Criminal Responsibility 15

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The Hawaii Revised Statutes (HRS) defines pathological intoxication as "intoxication *grossly excessive* in degree, given the amount of the intoxicant, to which the defendant *does not know* the defendant is susceptible and which results from a *physical* abnormality of the defendant." HRS §702-230(5)(c) (emphasis added).

Despite frequent attempts by defendants to present voluntary intoxication as pathological intoxication, and therefore as an exculpating factor, the courts have consistently maintained that voluntary intoxication is not admissible to negate state of mind to establish an element of the offense. See *State v. Souza* (1991); *State v. Hall* (1983); *State v. Freitas* (1980); *State v. Nuetzel* (1980).

In *State v. Souza* (1991), the defendant admittedly smoked methamphetamine just before he stabbed the victim in the back with a knife. Souza then repeatedly stabbed the victim as the latter attempted to escape, and then pursued the victim in a car, grazing his leg as the victim jumped into the bushes. Souza was subsequently arrested, charged, and convicted of attempted murder in the second degree and unauthorized control of propelled vehicle. On appeal, the Hawaii Supreme Court held that voluntary intoxication was not admissible and that it was a gratuitous defense that is not constitutionally protected as a defense to criminal conduct.

Psychological and psychiatric experts have not been deterred by the courts' ostensibly clear rulings. In *State v. Romel* (1990), the facts were straightforward. (See *Tradewind Insurance Co., Ltd. v. Stout*, 1997.) On June 30, 1988, 18-year-old Romel shot his summer-school teacher while she was teaching English at Aiea High School. At trial, Romel testified that he had been smoking crystal methamphetamine since his junior year and had smoked "ice" every day of summer school up to the time of the shooting. Prior to the shooting, he smoked ice before going to school with his gun. He further testified that the ice made him feel paranoid, and that he believed that the victim-teacher had been picking on him.

A psychiatrist based in Honolulu testified that ice smokers develop a paranoid psychosis similar to the symptoms of paranoid schizophrenia. In a further restatement of general findings from the literature, she observed that large quantities of ice make a person "very paranoid and delusional." Based on her interview of Romel, she concluded that he had experienced a "severe paranoid hallucinatory or persecutory state," had gotten to the point of "absolute desperation," and "felt he had no recourse but to try to kill [the victim], kill the object of his pain." Unsupported by any statistics or base rate information, she speculated that it "was 99.9 percent that he was not able to choose to stop" taking methamphetamine. She then concluded that the defendant would not have shot the victim had he not been methamphetamine intoxicated.

A clinical psychologist testified that, based on his interview of the defendant and his mother, Romel showed behavior consistent with ice abuse. Based on his interview and police reports, he conjectured that Romel had a minimal history of acting out. He then opined that the chances of the shooting occurring "without some kind of drug involvement would have been negligible, minimal." He then added that ice "was a major, major contributing factor, if not the causal one of what [Romel] did."

The state's expert agreed with the expert psychiatrist's conclusion that, at the time of the shooting, Romel was paranoid and deluded. He then opined that Romel's state of mind "was a classic picture of focused delusion," meaning the false belief directed at a particular set of circumstances. A particular person "is the one responsible for everything and right or wrong[,] everything kind of comes down on that one person." This expert also failed to incorporate the defendant's probable history of violence, especially under methamphetamine. Had such an evaluation been performed, the "focused delusion" may have been found to be directed at parties who placed expectations for performance on the defendant.

The jury in the *Romel* case decided beyond a reasonable doubt that the defendant intended to shoot his teacher. Romel was convicted of attempted murder in the second degree, which meant that, despite the proffered conclusions of the experts on the accused's drug use, the jury believed he had formed the specific intent to kill his teacher.

In the more recent case of *State v. Holbron* (1995), unlike those in the *Romel* case, experts offered diagnoses of multiple mental conditions to explain methamphetamine-related violence. In *Holbron*, on April 21, 1990, the defendant, in what appeared to be heinous conduct, threw a plate of food brought to him by his girlfriend at her head, then threw a radio at her. Holbron then asked her, "You ready to f_____ die?" He then poured gasoline on her and attempted to set her afire with a match. The attempt failed, but a second match ignited the gasoline and the victim suffered severe burns

trying to extinguish the flames. The defendant ran out of the house and down the street. The house was destroyed by fire.

Holbron did not dispute the facts, but instead offered the defense that he had "potentially suffered a lot of trauma to the head … and that he has recognized organic difficulties in the way his brain works and the way he functions in a day-to-day situation." One of the defense experts testified that Holbron's right frontal lobe was damaged, which created difficulties in impulse control. A second defense expert diagnosed Holbron's condition as Organic Mental Disorder NOS and an Antisocial Personality Disorder. A third expert diagnosed substance-induced Organic Mental Disorder and Methamphetamine Use.

The defense theory, as argued to the jury on the basis of cerebral damage, was that Holbron's bizarre actions clearly indicated that he did not have the requisite state of mind to commit attempted murder. Obviously referring to the amotivational effects of methamphetamine and brain damage, among other factors, his defense attorney then maintained that Holbron was not sufficiently "aroused" by the events of the alleged crimes to the point where he would have formed the specific intent to cause the victim's death. The defense attorney argued that "if anything, [Holbron] acted recklessly." The trial ended with the return of the jury's guilty verdict after 29 minutes of deliberation.

Pathological intoxication has been successfully used as a defense if, by reason of such intoxication at the time of the alleged offense, the defendant lacked substantial capacity either to appreciate its wrongfulness or to conform his or her conduct to the requirements of the law (HRS §702-230(4) and (5)). In other words, pathological intoxication can assume the status of a mental condition and hence may allow exculpation if a link to a cognitive or volitional impairment can be demonstrated.

Such was the case in *State v. Kuhia* (1992), a landmark case in several respects. Here, the defendant was acquitted by virtue of the affirmative defense of pathological intoxication by methamphetamine, a first in Hawaii, which the defense proved by a preponderance of the evidence. Two important facts were determinative: (1) the defendant was not substance intoxicated at the time he killed the victim; and (2) multiple diagnoses were offered, at least one of which had exculpating potential. In Kuhia, mental health experts, as well as other corroborating evidence, suggested that the defendant suffered from paranoid schizophrenia and an organic delusional disorder, in addition to methamphetamine abuse. The organic delusional disorder was seen as caused by chronic methamphetamine use, impairing his ability to conform his conduct to the requirements of the law.

Kuhia raises the troubling question of the necessity of intoxication at the time of the alleged killing in order to establish pathological intoxication, a

clear implication of HRS §702-230. This outcome appears to contradict the general principle limiting the availability of pathological intoxication as a defense in that it permits a defendant to avail himself or herself of a mental condition at the time of the alleged offense that is linked to a history of voluntary self-induced intoxication. Note that in all pre-1998 methamphetamine cases presented in this chapter in which the pathological intoxication defense was unsuccessfully offered, the defendant was methamphetamine intoxicated at the time. Under *Kuhia*, pathological intoxication could be presented as a defense for a defendant who had not ingested methamphetamine for a considerable period of time, perhaps months or years, before the alleged crime.

In *State v. Garringer* (1996), the defendant was convicted of robbery. During trial, Garringer admitted that he and a younger accomplice had planned to rob a Jack-in-the-Box. The minor threatened a worker, pounded the shotgun on the counter, where it discharged, and killed the worker. Garringer then grabbed the money from the cash register and the two males fled in a car stolen by Garringer prior to the robbery. The defendant testified at trial that he had smoked methamphetamine almost every day for about 2 years and that he and the minor had smoked methamphetamine before the robbery and planned to rob the Jack-in-the-Box after running out of drugs. Garringer testified that "despite feeling the symptoms of withdrawal during the incident in question, he had control over what he was doing." He never blamed methamphetamine for the robbery. Garringer was convicted of robbery in the first degree and of firearms-related charges.

Garringer later filed an action for postconviction relief. One of the grounds for the requested relief was ineffective assistance of his trial counsel, who had failed to raise the issue of the defendant's temporary insanity due to the effects of drug usage and had failed to obtain psychiatric evaluations of the defendant prior to trial. The Hawaii Supreme Court held in part that Garringer should have been allowed to clarify his petition by amending it to include factual allegations showing that (1) his appellate counsel omitted an appealable issue, and (2) in light of the entire record, the status of the law, and the space and time limitations inherent in the appellate process, a reasonably competent attorney would not have omitted that issue. The court noted that, despite the fact that the defendant's acquittal in *Kuhia* was based on the affirmative defense of pathological intoxication, Garringer was required to "overcome significant hurdles in order to establish that such a defense was potentially meritorious and that a reasonably competent attorney would not have omitted that issue."* On remand for a hearing to determine

* Among these hurdles were Garringer's trial testimony that, despite his use of crystal methamphetamine, he had control over what he was doing, and that he was voluntarily intoxicated at the time of the crime.

the merits of Garringer's ineffective assistance of counsel claim, the circuit court found against him. Garringer has appealed this ruling.

Other cases are of interest in untangling the issues surrounding pathological intoxication. In recent years, the methodology of the sanity examiner has been scrutinized in cases of criminal responsibility in which the role of methamphetamine was minimized, ignored, or misconstrued by the expert. In methamphetamine cases, no longer can it be assumed that a consensus of the three panel §704-404 examiners to the effect that the defendant is mentally incapacitated automatically leads to an acquittal on grounds of physical or mental disease, disorder, or defect.

The key case in Hawaii is *State v. Monte Louis Young* (1998). In that case, on May 10, 1997, shortly before 7 A.M. at the Burger King on University Avenue in Honolulu, Young pulled a hammer from behind his back and began striking the victim, Paul Ulbrich, on the back of the head. The victim's screams could be heard for some distance. After each blow, Young examined his handiwork as if to survey the damage. After the third blow, Young raised the hammer toward a Burger King worker and said, "Get in[side] before I kill you too." Young leapt over a wall, dropped the hammer in the parking lot, and left in his pickup truck.

According to witnesses and the experts, Young had been acting strangely before the killing, and had heavily abused alcohol and marijuana in the weeks before the instant homicide. He had a history of violent acting out within a strong polysubstance abuse pattern extending back at least a decade. His previous abuse of methamphetamine, apparently his drug of choice when available, was extensive. In 1993, Young's father had reported a 10-year history of methamphetamine use by Young. Young last became intoxicated on methamphetamine approximately 2 months before the instant homicide.

Computerized tomography (CT) scanning revealed a small subarachnoid hemorrhage and a cerebral contusion in Young's right parietal area. Based on his strange behavior, evidence of brain damage, and other factors, each of the examiners rendered a diagnosis of Psychotic Disorder NOS, among other diagnoses, and all but one examiner linked that disorder to a substantial impairment in both cognition and volition. The state retained the senior author to comment on the methodology of the sanity examiners pursuant to HRS §704-410. The state also retained the services of a clinical-forensic psychiatrist who had examined Young for the defense 5 years earlier in California.

In its Findings of Fact and Conclusions of Law, the court ruled that Young was guilty of murder in the second degree. The court correctly noted that (1) a condition excluding responsibility is an affirmative defense that must be shown by a preponderance of the evidence; (2) the lack of substantial capacity means "capacity which has been impaired to such a degree that only

an extremely limited amount remains"; (3) if Young had "no impairment, or if the impairment was not substantial, a fair-minded [trier of fact] would find the defendant sane beyond a reasonable doubt"; and (4) that Young had "failed to prove by a preponderance of the evidence, that he lacked the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." The court also concluded that self-induced intoxication, which is intoxication caused by substances that the defendant knowingly introduces into his body, is prohibited as a defense to any offense, does not constitute a physical or mental disease, disorder, or defect within the meaning of §704-400, and therefore cannot be considered an exculpatory condition that is the product of circumstances that were beyond Young's control.

In applying this reasoning, the court held that the state had proved, beyond a reasonable doubt, that Young knowingly and voluntarily ingested drugs and alcohol both over a prolonged period of time and in the weeks immediately preceding the homicide. The court viewed these two time periods of voluntary substance abuse as having caused Young's several "physical or mental diseases, disorders or defects."

There are remarkable similarities between *Young* and *Kuhia*, including prior substance abuse, which most likely contributed to other diagnosed mental conditions but no methamphetamine intoxication at the time of the alleged offense. It is speculated that *Young* will nullify the impact of *Kuhia* to a substantial degree.The above cases lead to the conclusion that the expert's decision path as well as *Daubert* considerations should be scrutinized closely. The American Law Institute (ALI) test of criminal responsibility leads to a three-part test of insanity: (1) a genuine, sufficiently severe mental disorder; (2) a substantial impairment in the accused's capacity to appreciate the wrongfulness of his acts and/or in his ability to conform his conduct to the requirements of the law; and (3) a link between the two. A heuristic model based on this three-part test for criminal responsibility evaluations was presented by the senior author (1984, 1987) and has direct relevance to methamphetamine cases. This model involves the retrospective analysis of the following:

- The forensic database
- The type of distortion and/or deception shown by the defendant
- The defendant's reconstruction of the instant offense
- Long-term (i.e., historical) vs. instant crime behavior
- The defendant's mental disorder in terms of whether it is sufficiently severe and causally connected to the instant offense
- Self-determination and choice of crime-related behaviors
- Conclusions regarding criminal responsibility

The first recommended step involves the creation of a reliable and valid database, multisourced and interdisciplinary in nature, that forms the basis for all opinions regarding criminal responsibility. The contents of the database are obtained by examining the perpetrator, victim, context of the crime, and other data relevant to the accused's current and past circumstances. The most important part of the forensic analysis concerning methamphetamine abuse may be the database on which the eventual conclusions are based. Criteria for including data in the database are that they are multisourced and interdisciplinary and are based on information drawn from sources other than the client. It is especially important to gather data from sources that the defendant wishes to conceal because of the likelihood of finding unfavorable information concerning methamphetamine abuse (e.g., juvenile records; so-called expunged records, which may be available in unmodified form at government archive centers; interviews with peers, ex-spouses, and mates; military performance reports; and information from other states or countries). It is helpful for the credibility of the expert to base the forensic evaluation on as many database sources as possible.

The notion of a complete database is critical in evaluating criminal responsibility in situations involving methamphetamine. At this juncture in time, the perception of the court, rather than reality, is the important factor. In *Kuhia*, the court appeared satisfied that the mental health experts had an adequate database, which then provided the foundation for later acquittal. In *Garringer*, the defendant asserted in his petition for postconviction relief that he should have been psychiatrically evaluated, thus, in essence, claiming that the court had an incomplete database.

In *Young*, all the defense experts admitted that their proffered findings could be wrong if the database on which each expert had relied was flawed or incomplete. The state then demonstrated through its own experts and through cross-examination that the sanity examiners' database lacked essential information. For example, the three panel examiners failed to take into account or even properly review existing neuropsychological tests from a defense neuropsychological consultant to the effect that Young had average or better cognitive functioning. Thus, a link between a mental condition based on brain damage and a substantial impairment, even if cerebral injury was established, could not be established.

The next step in the decision process concerning criminal responsibility consists of ruling out or accounting for nondeliberate distortion within (1) the evaluator; (2) the reporting person; and (3) the reported event. Nondeliberate distortion due to anxiety, fatigue, or other factors may largely explain both evaluation and crime behavior and is, therefore, considered first. Nondeliberate distortion for the methamphetamine user at the time of the instant offense may consist of several simultaneously operating factors. Time

perception is altered, resulting in unreliable estimates of time. Short-term memory problems, including encoding and retrieval difficulties, may be experienced. Other deficiencies in the perpetrator, victim, and witnesses need to be explored as discussed above.

As the next step in the evaluation process, deliberate distortion, if it exists, should be ruled in by a positive and replicable demonstration of misrepresentation. Deliberate distortion may be shown by the defendant and by cross-validating sources. The evaluation of the defendant's self-reports in methamphetamine cases should be scrutinized for misrepresentation by examining third-party reports and material evidence of the crime. Psychometric testing by objective measures, such as the Minnesota Multiphasic Personality Inventory–2 (MMPI-2), California Personality Inventory (CPI), 16-PF, and the Millon Multiaxial Clinical Inventory–III (MCMI-III), are appropriate for assessing distortion due to the embedded scales that accurately measure deception. An inspection of the crime scene is important as much methamphetamine-related violence occurs within a brief time span at a particular site, and an appreciation of the context is helpful to the evaluator. Data derived from the input of significant or knowledgeable others that indicate bias or a given motivational set (e.g., desire for revenge or desire to be reunited with the defendant) should be excluded from the data pool or placed in proper perspective by comparison with other known facts. In the murder and attempted murder cases reviewed above — *Romel, Holbron, Kuhia*, *Garringer*, and *Young* — the issue of nondeliberate distortion by the defendant was not raised. Considering the significant effects of methamphetamine use on attention, memory, and other cognitive skills, as discussed previously, the accuracy of the defendant's recollection needs to be cross-validated and not merely assumed or left unaided in the province of the jury.

Deliberate distortion — particularly faking bad or malingering in order to feign symptoms and conditions — raised as a significant source of concern in these cases was also not addressed. Yet, the base rate for malingering in state-of-mind defenses for felony cases, in general, is conservatively estimated at 20% (Rogers, 1988). There are compelling reasons to suggest that the incidence of malingering may be higher in methamphetamine cases. First, the chances of malingering increase with genuine deficiencies (Hall and Pritchard, 1996), and methamphetamine creates significant cognitive and psychological deficiencies in many abusers. Second, most defendants know, or have been instructed by their attorneys, that methamphetamine abuse or intoxication does not constitute an exculpating condition, as in virtually all cases the drug was taken knowingly and voluntarily. Thus, the search is on by the defense team, including the retained experts, for a condition that may be sufficiently severe and beyond the control of the defendant (e.g., a thought disorder such as Paranoid Schizophrenia). Methamphetamine mimics this

psychosis in many respects and thus would be a natural target for incorrect (but unintentional) diagnosis by defense experts. The defendant may, however, as seen by the authors in a number of cases, deliberately deemphasize methamphetamine use and exaggerate or fabricate psychotic features of their behavior.

After distortion and deception are taken into account, as a third step, a defendant's recollection of an alleged crime is usually helpful to know in inferring his or her state of mind. Even when the defendant does not testify or when state law shifts the burden of rebutting insanity to the government after the defendant has raised the possibility of insanity, presenting the defendant's state of mind through experts is critical to the successful application of the insanity defense. Although state of mind can often be inferred from eyewitness accounts, material evidence, reports of third parties regarding events before and after the crime, and the defendant's own description of events, the expert presents the state of mind of the defendant from a professional, independent vantage point using a well-established DSM-IV classification system. Hence, the impact on the court, especially when unrebutted, can be considerable.

In some methamphetamine cases, the accused may not render spontaneous statements or submit to interrogation shortly after the alleged crime. In such cases, an inspection of the crime scene and interviews of cross-validating sources take on even greater importance. In none of the cases cited above did the mental health experts who examined the defendant visit the scene of the crime. In cases where the accused declines to be evaluated by an expert, that professional must refrain from proffering conclusions relevant to criminal responsibility. The expert may, however, comment on the methodology of the other sanity commissioners, as in *Young*, and present information from the literature on methamphetamine abuse.

The fourth step involves conducting an historical analysis of relevant past behavior and comparing it with that shown during the instant offense. The goal is to determine whether the instant offense is typical or atypical for the defendant. Rare events are most likely triggered by high stress or an unusual combination of environmental or internal events in the absence of history. Common events suggest a habitual pattern and are considered more inculpatory. In methamphetamine cases, repetitive violence associated with abuse of this substance is considered inculpatory because it implies recurring choice to aggress upon others.

A key question is whether basal violence associated with methamphetamine, especially when it is similar to the instant offense, was the result of a habitual set of violent acts or an isolated event. Historical instances of violence should be examined in terms of variables such as frequency, severity,

recency, acceleration, triggering stimuli, opportunity factors, and inhibitions to aggression.

Historical factors that have traditionally indicated willfulness to commit violence in methamphetamine cases include the following:

- Lengthy time delays between triggers to violence and the instant crime
- Performance of complex chains of behaviors in order to execute the violent behavior
- Flexibility of response (e.g., when the perpetrator has multiple weapons with which to inflict harm)
- Predatory vs. reactive violence

Key forensic questions can be formulated as follows:

- Should the defendant have known the likely outcome of the chain of behavioral events culminating in violence?
- Did the defendant know that methamphetamine intoxication in this situation, based on the defendant's history, would likely result in violence to another?

Consider the following two courtroom scenarios:

> Prosecutor: Doctor, you testified that the accused suffered a substantial impairment in mental capacity at the time of the alleged offense. You cited a list of neuropsychological and psychological deficits in terms of his ability to self-control and self-monitor his behavior as reasons for the substantial incapacity, including a history of methamphetamine abuse. You did not examine previous violence, focusing instead on behavior during your evaluation and at the time of the alleged crime. Would your conclusion change if you knew the accused engaged in several dozen other very similar acts of previous violence while methamphetamine intoxicated, with rewarding consequences, high-stated self-control, some evidence of planning and rehearsal, and minimal loss of verbal or physical abilities during those violent acts? Why or why not? Cannot one's past violence influence and affect appreciation of wrongdoing and self-control in later violence?

Let's turn this around for the defense, assuming expert testimony to the effect that there was no substantial impairment for a male defendant who admitted to attacking the victim:

> Defense: Doctor, would you change your mind if you knew that the defendant (a) had no previous violence at all prior to the instant case and, in fact, worked productively and nonviolently in his job at the plantation for 15 years; (b) had an extremely high cumulative stress level for the year before the violence, as measured by several standardized tests and independently by DSM-IV criteria; (c) was borderline retarded with poor coping skills at best; and (d) believed that he had to perpetrate the violence because his life had been placed in danger by the victim? The other examiners considered these facts, why didn't you?

In short, there is no escape from considering historical influences to criminal behavior. This is because mental capacity to a greater or lesser degree is always influenced by previous experiences. Studies have suggested that historical violence accounts for the major portion of the statistical variance in accounting for exhibited violence (Hall et al., 1987). A history of violence or, conversely, a benign past, appears to act as a prepotent force of its own, determining to a large extent whether violence will, or will not, occur. In addition to history, triggers to violence and opportunity factors account for a high incidence of exhibited violence (Hall et al., 1984). This holds true whether or not there is a history of methamphetamine abuse.

Historical influences are discussed throughout the cases cited above. In *Romel*, the examiners noted that the defendant had a history of methamphetamine abuse, but one examiner, who proffered the ultimately unsuccessful opinion that the defendant was mentally incapacitated, failed to uncover a collateral history of violence even though the defendant was methamphetamine intoxicated at the time of the instant homicide. In *Holbron*, the defense attorney unsuccessfully argued that his client had a history of antisocial behavior (which is usually seen as inculpatory), reflected in several mental conditions, which then caused the defendant to be less aroused by the events of the alleged crime (and therefore presumably less responsible). In *Young*, the court noted as instrumental to its conclusions that the defendant had no family history of mental health problems but had a strong individual history of (1) polysubstance abuse and, in particular, methamphetamine abuse; (2) Antisocial Personality Disorder, with long-term behaviors associated with this condition; and (3) violence toward others.

As a fifth step, a diagnosis of the defendant's mental state at the time of the crime usually requires evidence in support of a DSM-IV mental condition. This is the first prong of the traditional three-part test of insanity (i.e., establishing a mental condition). For all practical purposes, sanity examiners, at least in this jurisdiction, offer dual or multiple diagnoses to the court. A diagnosis, such as Methamphetamine Intoxication or Abuse, is rarely offered alone because the examiner who wishes to find lack of criminal responsibility knows that voluntary substance abuse is not effective in achieving a favorable outcome, or because a single diagnosis does not reflect the clinical reality of the case. In *Kuhia*, the eventual acquittal of the defendant was tied to multiple diagnoses, any one of which could have been exculpatory in nature.

Defense attorneys should note that a very high percentage of methamphetamine abusers also have attention deficit hyperactivity disorder (ADHD; Eme, personal communication, 1998). The forensic evaluator must determine whether ADHD should be diagnosed in the instant case and factor these observations into his or her conclusions regarding criminal responsibility.

Any psychiatric condition, alone or in combination with existing conditions (i.e., creating interactive effects), provides the basis for lack of criminal responsibility. The situation is even vaguer when the accused was not methamphetamine intoxicated at the time of the alleged offense but had chronically used methamphetamine sometime in the past. Courts need to know, as in *Young*, that methamphetamine psychosis or methamphetamine-related violence persists for months after abstinence and can be triggered by substances other than methamphetamine to include alcohol, marijuana, cocaine, opiates, and even caffeine. The literature on cross-reversal tolerance (i.e., sensitivity) needs to be shared with the trier of fact.

A proffered diagnosis requires evidence that the condition existed at the time of the crime, regardless of whether or not it also existed prior to or after the crime. Evidence of a chronic mental disorder (e.g., schizophrenia, mental retardation, or cognitive disorder) in existence before the instant offense increases the likelihood that the disorder also existed at the time of the crime, but is not sufficient by itself. Some chronic mental disorders can be in some level of remission or can be controlled with psychotropic medications. Evidence of a mental disorder (e.g., depression, anxiety disorder) that arose after the instant crime is irrelevant to a diagnosis at the time of the offense.

The existence of a mental disorder at the time of the instant offense may or may not shed any light on the (legal) blameworthiness of the defendant. The severity of the disorder and its impairment of critical faculties at the time of the offense mediate its exculpatory effect. As a sixth step, the analysis of self-control and choice by the accused is central to the determination of criminal responsibility. Intact self-control and choice for the time of the alleged crime, which can exist along with delusional or hallucinatory

behavior, often lead to a finding of criminal responsibility. Conversely, impaired self-control frequently results in exculpation or mitigation of responsibility for the instant offense. In sum, the evaluator should analyze the instant offense for the defendant's abilities and deficits in areas relevant to behavioral self-regulation. An exclusive focus on limitations, pathology, and deficiencies is a fundamental mistake.

Whether or not methamphetamine use is an issue, parameters to be considered during the alleged commission of the crime by the defendant include the following:

- Coherence and other characteristics of speech suggesting intact verbal expression
- Intensity and appropriateness of affect, especially during portions of the crime sequence that would normally produce strong emotion
- The focus of the crime, ranging from nebulous to markedly specific
- Level of substance intoxication during or shortly before the alleged offense
- Current, long-range mental conditions such as retardation or focal brain damage
- Behaviors requiring immediate, short-term, and historical memory skills of discrete sensory modalities or a combination of modalities
- Gross-motor, fine-motor, perceptual-motor, and motor-sequencing skills
- Presence of bizarre behavior
- Level of anxiety and stress reactions
- Presence of delusions and/or hallucinations
- Presence of depressed or expansive mood
- Planning and preparation
- Cognitive awareness of criminality
- Level of physical activity
- Self-reported control

The defendant's activities during the week (or longer) before the instant offense should be examined for behavioral deterioration, especially in self-care, work productivity, and in the central love relationship. For many of these parameters, quantitative measures on an empirically validated, Likert-scale format can be obtained from the Rogers Criminal Responsibility Scale (Rogers, 1988) and the Schedule of Affective Disorders and Schizophrenia (Spitzer and Endicott, 1978).

Other considerations include the use of a weapon designed for attack, such as a gun, knife, or numchuka, or a tool that could easily inflict harm (e.g., hammer, screwdriver). The presence of any such weapon during an

offense would indicate a chain of responses more subject to control (i.e., selecting, obtaining, concealing, carrying, reaching for, and attacking with the weapon). Chains of responses usually call for shifts in behavior programs and lessen the likelihood of impulsivity. The next level of complexity involves use of a weapon that could be used for attack that the perpetrator found at the scene of the crime. A defendant's use of his or her body to club, strangle, or kick a victim suggests a primitive response. An attack with certain parts of the body, such as biting or banging one's head against the victim, suggests an even more primitive level of aggression. Continuing to attack nonvictim entities (e.g., banging the walls) suggests further loss of behavioral self-control.

The accused's flexibility of response and method of attack should also be considered. The use of multiple weapons or shifting back and forth from one method of attack to another suggests that different executive functions were utilized. This suggests the presence of self-control, even in methamphetamine-intoxicated persons.

As an illustration, in *Young*, indicia of self-control and choice were testified to by witnesses and investigators. These included, but were not limited to (1) the lack of erratic or dangerous behavior while in police custody for abuse of a household member 2 days before the homicide and at other times, in contrast to his claim that he was out of control for weeks prior to the killing; (2) just prior to the hammer attack on the victim, showing the ability to drive a truck, asking a third party for the time and attempting to panhandle some money from him, pulling a hammer from a position of concealment and striking the victim with it, and monitoring the effect of his blows. The damning observation from a self-control perspective was a witness's testimony that "after each blow, the defendant would look at Paul's injuries, as if to survey the damage"; and (3) after the fatal attack, showing the ability to threaten but not follow through on another attack on a worker, leaping a wall and running to the truck, driving away, and exhibiting clear and nonerratic cognition and behavior a day after the killing when he was arrested for stealing a boat from Kaneohe Bay.

Defense attorneys should again note the strong association of substance abuse with ADHD. Recognition of this co-morbidity is essential to proper diagnosis and treatment. ADHD is a serious impairment of self-regulation. Because the medical form of methamphetamine — Desoxyn — is effective for the treatment of ADHD, it may be possible that a significant percentage of methamphetamine abusers are self-medicating their ADHD. An individual analysis of self-regulation may reveal whether or not the methamphetamine abuse impairs choice and self-control.

The last step of the heuristic model for criminal responsibility (Hall, 1987) comprises the functional components of the American Law Institute's

three-part test, which calls for a connection in the nature of cause and effect between diagnosis and impairment. The evaluator must now compare crime-specific behaviors with the retrospective mental conditions proffered by the experts. A link must be demonstrated between the deficiencies of the defendant (i.e., mental condition) and the criminal behavior (i.e., substantial impairment).

If substantial impairment is found in either cognition or volition, that impairment must result from the proffered mental conditions. All jurisdictions require that there be a demonstrated link between substantial impairments and the accused's diagnosed conditions. Further, the cause must be direct, and not secondary. In most, but not all cases, self-induced alcohol or drug intoxication at the time of the crime may have contributed to the offense but is considered an invalid argument for escaping criminal responsibility. This further decreases the range of behaviors that can be used as the basis for exculpation. The symptom pool is restricted even more by the exclusion of all disorders that were operating at the time of the crime but had little to do with mental capacity interference.

Brain damage, by itself, for example, does not automatically lead to violence. Hall and Sbordone (1993), in an exhaustive review of the literature on brain injury in humans, found that no lesion in any neurological site or system automatically leads to violence. Even with epilepsy, the aggression that has been observed is primitive and defensive in nature, with no intention of inflicting harm on others demonstrated in empirical investigations.

Generally, competent executive behavior is incompatible with loss of self-control due to extreme emotion. "Executive" behavior is a neuropsychological term referring to motor output, self-monitoring, and judgment after sensory and processing functions have been initiated. Skilled executive behavior occurs in a situation where the accused observes and changes his or her behavior simultaneously in response to a fluctuating environment, all in accordance with the goal or desired object of the action sequence. Hypothesis testing is the highest form of effective performance, as when the accused changes his or her own behavior (e.g., threatens the victim, puts a key in a lock) to see the reaction or outcome (e.g., victim acquiescence, the door unlocking) and then changes his own behavior accordingly (e.g., proceeds to assault the victim, proceeds through the door into the bedroom). In essence, this skill taps the defendant's ability to show a concordance between intentions/plans and actions. It is measurable, objective, observable, and incompatible with both extreme emotion and emotional disturbance.

Executive behaviors that tend to rule out extreme mental or emotional disturbance for the time of the instant offense include, but are not limited to, the following:

- Motor or mental rehearsal of the crime sequence
- Demonstration of a variety of violent acts (flexible behavior as with several weapons)
- Ability to orchestrate a multistep or multitask scheme (e.g., long, connected chains of behaviors)
- Ability to show change in principle (e.g., from raping the victim to killing her to eliminate her as a witness)
- Ability to delay violent responses
- Nonstimulus boundedness (acts independent of environmental influences)
- Ability to regulate tempo, intensity, and duration of violent behaviors
- Ability to avoid non-erratic behavior during violence unless that was the planned effect (e.g., deliberately becoming substance intoxicated prior to the instant offense)

The above considerations apply in methamphetamine-related extreme emotion cases. The self-control analysis can benefit the defense or the prosecution, depending on findings. In *State v. Raquepo* (1988), a methamphetamine-intoxicated defendant was charged with attempted murder in the second degree, kidnapping in the first degree, terroristic threatening in the first degree, license to carry firearm, and place to keep firearm in an incident in which the defendant shot a rifle at a roommate/friend. Before trial commenced, the state offered the defendant probation on the basis of a loss of self-control and his disorganization at the time of the offenses. The senior author noted the following deficiencies before, during, and after the offenses:

- The defendant asked for help prior to the offenses. He called for an ambulance, informed his roommate that he could not wait for the ambulance, that he felt dizzy, and that he wanted to go to the hospital immediately. Amnesia commenced from this temporal point with no later data suggesting that he was faking the loss of memory.
- The defendant's behaviors were preceded by strange and perseverative behaviors, such as pacing the floor with a rifle and talking to himself, interspersed with frequent apologies to his friend.
- He shot the rifle in the direction of his friend; this shooting was not in the context of an impaired relationship with the victim.
- A detailed analysis of his background revealed no history of violence toward the victim or anyone else.
- The defendant engaged in disorganized behavior prior to the shooting. He saw the ambulance he was waiting for, but failed to signal the ambulance to stop, provided misdirections when riding in the truck to get help, and other behaviors.

- Delusional thinking, including the thought that he was dying (e.g., he said to his friend, "If you want to save your life, you going to have to save mine because I'm dying, so take me to the hospital."). He wanted to drop off his weapon at the police station prior to proceeding to the hospital. Shooting at his friend may have reflected his fear of abandonment more than intent to kill.
- The defendant showed bizarre behaviors after the offenses. He shot at his friend from the hip in front of others, with no suggestion of secondary gain. There was no chance of escaping detection. After he had left the victim's truck with the keys in it, he asked a stranger to help him by giving him the keys to her truck. He also told this stranger that he had been poisoned and for her to hide his rifle, then threw the firearm onto her lawn. He then proceeded to flag down a police car (with a loaded .45-caliber pistol in his belt) and asked for help, stating that someone was trying to kill him. The bizarreness of his behavior was reflected in the police officers' initial belief that he was the victim of a crime, not the possible perpetrator. The defendant forgot that he had "speed" in his clothes, which was discovered at the police station.

The reader may rightfully question whether or not *Raquepo* constituted a case of voluntary intoxication. Again, the perception of the court and the state or defense in pursuing its case strategy is more critical than actual events.

In *State v. Paned* (1997), the defendant, who had killed an acquaintance with a shotgun, claimed self-defense, but was found guilty of murder in the second degree. A history of methamphetamine-related violence was uncovered, including threatening his grandmother by shoving a gun in her mouth, assaulting various friends, assaulting his wife and striking her with a gun because he suspected her of infidelity, and discharging his shotgun in a reckless manner by shooting at his house. A clear pattern of methamphetamine abuse was shown by bleeding ulcers, paranoia, observations of his behaviors by his family members, and other symptoms. He denied being methamphetamine intoxicated at the time of the killing.

On the night of the murder, the defendant had volunteered to take the victim, a distant relative living at his residence that he suspected of "fooling around" with his wife, to the airport. His behaviors were replete with indicia of choice and self-control, including driving around with the victim, talking to peers and drinking whiskey with them, and calling his mother and instructing her what to tell others if they should call for him. At the scene — a secluded spot in a residential neighborhood — the defendant was in close proximity to the victim when he fired the shotgun twice, fatally shooting the victim in the chest and the right forearm. The defendant sped off in his

car and disposed of the shotgun, which was never found. He then drove to his friends' house and instructed them to remove the 12-gauge shotgun shells from the trunk of his car. He then attempted to borrow another car to establish an alibi and eventually went to a hotel to hide out. Despite an initial claim of amnesia for the crime events and for disposing of the shotgun, he presented information suggestive of recall. In sum, there were multiple indications of self-control for the time before, during, or after the violence. These included alibi behavior, ability to delay and execute the killing, and indicia of planning and preparation.

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