precautions from Bharat Jain, M.D., Excelsa Health - Westmoreland Sleep Disorders Center (Jan. 14, 1997). See also Mark R. Pressman & William C. Orr, *Understanding Sleep: The Evaluation and*

In summary, a defendant that raises the sleepwalking defense must carry the medical and legal burden to provide sufficient evidence to the court and the jury that the sleepwalking event actually occurred as claimed. This can be proven with sufficient medical expert and familial testimony. Further, if evidence indicates that the defendant is a chronic sleepwalker, she must prove that precautions were taken for her safety and the safety of the general public. Chronic sleepwalkers must be required to institute necessary measures to reduce the risk of harm to herself and others.

V. ANALYSIS OF THE AMBIEN DEFENSE IN CRIMINAL CASES

Defendants' use of voluntary drug intoxication as a defense in criminal cases is not a new legal tactic.¹⁰⁷ A voluntary drug intoxication defense has been claimed by defendants, mostly unsuccessfully, for over a century.¹⁰⁸ Specifically, section 2.08 of the Model Penal Code addresses the use of intoxication as a defense in criminal cases. The general rule is that intoxication is not a defense in criminal matters when the intoxication has been voluntarily induced by or upon the defendant.¹⁰⁹ Typically, only if defendant's intoxication is involuntary will it constitute a legitimate defense in a criminal case.¹¹⁰

As previously noted, the Ambien defense has generally failed for those defendants that have raised it in criminal matters. It appears that the courts equate the use of Ambien as voluntary intoxication on the part of the defendant, and thus not as a valid defense. This analysis is accurate because the general public is now aware of the side effects that can occur from the use of Ambien. By taking the drug, defendants have met the requirement of voluntary intoxication, and the courts have not allowed them to expand the Ambien defense to negate the general rule that voluntary intoxication may not be used as a defense.

Marie Connelly's attorney, most probably, succeeded in her drunken driving case with the Ambien defense primarily due to the fact that the side effects were not commonly known to the general public at the time of her accident on September 10, 2006.¹¹¹ It appears that the court equated Connelly's Ambien-induced condition to that of involuntary intoxication, because it found that the Legislature never intended for a driving while intoxicated conviction to stand against someone taking a sleep medication which would produce the unlikely side-effect of sleep driving.¹¹² However, due to the widespread publicity that Ambien and other sleep aids have received since the 2006 Patrick Kennedy incident, the possibility of the Ambien defense expanding in criminal matters is highly unlikely. Further, as a precautionary measure, any individual that has suffered from adverse side effects while using Ambien should immediately cease taking it to protect themselves and others from possible dangers.

Treatment of Sleep Disorders 436 (1997); *Violent Behavior During Sleep*, *supra* note 97, at 4; *The Calming Power of The Magic Blanket*, <http://themagicblanket.beanblanket.com> (last visited May 27, 2009).

107. Phillip E. Hassman, Comment, *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, 73 A.L.R.3d 98 (1976).

108. *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, *supra* note 105 (citing *Leache v. State*, 3 SW 539 (TX App. 1886)).

109. MODEL PENAL CODE § 2.08(1) (1981).

110. MODEL PENAL CODE § 2.01(4).

111. *Hillsborough woman acquitted of drunken driving based on sleep-pill defense*, *supra* note 86.

112. *Id.*

VI. CONCLUSION

Sleepwalking is a disorder that affects about twenty percent of the population. The law must require proof beyond a reasonable doubt that an individual suffered from a sleepwalking disorder for it to be used as a defense in criminal cases. Such a requirement can be justified when comparing a sleepwalking disorder to other medical conditions.

There are some cases where sleepwalking may be a valid defense. However, in all cases, the courts and the juries must be provided with sufficient information to determine the reasonableness of the sleepwalking defense. In order to keep the use of a sleepwalking defense to a minimum, the evidentiary balancing test must be applied, and the placement of burden of proof and appropriate duties upon the defendant is essential.

The same burdens and duties must apply to defendants that raise the Ambien defense. This can be justified when comparing the duty of an individual under the influence of Ambien to protect others from harm to that of a person who is required by law not to drink and drive. By taking Ambien as a sleep aid, the defendant has altered his condition to that of a drug-induced voluntary intoxication. The law, generally, does not allow voluntary intoxication to be a defense in criminal cases.

If the appropriate evidentiary burdens and legal duties referenced in this Comment are not placed upon defendants in criminal cases, the use of the sleepwalking and Ambien defenses will continue to rise. Because sleepwalking affects approximately twenty percent of the population, and because Ambien side effects have been well documented by the media, many people can claim these defenses in an attempt to avoid criminal liability. The use of these defenses, without sufficient evidentiary requirement, will unjustly acquit defendants in criminal matters. These abuses cannot be allowed to occur.

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