



Fallujah, by Elzie Golden, watercolor on paper, Iraq, 2005.
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Chapter 5

EXCULPATORY DEFENSES AND MATTERS IN EXTENUATION AND MITIGATION

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The opinions expressed in this chapter do not reflect those of the Texas Department of State Health Services.

INTRODUCTION

Psychiatrists may provide expert consultation and testimony for the defense regarding an accused's guilt or innocence on topics other than a pure lack of mental responsibility (insanity). Examples of exculpatory evidence in the findings (guilt or innocence) phase include testimony on the effect of intoxication or psychiatric conditions on mens rea (criminal intent), testimony concerning a victim's psychiatric state of mind, and defenses other than insanity such as mistake of fact as to consent and self-defense. Psychiatrists may also consult and testify on extenuating and mitigating factors during the sentencing phase of the court-martial to reduce the severity of the punishment. Exculpatory evidence from the guilt-innocent phase of the trial, whether deemed admissible or not, may be admissible and pertinent in the sentencing phase. Consistent with the language in the *Manual for Courts-Martial United States (MCM)*,¹ in this chapter exculpatory refers to expert witness testimony in the findings phase of

the court-martial, whereas extenuating and mitigating refer to an expert witness role in the sentencing phase. The statutes defining these terms and the grounds for defenses are contained within the MCM, although some offenses, such as Article 120, rape and sexual assault, undergo periodic and sometimes significant alterations.

Psychiatrists should consult with defense attorneys after the court has formally appointed them as a defense expert. As a confidential consultant, the psychiatrist does not testify and is included under attorney-client privilege. A psychiatrist may start as a confidential consultant and become an expert witness. Only after the psychiatrist is placed on the expert witness list do his or her data and opinions become open to discovery and subject to interview by the opposing party. This chapter is intended to touch on aspects of criminal defense in which a forensic psychiatrist may be involved, but it is not an exhaustive list of every possible defense or scenario.

EXCULPATORY DEFENSES DURING THE FINDINGS PHASE

Mens Rea Defenses

The findings phase of a court-martial is that part that culminates in a finding of guilty, not guilty, or not guilty only by reason of lack of mental responsibility ("insanity"). Rule 916(k) in the MCM's Rules for Courts-Martial (RCM) not only provides the basis for the insanity defense as described in chapter 4, but also provides for situations in which a defense of "partial mental responsibility" is possible. Unlike the insanity defense, a defense of partial mental responsibility is not an affirmative defense. Rather, it is an attempt to cast reasonable doubt on the government's proof of an element of the crime, namely the presence of specific intent. RCM 916(k) in the MCM states that mental health evidence not amounting to an insanity defense is not admissible unless it shows whether an accused entertained ("had") a state of mind—that is, mens rea—necessary to be proven as an element of the offense.¹ RCM 916(l)(2) in the MCM builds on this, stating that voluntary intoxication is not generally a defense, but may raise reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if that is an element of the offense.¹ Note the subtle change of wording from "entertained" to "existence" between the two sections, yet the terms appear to be equivalent as far as saying that one either has specific intent or does not have it, rather than an in-between state. Thus, the door is left

open for psychiatric testimony on specific intent crimes for noninsane mental states of an accused. Refer to Exhibit 5-1 for a list of all crimes in the MCM containing a specific intent element (often phrased merely as "intent" in the language of the crime).

A brief discussion of mens rea and specific intent is conducive at this point. Common law and legislative history have traditionally broken down criminal acts, excluding strict liability crimes, into two key components: (1) mens rea, or a "guilty mind," and (2) actus reus, or the "guilty act." Mens rea is traditionally broken into two components of relevance: (1) general intent, and (2) specific intent. In broad terms, general intent crimes are ones in which the overall mindset is to commit a crime that only has an immediate effect on a victim. Specific intent crimes require an added degree of purpose and knowledge, such as a long-range goal beyond just the immediate effect, or a second action taken after the first criminal action. For example, being absent without leave (AWOL) is usually a general intent crime, but desertion is a specific intent crime. Unpremeditated murder is a general intent crime, whereas premeditated murder is a specific intent crime.

A specific intent crime carries a greater degree of culpability. Crimes in the punitive articles of the MCM are designated as specific intent crimes by having language to that effect as an element of the crime. Not all crimes fit neatly into these two categories, and the

EXHIBIT 5-1

LIST OF ALL UNIFORM CODE OF MILITARY JUSTICE CRIMES CONTAINING A MENS REA/ SPECIFIC INTENT ELEMENT

- Attempted murder or manslaughter
- Attempted mutiny
- Solicitation
- Desertion
- AWOL: specific intent is contained only in certain aggravating factors
- Missing movement
- Assaulting or willfully disobeying superior officer
- Mutiny and sedition
- Releasing prisoner without proper authority
- Noncompliance with procedural rules
- Misbehavior before the enemy
- Subordinate compelling surrender
- Aiding the enemy
- Spies
- Espionage
- False official statements
- Military property: sale, loss, damage, destruction, wrongful destruction (for those requiring willfulness)
- Nonmilitary property: waste, spoilage, destruction
- Improper hazarding of vessel
- Wrongful use or possession of controlled substances (with intent to distribute)
- Malingering with intentional self-injury
- Premeditated murder
- Felony murder
- Voluntary manslaughter
- Assault with intent to commit voluntary manslaughter
- Aggravated assault (intent to inflict great bodily harm)
- Death or injury of an unborn child (with intent to kill)
- Maiming
- Robbery
- Forgery
- Larceny
- Extortion
- Frauds against the United States
- Burglary
- Making check, draft, or order without sufficient funds
- Housebreaking
- Obtaining services under false pretenses
- Lewd act involving a child
- Indecent exposure
- Indecent broadcasting

Article 120 Offenses:

- Rape
- Sexual assault
- Aggravated sexual contact
- Abusive sexual contact

Article 134 Offenses:

- Assault with intent to commit another listed crime
- Bribery and graft

(Exhibit 5-1 continues)

Exhibit 5-1 *continued*

- Burning with intent to defraud
- Child endangerment
- Child pornography (possession with intent to distribute)
- Disloyal statements
- False or unauthorized passes
- Obtaining services under false pretenses
- False swearing
- Impersonating with intent to deceive
- Jumping from vessel into water
- Mail: taking, opening, secreting, destroying, or stealing
- Obstructing justice
- Wrongful interference with an adverse administrative proceeding
- Public record: altering and related acts
- Breaking of medical quarantine (only listed in *Military Judges' Benchbook* as a specific intent crime)
- Seizure: destruction, removal, or disposal of property to prevent
- Soliciting another to commit an offense
- Threat or hoax designed or intended to cause panic or public fear
- Communicating a threat

AWOL: absent without leave

Data sources: (1) US Department of Defense. *Manual for Courts-Martial, United States (2012 Edition)*. Washington, DC: DoD; 2012. (2) US Department of the Army. *Military Judges' Benchbook*. Washington, DC: DA; 2010; 169–171. DA PAM 27-9.

dividing line that makes some crimes have specific intent can be nebulous. No single list of specific intent crimes exists that applies to all state and federal/military laws and codes; one must always consult the relevant statutes to determine whether a crime is defined as general or specific intent. Finally, mens rea is often used synonymously with specific intent in many law statutes and scholarly articles, including military documents. The terms will be used interchangeably throughout the rest of this chapter.

Partial Mental Responsibility

The defense of partial mental responsibility is distinguished from “diminished capacity” defenses because it is not an affirmative defense. Rather, like most of the “special defenses” in the MCM (see Other Defenses), the government must prove that the defense did not exist beyond a reasonable doubt. Nonetheless, this is a procedural difference, while the actual content of psychiatric testimony will overlap with what one might see in a diminished capacity defense. Diminished capacity has different variants according to legal literature, and a complete description is beyond the scope of this military-oriented chapter.²

In the military, such testimony is technically allowed only when the testimony is to negate the presence of specific intent, not a mere impairment

in forming it. In practice, despite the exact wording, military courts may give wide latitude to mens rea testimony, including testimony concerning merely an impaired capacity to form specific intent rather than a complete absence of specific intent. An additional work-around is an expert who testifies that a condition such as intoxication or severe depression caused a diminishment of ability to form specific intent, without offering an ultimate opinion as to whether the specific intent actually existed. The fact finder would have to decide that issue. Finally, even if a fact finder disregards a mens rea defense, the testimony would still be usable and ripe for further exploration in the sentencing phase of the court-martial, as described later in this chapter.

Before 2004, the MCM forbade a defense of partial mental responsibility even to dispel elements of the crime dealing with specific intent. This action stemmed from the language of the Insanity Defense Reform Act of 1984, which many read as disallowing all psychiatric testimony other than that aiming to prove insanity. The US Court of Military Appeals eventually found this interpretation to be constitutionally lacking and with no evidence of congressional intent for an absolute restriction of this defense.³ In contrast, in *Clark v Arizona*, the US Supreme Court held that a state could choose to bar any psychiatric testimony concerning the presence or absence of a mens rea.⁴

A worthy distinction is that a successful insanity defense does not require disproving the presence of specific intent, and lack of mens rea does not mean one was insane. An accused person found to have lacked mental responsibility may have actually formed general and specific intent to commit the crime, but the reality or basis behind the formation of said intent was “insane” due either to delusion, mind disorganization, or another severe mental state. In other words, insanity deals with the underpinning of the tapestry upon which intent is formed. For example, an individual functioning under a delusion, who plots and executes the killing of his coworker because of a false belief that the coworker is plotting to assassinate him for a foreign government, may possess specific intent to premeditate murder (under the umbrella of self-defense) while also possibly being insane from not appreciating the true nature of his conduct (killing an innocent person).

Although this concept may seem contradictory, in that the historical concept of insanity was that mens rea did not exist in an insane individual, the answer is that mens rea is defined differently in the modern era. Modern laws interpret mens rea as “conscious awareness,” as opposed to the more generalized interpretation that was used in past centuries when insanity concepts were first formulated.⁵ Mens rea in the modern sense focuses primarily on this awareness as the element of a crime, and no longer equates it with criminal responsibility. Whether this is an accurate breakdown of how the human mind works is beyond the scope of this chapter; it is simply a statutory decision with which psychiatrists must work.⁶

Additionally, an insanity defense is an affirmative defense, whereas a mens rea defense is a regular defense against the prosecution’s requirement of finding the accused guilty of every element of the crime beyond a reasonable doubt. Thus, an insanity defense may be brought forward for a general or specific intent crime, whereas the partial mental responsibility defense can only be used for a specific intent crime. By successfully disproving the presence of specific intent but no other element, the accused may still be found guilty of a lower, general intent form of the crime, or in some cases, simply not guilty. The first scenario allows for a lesser sentence. Experts are generally advised to be well prepared when offering testimony toward mens rea because considerable controversy exists over any expert’s ability to parse out one aspect of cognition and state that it was compromised or nonexistent because of psychiatric factors. One should also be aware that attempted crimes (unsuccessful criminal attempts) all carry a specific intent element.

Voluntary Intoxication

Voluntary intoxication refers to an individual’s conscious decision to ingest alcohol or drugs. Considering that violent crimes occur when individuals are intoxicated, intoxication can seemingly provide the basis for many exculpatory defenses. However, voluntary intoxication is statutorily forbidden for use as a defense (including insanity), except for disproving that an accused could have formed specific intent. Even then, RCM 916(1)(2) explicitly forbids the use of a voluntary intoxication defense to reduce premeditated murder (a specific intent crime) to any lesser charge other than unpremeditated murder (a general intent crime).¹ To put this in a different light, voluntary intoxication can never be used as a defense in any way for a general intent crime. The expert consultant should discuss with the consulting attorney to determine whether any of the charged crimes includes a specific intent crime, or check the exact statutory language in the MCM. A defense of voluntary intoxication could be used for a charge of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact, which are collected under Article 120 in the MCM.¹ All four of these charges include permutations of the presence of a sexual act, sexual contact, and a lewd act, all three of which are specific intent elements. The MCM defines these three elements as having “an intent to abuse, humiliate, harass, or degrade any person, or to arouse or gratify the sexual desire of any person.”¹ In short, voluntary intoxication of an accused could be used to negate the mens rea component of this definition, and thus reduce a rape or sexual assault charge to simple assault or battery (general intent crimes). This defense is rarely used, however, because it implies that the accused knew that the victim was not consenting to the sexual act, and the defense may not appeal to the sensibilities of a jury of peers. Defense attorneys usually pursue other defenses to establish that the victim consented to a sexual act and is either mistakenly or deliberately alleging that it was a nonconsensual act.

Posttraumatic Stress Disorder

Posttraumatic stress disorder (PTSD) may be viable as a mens rea defense in terms of both general symptoms of the behavioral disorder and voluntary intoxication. PTSD sufferers often abuse alcohol, drugs, or prescription medications, and may commit illegal acts while both intoxicated and dealing with acute symptoms of their illness. The symptom of anger, and poor control of that anger, could lend itself to a theory of impulsive behavior, rather than planned, purposeful action. In a sense, although the concept of an irresistible

impulse has been stricken from the present day military insanity defense the concept could see limited play in casting reasonable doubt on mens rea, especially in specific intent crimes involving PTSD sufferers.

Involuntary Intoxication

Voluntary intoxication is distinguished from involuntary intoxication, in which a person unknowingly ingested a substance either by accident or by surreptitious means by another individual. Involuntary intoxication may therefore be used as the basis for an insanity defense, not just a mens rea defense, and may also be used as a defense in general intent crimes.³ A potential gray zone between voluntary and involuntary intoxication exists in cases in which an individual taking prescribed medication, such as zolpidem or oxycodone, drinks alcohol and proceeds to display bizarre behavior and/or have a memory blackout resulting from the substances' unanticipated additives or synergistic effects. Evidence in such a case might focus on whether the individual received instructions not to drink while on such medication. Nonetheless, a possible defense against forming specific intent exists here. A similar example is an accused person who is prescribed benzodiazepines and opioid painkillers through different providers and engages in bizarre or assaultive behavior from the combined effect of all medications. Since alcohol was not involved in the latter example, the accused could argue that his or her "intoxication" was involuntary and of an etiology beyond his or her understanding.

Heat of Passion

An interesting defense of psychiatric relevance concerns the distinction between premeditated murder and voluntary manslaughter. Both premeditated murder and voluntary manslaughter involve the deliberate act of killing another human being with specific intent. However, the presence of "heat of passion" could reduce the premeditated murder charge to voluntary manslaughter. Heat of passion is not an affirmative defense: If the defense raises the issue, the prosecution must present evidence to the contrary. Per Article 119 in the MCM, heat of passion refers to when "adequate provocation" causes "uncontrollable excitement in a reasonable person."¹ The *Military Judges' Benchbook* defines heat of passion as "a degree of rage, pain, or fear which prevents cool reflection."⁷ Examples of adequate provocation include a great fear of impending bodily harm, unlawful imprisonment, and "the sight by one spouse of an act of adultery committed by the other spouse."⁷ A heat of passion killing must occur in close proximity to the provocation; otherwise the

evidence for premeditation is bolstered. Psychiatric expert testimony regarding an accused's emotional capacity and ability to regulate emotions could be admissible.^{8,9} The case of *US v Schap* provides discussion of the military judge's explanation of the link between heat of passion and mens rea, as well as procedural issues regarding the admissibility of a psychiatrist's testimony concerning the mental state at the time of offense.¹⁰ The *Military Judges' Benchbook* provides instructions to the fact finder that "you may consider evidence of the accused's passion in determining whether he/she possessed sufficient mental capacity to have the premeditated design to kill."⁷ A hypothetical case could involve an accused person with PTSD with poor heightened anger responses who kills another person. An expert could testify about the anger issues that predisposed the accused to act under a heat of passion in response to a provocation, especially if that provocation was a psychological cue pertaining to a past combat traumatic experience.

Actus Reus Defenses

Another common area for defense expert consultation and testimony involves various scenarios in which the accused did not actually commit the actus reus, or criminal act. Mens rea need not be countered if doubt can be cast that a crime was actually committed. A defense that could lead to complete exoneration of the accused for a crime is termed a complete defense. A frequently seen request is for the expert to opine on whether any scientific or behavioral explanation exists for a victim falsely or incorrectly alleging that the accused is the perpetrator of a crime. For example, in a rape case, the defense may gain access to evidence of a victim's behavioral health history, and ask for opinions on whether a history of sexual abuse or borderline personality disorder might contribute to a false rape claim or a misperception of consensual sex as being rape after the fact. Experts might also opine on the characteristics of memory formation, eyewitness identification, and confabulation, which might lead to a victim's false memory of the alleged crime. A victim's alcohol or substance use is a commonly seen factor that may adversely affect the latter situations, or even a no-memory situation (resulting from a blackout).

In these situations, the expert for the defense may be called upon to educate the military panel on topics such as the toxicological effects of alcohol, the effects of childhood abuse on adult functioning, or the reliability or suggestibility of child witnesses. The scientific literature supporting memory misattribution of witnesses is termed source monitoring theory.¹¹ The limits of this type of testimony are that the expert may not have an opportunity to interview the victim, and

the expert must not opine about whether that person is or is not being truthful.¹² The latter is a prohibition established through prior appeals-level cases that the ultimate decider of a victim's credibility is left to the fact finder—not the expert—and that an expert's conjectures would too often be more prejudicial than probative.

Automatism is a special legal term that refers to acts committed in an unconscious or semi-unconscious state, such as sleepwalking or epilepsy (ie, temporal lobe status epilepticus). No specific language concerning an automatism defense exists in the MCM. It could be argued that an unconscious individual cannot form either general or specific intent. An insanity defense that places the individual in a status of civil commitment because of "lack of mental responsibility" also seems inappropriate for someone who was in a temporary state of automatic behavior. Decisions by the Court of Military Appeals as of 1993 seemed to hold that automatism was a defense that no actus reus occurred and, therefore, could allow for a not guilty verdict (a "complete defense").¹³ However it is used, psychiatrists can clearly testify about the evidence of an actual sleep disorder or medical condition that could have occurred during the criminal behavior. The case of *US v Savage* is an example of use of this defense in a relatively recent Army court-martial.¹⁴

Other Defenses

This category, referred to as "special defenses" in RCM 916, involves admitting to committing an actus reus, but disputing the assumptions underlying the charge, saying that things were not as they seemed. Examples include self-defense, provocation, duress, mistake of fact, obedience to military orders, and entrapment. Insanity and partial mental responsibility, described above, are also special defenses. Many of the special defenses described here are also complete defenses in that they may lead to a not guilty verdict if successful. In each case, the accused is proffering a

legally sanctified or exculpatory reason for why he or she engaged in an alleged crime. An expert's role in these cases includes assessing the accused's rationale for believing that he or she had to commit the alleged crime, the impact of psychiatric conditions or states on that belief, and whether any collateral information supports this belief. Self-defense may include not only scenarios in which one is defending oneself against an immediate threat, but also situations in which someone is defending against a future threat. Key examples of psychiatric relevance are a battered spouse, a child or adult victim of ongoing sexual abuse, or a soldier in a combat zone who may respond to implied or nonexistent threats in an exaggerated or lethal manner resulting from past trauma exposure. Mistake of fact may lend itself to military rape cases in which the defense could argue that the accused mistakenly believed that the victim consented to sexual intercourse while intoxicated. However, RCM 916(j)(3) also specifies that mistake of fact is a mistake that can be made by a reasonable, sober adult; as such, intoxication of the accused cannot be used to put forward this defense.¹ A psychiatric expert's role necessarily involves testimony concerning alcohol effects and whether the facts of the case support or refute varying degrees of intoxication by the victim and the accused.

On a procedural note, only the insanity defense and the defenses of mistake of fact as to consent and mistake of fact as to age are affirmative defenses. For all other defenses such as self-defense, the burden is on the government to prove that the defense did not exist by beyond a reasonable doubt, as stated in RCM 916(a).¹

An expert defense consultant should consult the MCM about the charges that the accused is facing, and have some familiarity with any special defenses that could counter an element of the crime. Military attorneys have varying degrees of comfort in constructing psychiatric defenses for their clients, and they may benefit from a forensic psychiatrist's reasoned medico-legal opinion.

EXTENUATING AND MITIGATING EVIDENCE DURING THE SENTENCING PHASE

The military psychiatrist may serve as a confidential defense consultant or be called in as an expert witness for the defense to opine upon mitigating and extenuating circumstances.¹⁵ The MCM defines a "matter in extenuation of an offense" as "[explaining] the circumstances surrounding the commission of an offense, including those reasons for committing the offense that do not constitute a legal justification or excuse."¹ The MCM defines a "matter in mitigation of an offense" as evidence to "lessen the punishment to be adjudged by the court-martial, or to furnish grounds

for a recommendation of clemency."¹ The rules on the admissibility of evidence by the defense in the sentencing phase are "relaxed" per the MCM.¹

RCM 1001-1009 governs sentencing in the military. Relevant evidence of interest to a forensic psychiatrist includes presence of a psychiatric diagnosis, need for treatment, evidence of past compliance with psychiatric treatment, support network for the accused, expected psychosocial stressors in the future, and a risk assessment for the likelihood of recidivism. Many of these terms are grouped under the rubric of

“rehabilitative potential” in RCM 1001.¹ The *Military Judges’ Benchbook* states that rehabilitation of the wrongdoer is one of the five key principles of sentencing, and it gives a sample instruction to the panel as “weight given to any and all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.”⁷

Every charge in the MCM contains a “maximum sentence” specifier.¹ A few charges, such as murder, may include a minimum sentence specifier. If an accused person is found guilty of more than one charge, and if those charges are not overlapping (termed “multiplicity” in the MCM), the maximum sentences may be combined in an additive manner. Except for a few circumstances, no formula exists for setting a minimum sentence, such as a guilty verdict on a charge carrying a 15-year maximum confinement and another carrying a 20-year maximum confinement resulting in a minimum 15-year confinement. These rules, and rules for establishing minimum separation and confinement punishments for offenders with two or more prior convictions, are contained in RCM 1003. Military fact finders may choose any degree of punishment that is deemed appropriate. Part of the reason for this system is that many charges carry overlapping sentences, such as forfeiture of pay and separation from service. Rather than deliver three separation sentences, they are merely rolled up into one separation sentence, which is different from the US Sentencing Guidelines that lay out tables for finding appropriate sentencing ranges. The sentence for any offense not listed in MCM’s maximum punishment chart in appendix 12 and not subsumed under included or related offenses will be determined according to the US Code (federal law).

In rare noncapital cases, MCM’s Article 134 allows for prosecution for crimes under the US Code, rather than the MCM, under the rubric of a “State law [becoming] Federal law of local application.”¹¹ Technically, the crime would fall under Article 134 and include only specific violations related to Section 13 of Title 18 of the US Code. This section relates to a specific grouping of crimes including violation of a federal law such as counterfeiting or certain attempts to defraud the federal government. In the court-martial of Bradley Manning, the military chose to pursue charges for violation of the Espionage Act under Title 18. Using this procedure involves the US Sentencing Guidelines that use a complex table of minimum punishments and methods of adding crimes together to generate sentences. Some guidelines delineate what types of mitigating evidence is admissible based on the type of crime involved.¹⁶

One key aspect of a case of an accused person with a need for psychiatric treatment is whether his or her discharge from service will be of such a character

as to preclude him or her from receiving Veterans Affairs benefits (ie, psychiatric care). A military fact finder may be inclined to deliver punitive measures such as separation, but keep the access to medical care intact so that the accused has a greater chance to be rehabilitated.

The defense may call upon the consultant or expert witness to examine the defendant (although sometimes the defense may want the consultant/expert witness to review documents only). If called upon to examine the defendant, the consultant/expert witness should perform the evaluation without bias and in the same manner as previous evaluations of the accused. The evaluation of a case for sentencing is similar to the evaluation performed in a sanity board, such as reviewing charge sheets, police records, and witness statements; completing a thorough history; gathering collateral data; and reviewing all available medical and behavioral health records. A careful mental status examination focusing on mental disturbances that do not meet criteria for legal insanity should be examined.¹⁵ The defendant and character witnesses should be instructed to be truthful and not hide “bad information” because such information could potentially be useful.¹⁵

The consultant/expert witness may be asked to explain behaviors that seem counterintuitive (eg, battered woman syndrome), discuss the risk for recurrent behaviors, review a sanity board report, discuss extenuating or mitigating circumstances, or “translate” behavioral health/medical records, for example. As part of the consultant’s ethical duty to remain neutral and objective, he or she must also be cognizant of potential aggravating factors or malingering of psychiatric symptoms that may weigh against or disprove extenuating and mitigating factors. An accused’s report of extenuating or mitigating factors also must be evaluated for honesty and feasibility, and it should be supported by collateral information to the greatest extent possible. The expert must assist the defense attorney in determining how strong the data are, and whether it could “backfire” through exposure of factors such as poor medical compliance, lack of insight into illness, continued substance abuse, or lack of empathy for victims.

Testimony should be objective in nature. The expert should explain the actions of the accused rather than excuse the actions.¹⁷ Because the panel has already rendered a verdict, the expert must be careful to avoid giving testimony that would appear to question the panel’s decision.¹⁷ The following section will cover some examples of extenuating/mitigating circumstances in sentencing.

EXAMPLES OF EXTENUATING/MITIGATING CIRCUMSTANCES

Diminished Capacity

Diminished capacity has relevance in the sentencing phase, although the term itself may never actually be spoken in discussions with the defense attorney. As stated above, psychiatric evidence that informs as to the accused's rehabilitative potential is relevant to the fact finder. The expert witness/consultant evaluates the defendant to determine whether he or she had a mental illness that significantly impaired his or her ability to (a) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason, or (b) control behavior that the defendant knows is wrongful. No stated restriction against sentencing testimony regarding voluntary intoxication exists in the MCM¹; in fact, discussing an accused's substance issues and willingness to start or extend treatment would be highly relevant.

In essence, any and all mental health conditions are potentially relevant and admissible at the sentencing phase, including, but not limited to, depression, intermittent thought disorders, impulse control disorders, and paraphilias. The expert should ensure that the defense attorney knows the potential drawbacks to such information. For instance, an accused with an incident of domestic violence while intoxicated may not present well if he or she denies having an alcohol problem, continues to drink heavily, and does not think he or she needs any treatment to improve behavior in relationships.

Posttraumatic Stress Disorder

PTSD is a common issue for assessment given the recent decade of prolonged armed conflicts in Iraq and Afghanistan. The presence of a dissociative flashback as the basis for an insanity defense is extremely rare, but the presence of anger problems and comorbid substance abuse is very common. PTSD plays well to military panels, especially when there is an admirable service record and positive character testimony from commanders and senior enlisted personnel. Common themes include the fact that avoidance of treatment or self-medication with alcohol are extremely common in PTSD sufferers, and that anger is worsened by the nature of the illness, insomnia, intoxication, environmental cues or triggers, and hypervigilance. Poor anger control leads to inappropriate responses exceeding what the situation required, or just plain impulsive behavior.

Physical/Sexual Abuse as a Child

Physical/sexual abuse as a child and/or exposure to domestic violence can be considered an extenuating/mitigating circumstance, especially if the abuse or exposure to domestic violence was extraordinary and the expert can show that the extreme childhood abuse caused mental health symptoms that contributed to the accused's commission of the offense.¹⁷

Mental Retardation

The US Supreme Court cases *Atkins v Virginia* and *Penry v Lynaugh* include comments that individuals with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . often act on impulse rather than pursuant to a premeditated plan, and . . . are followers rather than leaders."¹⁷⁻¹⁹ Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability" and mental retardation may render a defendant "less morally culpable than defendants who have no such excuse."¹⁷⁻¹⁹

Brain Injury

Although cases of blunt force trauma or intracranial hemorrhage have long been associated with behavioral and emotional changes, mild traumatic brain injury has also become a common diagnosis among Operation Iraqi Freedom and Operation Enduring Freedom veterans. Behavioral changes of forensic relevance include difficulty controlling anger, sleep disturbances, depression, and cognitive problems. Discussing the presence of these issues may help the fact finder to determine an appropriate severity of punishment, especially in regard to retention or removal of Veterans Affairs medical benefits if the service member is separated from active duty.

Risk Assessment

Risk assessment refers to an assessment of an accused's likelihood of re-engaging in an act of physical and/or sexual violence in the future, either in or out of a confinement facility. The fact finder will be interested to know the likelihood of recidivism and future factors that may increase that risk. The fact finder should weigh the need to protect the public versus giving offenders a

second chance to redeem themselves.²⁰ Specialized versions of such assessments may include the likelihood of repeat domestic violence, recidivism by mentally ill populations as opposed to nonmentally ill populations, and child perpetrators. The state of the art in this field is increasingly seeing the incorporation of structured psychological instruments and actuarial instruments, the use of which is recommended but beyond the scope of this chapter.²⁰ Psychiatrists may use all of these instruments, such as the Static-99 and Stable-2007 for sexual violence risk, the Hare Psychopathy Checklist-Revised, or the HCR-20 for violence risk, although a period of supervision is recommended.²⁰

Death Penalty Cases

The stakes for an expert presenting extenuating and mitigating evidence for the defense do not get

higher than when the death penalty is on the table. In these circumstances, the government must present evidence for one or more of the aggravating factors listed in RCM 1004(b)(2). The fact finder must decide that any aggravating factors outweigh any extenuating or mitigating factors as one requirement in reaching a death sentence. Aggravating factor evidence of psychiatric interest includes the emotional impact of the crime against the victim or victim's family members. The extenuating or mitigating evidence presented by a defense expert involves issues specific to the accused, as listed above, so there is not necessarily a direct overlap between the nature of the evidence presented by both sides. The higher the stakes of the case, the more adversarial the cross-examination of witnesses, so the expert should take extra precaution as to the accuracy and basis of any opinions rendered.

EXAMPLE OF EXTENUATING/MITIGATING CIRCUMSTANCES IN COURTS-MARTIAL

According to the Military Justice Statistics Fact Sheet, the top seven US Air Force offenses (specifications) tried in courts-martial from 1 January 2000 to 30 June 2012 in descending order were:

- use of controlled substances,
- wrongful use of marijuana,
- willful dereliction of duty,
- making a false statement,
- distribution of controlled substances,
- failure to obey a lawful order, and
- other offenses under Article 134.²¹

Partial mental responsibility cannot be claimed during the guilty-innocence phase for behaviors exhibited while voluntarily intoxicated unless it relates to a specific intent element of the charge. It is not uncommon for individuals charged with use of controlled substances or wrongful use of illicit substances to claim that they were self-medicating to treat their mood or anxiety symptoms. Here is an example:

Case Study 5-1: A US Air Force female E-6/Technical Sergeant was accused of wrongful use of a controlled substance (methamphetamine) after two positive command-directed urine drug screens. She stated that her life started to become stressful in late 2011. She reported that she switched commands during that time and was doing a job that she had never worked at previously. She reported that the upcoming holidays (with a trip planned to see her parents), her best friend's deployment (and caring for the friend's place), arguments with her stepfather, and juggling

four children added to her stress. She stated that she was playing poker around 1 month later with individuals known to use illicit substances and/or acquire illicit substances. Because of feeling overwhelmed with stress in her life, she asked one of the individuals at the card tournament to purchase "ice" and gave this individual \$300 for the purchase. She reported that the individual provided her with methamphetamine within 1 hour. The service member subsequently went home and told her husband of her purchase. She claimed that he was supportive and used "ice" with her. When asked what her thoughts were around the time of use, she stated, "I knew it was wrong but I just didn't care . . . it [stress] was getting too much." She reported snorting "a few lines" of methamphetamine in 1 hour that night, with its intoxicating effects lasting 6 hours per line. She then used the remainder of the substance over the following week. She reported that methamphetamine "made me feel like I had a lot of energy and care-free . . . I was awake a lot so I got a lot of things done." Her first positive urine drug screen was 3 to 4 days after her last use of methamphetamine.

During that same time period, she, her husband, and their children went out of state to visit her mother and stepfather. Her mother and her stepfather have been divorced for 2 years. When she visited her stepfather, she stated that he called her mother names and her brother was often yelling at her. When she visited her mother, she stated that her mother "likes attention and is a pro guilt tripper." She reported that this trip was not pleasant. In addition, she reported that she and her husband had been arguing more as she was trying to make changes in her marriage. Upon their return to

home, she stated, “I made it for a few days before I broke down.” She claimed that her husband asked her if she wanted to use meth again. She had contemplated this request for some time before responding “yes.” The service member stated that her husband procured methamphetamine for them to use. She reported that she snorted two to three lines of methamphetamine for 1 day, with its intoxicating effect lasting about 4 hours per line. Her second positive drug screen was 3 to 4 days after that use. She reported that she was glad her urine drug screen was positive because “I can’t stop [using] on my own.” She reported that she has a history of methamphetamine use as a teenager and reported, “this [drugs] is what I knew growing up . . . everyone used in my town.”

She endorsed feeling increasingly depressed before using methamphetamine from the stressors outlined above. At times, she stated that “I would drive and picture myself hitting my car into things . . . I had other people drive me at times because I didn’t trust myself.” She denied attempting to harm herself during this time period. She admitted to being sporadically compliant with her antidepressant medication for about 6 months before the illicit substance use (her last contact with a mental health clinic at the time of alleged events). When asked why she didn’t go to the mental health clinic for help at that time, she stated, “My pride didn’t

allow it . . . I hadn’t been back since 6 months ago.” She continued to work and denied occupational impairment during the above-mentioned time periods. She denied using methamphetamine as a method to harm herself. She admitted using meth to “escape reality [my stress].” She denied experiencing manic, psychotic, or anxiety symptoms during the above-mentioned time periods. She stated that “I was hoping to block everything I was feeling out for just a little while and feel a little happier” as her reason for using methamphetamine. When she had to undergo a urine drug screen, she told investigators, “I immediately feared for my family, especially my kids’ futures after I had made such a terrible mistake . . . I have felt stupid, angry, sad . . . most of all sorry for the decision I made.”

Although she was experiencing depressive symptoms around the time of her alleged use (on both occasions), there was no evidence that her depressive symptoms interfered with her ability to appreciate the nature and quality of her actions or her ability to distinguish right from wrong. Given that she had a history of depression and was experiencing depressive symptoms at that time, her defense team used her history of mental illness to get a reduction of her prison sentence from 1 year to 6 months and a discharge of other than honorable conditions (as opposed to bad conduct discharge).

SUMMARY

The military system for courts-martial allows for psychiatric testimony in both guilt versus innocence and determination of sentence. Psychiatric testimony regarding the absence of mens rea could result in a guilty finding for a reduced charge, thus resulting in a potentially reduced sentencing maximum. Psychiatric

testimony at sentencing as to behavioral health conditions that affected judgment or emotional control could also reduce the maximum sentence if the fact finder finds the information compelling. A forensic psychiatrist defense consultant should work with the attorney to explore any and all avenues that may assist in the defense of the case.

REFERENCES

1. US Department of Defense. *Manual for Courts-Martial, United States (2012 Edition)*. Washington, DC: DoD; 2012.
2. Arenella P. The diminished capacity and diminished responsibility defenses: two children of a doomed marriage. *Columbia Law Review*. 1977;6:828–867. <http://www.jstor.org/>. Accessed January 10, 2014.
3. Criminal Law Department, The Judge Advocate General’s Legal Center and School, US Army. *Practicing Military Justice*. Charlottesville, VA: Author; April 2013:6–37.
4. *Clark v Arizona*, 126 S. Ct. 2709 (2006).
5. Gennetti A. Criminal law: distinguishing lack of mens rea from insanity. *Villanova Law Review*. 1988;33:669. <http://digitalcommons.law.villanova.edu>. Accessed January 10, 2014.
6. Morse S, Hoffman M. The uneasy entente between legal insanity and mens rea: beyond *Clark v. Arizona*. *J Criminal Law and Criminology*. 2007;97:4.

7. US Department of the Army. *Military Judges' Benchbook*. Washington, DC: DA; 2010; 169–171. DA PAM 27-9.
8. *US v Staten*, 6 MJ 275 (1979) (CMA) .
9. *US v Jackson*, 6 MJ 261 (1979) (CMA).
10. *US v Schap*, 49 MJ 317 (1998) (CAAF).
11. Johnson M, Hashtroudi S, Lindsay DS. Source monitoring. *Psychol Bull*. 1993;114:3–28.
12. *US v Arruza*, US Army Court of Military Appeals (1988).
13. Davidson M, Walters S. United States v. Berri: automatism defense rears its ugly head. *The Army Lawyer*. 1993:17–26.
14. *US v Savage*, US Army Court of Criminal Appeals (2006).
15. Lande RG, Armitage DT. *Principles and Practice of Military Forensic Psychiatry*. Springfield, IL: Charles C Thomas; 1997.
16. 2013 *United States Sentencing Commission Guidelines Manual*. http://www.ussc.gov/Guidelines/2013_Guidelines/index.cfm. Accessed May 22, 2014.
17. Levine MR. *128 Easy Mitigating Factors: Cases Granting, Affirming, or Suggesting Mitigating Factors*. 2006. http://sentencing.typepad.com/sentencing_law_and_policy/files/128_easy_mitigating_factors_feb_2006_toc.doc. Accessed May 22, 2014.
18. *Atkins v Virginia*, 536 US 304, 318 (2002).
19. *Penry v Lynaugh*, 492 US 302, 322 (1989).
20. Mossman D. Assessing predictions of violence: being accurate about accuracy. *J Consult Clin Psychol*. 1994;62:783–792.
21. US Air Force Legal Operation Agency. *Air Force Military Justice Statistics Fact Sheet (for period 1 January 2000 to 30 June 2012)*. Accessed through Automated Military Justice Analysis & Management System database on July 13, 2012.