



Drivers, by Elzie Golden, charcoal/pastel on paper, Iraq, 2005.
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Chapter 11

PSYCHIATRIC ASSISTANCE IN CAPITAL CASES

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INTRODUCTION

Both capital punishment and capital trials in the military justice system have been infrequent. The last military execution occurred on April 13, 1961, when John A Bennett was hanged after being convicted of rape and attempted murder.¹ Subsequently, *United States v Matthews*,² a ruling following the lead of *Furman v Georgia*, declared military capital sentencing procedures unconstitutional for failing to require a finding of individualized aggravating circumstances.³ President Ronald Reagan signed an executive order in 1985 reinstating the death penalty with detailed rules for capital courts-martial, delineating a list of 11 aggravating factors that could qualify defendants for death sentences.⁴ Between that order and March 2008, 47 capital courts-martial proceedings led to 15 adjudicated death sentences, a rate of 31.9%.¹ Two of those sentences were commuted to life sentences by commanding generals, and others have been overturned or commuted on appeal.¹

As of this writing, five inmates were housed on death row at the US Disciplinary Barracks at Fort Leavenworth, Kansas¹:

1. Ronald Gray,
2. Dwight Loving,
3. Hasan Akbar,
4. Timothy Hennis, and
5. Nidal Hasan.

Another inmate, Andrew Witt, just had his sentence overturned awaiting further appeal.

Before leaving office, on July 28, 2008, President George W Bush had approved the execution of Ronald Gray,⁵ a former Army private convicted of two counts of premeditated murder, one count of attempted premeditated murder, three counts of rape, two counts of robbery, and two counts of forcible sodomy.⁶ On November 26, 2008, a federal judge granted Gray a stay of execution to allow time for further appeals.⁵

However, recent events suggest that military capital trials may become more frequent. In 2005 Hasan Akbar was convicted of two counts of premeditated murder and three counts of attempted premeditated murder from an incident involving 16 US soldiers in Kuwait.⁷ Another military capital trial was anticipated in the case of *United States v Sergeant John Russell*, who was accused of the premeditated murder of five service members at a combat stress clinic at Camp Liberty in Iraq in May 2009.⁸ Major Nidal Malik Hasan was convicted of 13 counts of murder and wounding 31 in shootings at Fort Hood, Texas. In addition, with the prospect of military tribunals trying detainees from Guantanamo Bay, there may be more capital trials involving military panels.

DEFINITION OF CAPITAL OFFENSE

Currently, the Uniform Code of Military Justice (UCMJ) defines 15 offenses for which capital punishment may be adjudged, including "mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, improper use of countersign, forcing a safeguard, aiding the enemy, espionage, improper hazarding of vessel, murder, rape, and carnal knowledge."⁹ The following may only result in a death sentence if committed during times of war: desertion, assaulting or willfully disobeying superior commissioned officer, failure to obey order or regulation, and misbehavior of a sentinel or lookout."

However, currently all five inmates on the military's death row were convicted of premeditated murder or felony murder. Article 118 of the UCMJ only allows for a death sentence in the event of a conviction for premeditated murder or felony murder in which the defendant was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson.¹⁰ An alternative punishment of life without the possibility of parole was added in 1997.¹

LEGAL PRINCIPLES

In a military capital case, the convening authority, a high-ranking commanding officer, refers the case for courts-martial and decides whether the death penalty will be sought.¹ The military panel, acting as a jury does in a civilian criminal court, must consist of at least five members. The defendant does not have the option of a bench trial before a military judge alone in a military

capital trial.¹⁰ Nor does the defendant have the option of pleading guilty in a capital military trial.¹¹

For a death sentence to be adjudicated, the military panel must unanimously agree that the defendant is guilty of a capital offense at the trial on the merits. At the sentencing hearing, the panel must then unanimously find at least one aggravating

factor exists and that any extenuating and mitigating circumstances are substantially outweighed by the aggravating factors. On the basis of unanimous findings of these criteria, the death sentence is to be imposed if the panel then agrees that death is the appropriate punishment.⁴ The convening authority then has the option of approving the death penalty or reducing it to a lesser sentence.¹ The US Supreme Court subsequently held that the Rules for Court-Martial (RCM) 1004 were constitutional in *Loving v United States*.¹²

The record of trial is then reviewed by the Court of

Criminal Appeals for the defendant's branch of service, followed by the Court of Appeals for the Armed Forces, a five-member Article 1 court that has jurisdiction over the entire military justice system. This court is composed of civilian judges appointed by the President and confirmed by the Senate to 15-year terms.¹³ The US Supreme Court has discretionary certiorari jurisdiction over capital cases heard by the Court of Appeals for the Armed Forces.^{13,14} Ultimately, the President must approve the execution before it may be carried out.¹⁵ Presently, military executions are carried out by lethal injection.¹

AGGRAVATING CIRCUMSTANCES

The death penalty may be adjudged only if the panel members unanimously find—beyond a reasonable doubt—one or more of the following aggravating factors⁴:

- (1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of violation of Article 118 (Murder) or 120 (Rape);
- (2) That in committing the offense, the accused:
 - (A) Knowingly created a grave risk of substantial damage to the national security of the United States; or
 - (B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to national security of the United States would have resulted had the intended damage been effected;
- (3) That the offense caused substantial damage to the security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of violation of Article 118 or 120;
- (4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104 (Aiding the Enemy), 106a (Espionage), or 120;
- (5) That the accused committed the offense with the intent to avoid hazardous duty;
- (6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then

an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

- (7) That, only in the case of a violation of Article 118(1):
 - (A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;
 - (B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense;
 - (C) The murder was committed for the purpose of receiving money or a thing of value;
 - (D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;
 - (E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

- (F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress-elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(c)(2), 315(c)(3);
- (G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;
- (H) The murder was committed with intent to obstruct justice;
- (I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, "substantial physical harm" means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term "substantial physical harm" does not mean minor injuries, such as a black eye or bloody nose. The term "substantial mental or physical pain or suffering" is accorded its common meaning and includes torture;
- (J) The accused has been found guilty in the same case of another violation of Article 118;
- (K) The victim of the murder was under 15 years of age;
- (8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life;
- (9) That, only in the case of a violation of Article 120:
 - (A) The victim was under the age of 12; or
 - (B) The accused maimed or attempted to kill the victim;
- (10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;
- (11) That, only in the case of a violation of Article 104 or 106a:
 - (A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or
 - (B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim. For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

A psychiatrist is unlikely to have a role in the government's presentation of aggravating circumstances at the sentencing hearing. Instead, the government may call a psychiatrist to rebut the defense psychiatrist's testimony. For example, the defense may call a psychiatrist in an attempt to nullify aggravating factors, such as those requiring a knowing or intentional mens rea. Similarly, the government may call a psychiatrist in rebuttal of the defense expert's testimony on mitigating factors.

MITIGATING CIRCUMSTANCES

RCM 1004 does not list mitigating circumstances in the same manner that it lists aggravators. Instead, it states that “the accused shall be given broad latitude to present evidence in extenuation and mitigation.”⁴ However, general rules for presentencing procedure identify several factors, including personal data and character of prior service of the accused; evidence of rehabilitative potential; matters in rebuttal to any material presented by the prosecution, including extenuating and mitigating circumstances; and evidence relating to any mental impairment or deficiency of the accused person.¹⁶

Many states delineate statutory mitigating factors, such as the following¹⁷:

1. The defendant has no significant history of prior criminal activity;
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3. The victim was a participant in the defendant's conduct or consented to the act;
4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct;
5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
6. The defendant acted under extreme duress or under the substantial domination of another person;
7. The youth or advanced age of the defendant at the time of the crime;
8. The capacity of the defendant to appreciate

the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication that was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment; and

9. Any other mitigating factor that is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.

Commonly, these other mitigating factors include history of childhood physical and/or sexual abuse, family dissolution, poverty, lack of education, expression of remorse, and rehabilitative potential, among others. In addition, no defendant with mental retardation at the time of the crime shall be sentenced to death, although preenlistment screening most likely would eliminate this possibility.¹⁸

In the preparation of mitigating evidence, *Ake v Oklahoma* provided for the services of a psychiatrist.¹⁹ More recently, *United States v Kreutzer* allowed for the services of a mitigation specialist.²⁰ Mitigation specialists are generally individuals “qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant.”¹³ Although these specialists may not actually testify, they can be essential in identifying and amassing the necessary records and conducting interviews with witnesses and family members of the capital defendant.

PSYCHIATRIC PRESENTATION OF MITIGATING CIRCUMSTANCES

Only 2% of US citizens engage in a violent act in a given year, and even fewer kill another person.²¹ Although many may utter that they would like to kill someone in moments of exasperation, few actually contemplate it. Thus, when confronted with someone who has committed a murder, it is difficult to grapple with it and to decide on a fair punishment. It is here that juries in capital trials must weigh potential aggravating and mitigating circumstances to recommend the appropriate sentence. Because these issues are so complex and often involve biological, psychological,

and social issues, testimony from a psychiatric expert witness can be helpful.

Obviously, the defendant should undergo a thorough psychiatric evaluation, including past psychiatric, medical, social, developmental, and family history; an account of the offenses and events leading up to them; a mental status examination; and a review of all relevant records and collateral interviews, the latter either conducted by the psychiatrist or the mitigation specialist as appropriate. Neuropsychological testing, laboratory studies, and imaging studies may also be

conducted. Some prefer to order these tests automatically; others are conscious of budget restraints and look for an indication to pursue these before ordering them.

A psychiatrist can fulfill several roles in presenting mitigation evidence at the capital sentencing hearing. First, the psychiatrist may offer psychiatric diagnoses that may qualify as extreme mental or emotional disturbance and explain how mental disease, defect, or intoxication may have affected the defendant's capacity to appreciate the wrongfulness of his or her actions or to conform his or her behavior to the law. Explanation of the diagnoses and their origins with appropriate biological studies can be extremely helpful.

Second, the psychiatrist may also explain the nature of the relationship between the defendant and victim that may either illustrate the victim's participation and/or consent in the murder. Similarly, the psychiatrist may explain the nature of the defendant's and the codefendant's relationship in terms of personality issues that can elucidate how the defendant may have acted under duress or the dominion of the codefendant.

Third, the psychiatrist may explain how the defendant believed that he or she was morally justified, portraying his or her worldview in the context of his or her experience. Although age may be readily apparent, the psychiatrist may explain the various maturational phases and how a youthful defendant may have been more impulsive and immature at the time of the murder and yet be more malleable subsequently, such that the defendant would have greater rehabilitative potential.

Other issues are frequently uncovered, such as a history of abuse and neglect, and how these issues factor into the development of the defendant's personality and worldview in the context of his or her offense. The psychiatrist can explain how such trauma taught the defendant fear and violence as problem solving, as opposed to a healthier means of coping. Other deficits, such as poverty, lead to the development of shame. Formulation of how shame and fear lead to rage and violence can be contrasted with healthy development.

Fourth, the psychiatrist may address the issue of remorse, which is a process, not an event. Although defendants may deny any crime involvement to avoid prosecution, they may find their actions so reprehensible that they cannot admit it to themselves. In some cases, denial takes on psychotic proportions.

Fifth, and perhaps most important, is the psychiatrist's capacity to offer a cogent formulation that can address questions of "Why you? Why now?" As opposed to presenting a list of mitigators, the psychiatrist should help develop a narrative for the case, explaining the defendant's behavior in the context of his or her life and the stressors he or she faced at the time of

the offense. Ideally, the defense psychiatrist takes an incomprehensible event—the murder—and presents it in a light where it is understandable, even though it remains unpardonable. There is almost always a stressor that precedes actions of this nature. Violence is driven primarily by loss, shame, and fear, which lead to rage. A good psychiatric formulation may develop the aspects of the defendant's shame and fear in the context of his or her life, past experience, and psychopathology. A single, unifying explanation for the act is preferable to a list of possible explanations. Juries view a list of explanations as a series of excuses and tend to disregard them. It is more difficult to ignore a single, developed, and consistent theme.

Following is a case example from a military court-martial.

Case Study 11-1: The defendant was a 20-year-old junior enlisted man accused of first degree murder of a noncommissioned officer. The defendant was having an affair with that noncommissioned officer's wife. She suggested the murder, promising to stay with the defendant and offering him \$50,000 from anticipated insurance money. The defendant initially shot the victim, who then fought back. The defendant then struggled with the victim, before slashing his throat.

Aggravators: In filing for the death penalty, the prosecution introduced that the murder was committed for money, the accused person knew the victim was a US Army noncommissioned officer, and the murder involved substantial mental or physical pain or suffering. Prosecution suggested that the throat slashing occurred with the victim in the prone position on the ground.

The defendant claimed that a struggle and slashing occurred as both of them were standing and wrestling. In examining the crime scene photos, the blood spatter pattern was consistent with the defendant's claims and inconsistent with the prosecution's claims, an observation that was confirmed by the forensic pathologist. Thus, one of the aggravators was refuted.

Mitigation: The defendant was the product of a violent, chaotic home in which he was severely physically abused by his father and neglected and abandoned by his alcoholic, drug-abusing mother. He grew up in an impoverished, violent neighborhood, which numbed him to the violence around him. He was moved frequently from his own broken home to that of relatives and back again until the Bureau of Child Welfare removed him (and his siblings) when he was 11 years old. He and his siblings were placed in different foster homes, which was particularly difficult for them because they comforted each other in their abusive and neglectful environment. The defendant's overwhelming longing to reunite with family became a central theme in his life and in this crime. He did not adopt a hostile position toward his family, but sought to forgive them.

The defendant, who was generally clingy and dependent, had no prior history of violence. He married his first girlfriend within weeks of their meeting, but their relationship ended in divorce when she aborted their child against his wishes.

The defendant was devastated and extremely vulnerable to manipulation by women. Shortly thereafter, he met the victim's wife and became obsessed with having a family with her. She threatened to end their relationship if he did not commit the murder, while promising to start a family with him once her husband was killed. She had persuaded him to invest his share of the insurance money in a bar with her. In the end, the defendant killed for love and the prospect of having a family in a state of extreme emotional disturbance.

The defendant took full responsibility for the offense in an interview. He stated succinctly that the victim's wife provided him with a motive but he was responsible for the murder. The defendant was particularly remorseful about his failure to consider the impact of his actions on the victim's children. In addition, because he had previously learned from his mistakes by avoiding the pattern of substance abuse that had wrecked his own home, had maintained an otherwise good reputation and service record, and worked to forgive his family of origin, he demonstrated good rehabilitative potential.

Mitigating Factors: Based on his history of abuse, neglect, and the fragmentation of his family, the defendant developed prominent dependent personality traits that were exploited by his codefendant, who held dominion over him through their romantic relationship. He longed to have the family with her that he had lacked as a youth. Similarly, his exposure to physical abuse in his youth had numbed him to violence and taught him violence can solve problems. The defendant

had acted in response to a stressor of tremendous emotional magnitude to him—a threatened abandonment crisis counterbalanced by his longing to have a family. Thus, he was in a state of extreme emotional disturbance at the time of the offense. In addition to his youth, the defendant lacked maturity because he was not exposed to consistent parenting. His prior service had demonstrated good rehabilitative potential based on his otherwise good conduct and reputation within his command. He also expressed remorse for his actions.

This case ended with a plea bargain for first-degree murder in exchange for a sentence of 40 years unless the military judge sentenced the defendant to a lesser punishment at his sentencing hearing. When the author met with the military prosecutor before the sentencing hearing, he commented that the mitigation outlined in the author's evaluation had been central to the command's decision to offer the plea bargain. After the author's meeting with the prosecutor, he did not cross-examine him during the sentencing hearing. The author was later told by the defense attorney that the prosecutor had felt that he had addressed his questions well enough in the pretrial conference that he did not see any advantage in cross examination. Ultimately, the judge sentenced the defendant to a lesser sentence, although the author does not recall the exact number of years. The defense attorney had commented that the psychiatric mitigation evidence had significantly affected the military judge's decision to limit sentencing.

OTHER COMPETENCIES

The role of the psychiatrist in capital cases is not restricted to the sentencing phase. Psychiatrists are likely to become involved if the defendant raises issues of competency to stand trial or insanity, and these issues are covered in other chapters in this text. However, psychiatrists may also become involved in postconviction appeals and in the determination of competency to be executed.²²

Competency to Waive Appeals

Following conviction, capital cases undergo a series of appeals. At times, defendants (more commonly referred to as appellants or petitioners) seek to abandon their appeals, dismiss their attorneys, refuse medical care, or pursue irrational postconviction strategies for various reasons, many of which may be driven by mental illness. *Rumbaugh v Procunier* established several criteria for such assessments, including whether the appellant was suffering from a mental illness or defect, if that condition prevented him from understanding his legal position, and the options available to him or that prevented him from making a rational choice.²³ *Comer v Stewart* added a "voluntary" test that conditions of confinement should not be so harsh as to force the petitioner to "abandon a natural desire to live."²⁴

Competency to Be Executed

Competency to be executed is among the most contentious areas of psychiatric involvement in the capital punishment process. The US Supreme Court determined in *Ford v Wainwright* that it is not permissible to execute those who do not comprehend what is to happen to them and why, ruling that "the Eighth Amendment (to the US Constitution) prohibits the state from inflicting the death penalty upon a prisoner who is insane."²⁵ More accurately, the state is not permitted to execute those who are incompetent to be executed.

However, other courts have ruled that it is permissible to treat mentally ill persons against their will to restore competence to be executed, which implies a reassessment of competence.^{26,27} It is difficult to see how any of this can be accomplished without the assistance of psychiatrists and/or psychologists. The key questions then are: should psychiatrists undertake assessments of competence to be executed? Furthermore, should they undertake treatment of mentally ill persons to restore competence to be executed? These questions have been addressed more fully elsewhere.²²

Even as this debate carries on, military psychiatrists are tasked with periodically assessing competency to

be executed in the death row inmates. As a forensic psychiatry fellow in the military, the author was ordered to conduct competency to be executed assessments of military death sentence inmates. The author was well aware of the American Medical Association's ethical guidelines banning physician participation in executions.²⁸ He was particularly concerned that rendering an opinion that an inmate may be competent to be executed may be interpreted as "an action that would assist...or contribute to the ability of another individual to directly cause the death of the condemned prisoner."²⁹ However, the author was under orders to do the evaluations and did not want to risk violating the UCMJ. He also felt a moral duty to potentially

prevent the execution of an incompetent inmate, and the only way to ensure that an inmate was not incompetent was to conduct the evaluation. Thus, the author would have been comfortable stating an opinion that the inmate was incompetent to be executed, but he was uncomfortable stating an opinion that an inmate was competent to be executed. Ultimately, when the author interviewed these prisoners, he found "no evidence of incompetence to be executed" and stated such, deferring on the issue of competence for execution. Fortunately, at the time, the author was not in the position of evaluating prisoners for whom execution orders had been signed, so his participation in the process was never brought to light.

SPECIAL CONSIDERATIONS FOR ACCUSED TERRORISM SUSPECTS

Currently, it is unclear whether Guantanamo detainees will be tried in federal courts, as appears to be the plan under the Obama administration, or by military tribunals in a plan proposed by the Bush administration. Even in the latter plan, it is unclear the degree to which

military psychiatrists would be involved or how closely the cases would resemble military courts-martial. All of the above principles and practices would apply, with the additional task of understanding and explaining the defendant's culture to the panels hearing the cases.

ETHICAL ISSUES

A psychiatrist's participation in capital cases is fraught with ethical issues. Although some have argued against psychiatrists participating in any phase of a capital case, most do not take this view.²⁸ However, many are opposed to capital punishment, as evidenced by the results of a 2001 poll of American Academy of Psychiatry and the Law members.²⁹

A psychiatrist opposed to capital punishment may be asked to acknowledge this in court as a potential bias. Even if not asked directly, a psychiatrist opposed to the death penalty engaged in a capital case should remain vigilant for this potential bias creeping into judgments in the case and strive for objectivity, even when it means delivering opinions that do not support the cause of the team that has retained him or her.

Similarly, a psychiatrist is not immune to the same negative feelings that others may experience when faced with a capital murder defendant. Often these individuals are hostile and alienate defense team members. Failure to deal with these feelings honestly may lead to missing potential mitigation factors.

Whether working with the defense or the government, psychiatrists are often thrust into a media spotlight and may draw attention that they are not accustomed to receiving. A public backlash may result, particularly for a psychiatrist working with the defense team in a high profile case. Most often this attention is relatively short-lived, although it can be uncomfortable. Maintaining balance and boundaries between professional and personal lives is important to maintain at these times.

CONCLUSION

There are numerous roles for psychiatrists in military capital courts-martials including standard roles in other criminal cases, such as the evaluation of competency to stand trial and mental state at the time of the alleged offenses for a potential insanity defense or diminished capacity. Psychiatrists may also be centrally involved in the presentation of mitigating

evidence or rebuttal of other psychiatric expert testimony. Psychiatrists may also be involved in evaluation of competency to waive appeals and competency to be executed. Regardless of one's personal feelings about the death penalty, psychiatrists should perform objective evaluations within the ethical guidelines of standard forensic psychiatric practice.

REFERENCES

1. Death Penalty Information Center. <http://www.deathpenaltyinfo.org/us-military-death-penalty>. Accessed February 3, 2014.
2. *United States v Matthews*, 16 MJ 354 (1983).
3. *Furman v Georgia*, 408 US 238 (1972).
4. Rules for Courts-Martial (RCM) 1004. *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
5. Ronald Gray. http://en.wikipedia.org/wiki/Ronald_A._Gray. Accessed February 3, 2014.
6. *United States v Gray*, 32 MJ 730 (1991).
7. Hoffman L. Two killers closer to first military executions since 1961. *Stories in the News*. February 6, 2006. http://www.sitnews.us/0206news/020606/020606_shns_militaryex.html. Accessed February 3, 2014.
8. Gaskell S. Army IDs Sgt. John M. Russell as the shooter who killed 5 fellow soldiers at Iraq base. *The Daily News*. http://www.nydailynews.com/news/us_world/2009/05/12/2009-05. Accessed February 3, 2014.
9. UCMJ, 10 USC Sections 886-934. *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
10. UCMJ, Article 118. *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
11. UCMJ, Article 45(b). *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
12. *Loving v United States*, 41 MJ 213, 277 (1994).
13. Montgomery JM. Death is different: Kreutzer and the right to a mitigation specialist in military capital offense trials. *Army Lawyer*. 2007;13.
14. UCMJ, Article 67(a). *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
15. UCMJ, Article 71(a). *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
16. MCM, RCM 1001 (2005). *Manual for Courts-Martial United States (2008 Edition)*. Washington, DC: US Department of Defense; 2008.
17. Tennessee Code Annotated, Section 39-13-204.
18. *Atkins v Virginia*, 536 US 304 (2002).
19. *Ake v Oklahoma*, 470 US 68 (1985).
20. *United States v Kreutzer*, 59 MJ 773 (Army Ct Crim App 2004).
21. Swanson JW, Holzer CE, Ganju VK, Jono RT. Violence and psychiatric disorders in the community: evidence from the Epidemiologic Catchment Area Surveys. *Hosp Community Psychiatry*. 1990;41:761-770.

22. Akinkunmi AA, Caruso KA. On pain of death: forensic psychiatry and capital punishment. *J Forensic Psychiatry Psychol.* 2008;19:127–136.
23. *Rumbaugh v Proconier*, 753 F2d 395, 398 (5th Cir 1985).
24. *Comer v Stewart*, 312 F3d 1157 (9th Cir 2002).
25. *Ford v Wainwright*, 477 US 399 (1986).
26. *Singleton v Norris*, 319 F3d 1018 (8th Cir 2003).
27. *Sell v United States*, 123 S Ct 2174 (2003).
28. American Medical Association. *American Medical Association, Policy Compendium, H140.974*. Chicago, IL: AMA, 1997.
29. Halpern AL, Halpern JH, Freedman AM. Now is the time for AAPL to demonstrate leadership by advocating positions of social importance. *J Am Acad Psychiatry Law.* 2004;32:180–183.