

An Overview of the Capital Jury Project for Military Justice Practitioners: Aggravation, Mitigation, and Admission Defenses

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Introduction

What themes drive a juror's decision to vote for life or death in a capital case? For a judge advocate assigned to a capital case, the answer to that question should serve as the foundation for her case development. If she builds a case based on what *attorneys* traditionally think is aggravating and mitigating, she might build the wrong case. What is important is what *jurors* actually think, and then constructing arguments to match those belief patterns. Fortunately, modern research provides insight on what influences jurors to vote for life or for death. Jurors tend to focus on three aggravating themes: fear, loathing, and lack of remorse.¹ Jurors also tend to find a few mitigating themes persuasive: residual doubt, shared culpability, reduced culpability, family testimony, and remorse.²

Even if the judge advocate gets the theme right, if she waits too long to present the evidence that supports that theme, she may have missed her chance to influence the panel members. Modern research has also shown that jurors make up their minds early about the appropriate penalty in the case. Although jurors are supposed to wait until the conclusion of the sentencing hearing before deliberating and then deciding on punishment, research has shown that one-half of jurors choose the punishment for the crime during the presentation of evidence on the merits and during merits deliberation.³ Almost all of these jurors were absolutely convinced or pretty certain of their decision,⁴ and six in ten of these jurors held fast to that belief through the sentencing phase.⁵

Further, even though jurors are prohibited from discussing the sentence until all the evidence is presented

during the penalty phase, jurors talk about their positions well before then: "Three to four of every ten jurors (33.6% to 45.7%) indicated [their preference] during guilt deliberations."⁶ More importantly, some jurors start actively and explicitly negotiating the death penalty vote during the merits deliberations:

For some jurors, guilt deliberations became the place for negotiating or for forcing a trade off between guilt and punishment. One or more jurors with some doubts, possibly reasonable doubts, about a capital murder verdict nevertheless may have agreed to vote guilty of capital murder in exchange for an agreement with pro-death jurors to abandon the death penalty.⁷

The critical lesson is that if an attorney waits until the penalty phase to present certain evidence, then that attorney may be too late.

These findings are among many uncovered by the Capital Jury Project (CJP).⁸ Started in 1991, the CJP is a research project supported by the National Science Foundation and headquartered at the University of Albany's School of Criminal Justice.⁹ The CJP is comprised of "a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members—utilizing common data-gathering instruments and procedures."¹⁰

The CJP investigators conduct in-depth interviews with people who have served on juries in capital cases "randomly selected from a random sample of cases, half of which resulted in a final verdict of death, and half of which resulted

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¹ See *infra* notes 18–26.

² See *infra* notes 38–44.

³ William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1089–90 (1995).

⁴ *Id.* at 1089–90; Marla Sandys, *Cross Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1191–95 (1995).

⁵ William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Juror's Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1491–92 (1998).

⁶ *Id.* at 1519.

⁷ *Id.* at 1527; Sandys, *supra* note 4.

⁸ For an excellent introduction to the Capital Jury Project (CJP) findings along with a list of articles and books related to the CJP, see SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2005). Sundby introduces the broad themes of the CJP within the study of a single jury. See also SCH. OF CRIMINAL JUSTICE, UNIV. AT ALBANY, STATE UNIV. OF N.Y., *Publications*, <http://www.albany.edu/scj/13194.php> (last visited June 8, 2011); CORNELL UNIV. LAW SCH., *Articles*, cornell.edu/research/death-penalty-project/Articles.project/Articles.cfm (last visited June 7, 2011) (providing lists of articles and book related to the CJP).

⁹ STATE UNIV. OF N.Y. AT ALBANY SCH. OF CRIM. JUST., *What is the Capital Jury Project?*, <http://www.albany.edu/scj/CJPwhat.htm> (last visited May 15, 2011) [hereinafter, *What is the CJP?*].

¹⁰ Bowers, *supra* note 3, at 1043.

in a final verdict of life imprisonment.”¹¹ Trained interviewers administer a fifty-one page survey and then conduct a three to four hour interview.¹² The interviews “chronicle the jurors’ experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.”¹³ To support their findings, the researchers draw upon the statistical data that results from the surveys and interviews as well as the narrative accounts given by the jurors.¹⁴ So far, the CJP has conducted interviews with 1198 jurors from 353 capital trials in 14 states.¹⁵

The CJP’s findings related to aggravation, mitigation, and to when jurors make their decisions have important implications for theme development. We will see that jurors approach aggravation and mitigation based on certain fundamental beliefs about human behavior (free will versus environmental shaping) and punishment (eye-for-an-eye versus redemption). Counsel should shape the aggravating and mitigating evidence to address those beliefs.

The findings are also important because they validate an important defense strategy known as the admission defense.¹⁶ Admission defenses “admit that the defendant committed the acts charged, but also assert that she lacked the requisite intent to be held criminally liable for the offense charged. Provocation, self-defense, insanity, diminished capacity, and lack of specific intent are all examples of admission defenses.”¹⁷ We will see that if a defense counsel uses an admission defense, she will address many of the issues related to theme development. The admission defense helps jurors focus on two key mitigators: reduced culpability and lingering doubt. The admission defense allows the accused to accept some responsibility for the crime and appear remorseful. Importantly, the admission defense addresses the timing of juror decision-making by ensuring that the jurors know about some of the mitigating evidence before they might become foreclosed to it. With an

admission defense, the jurors learn about the mitigating evidence in the *merits* phase of trial. By using the admission defense, defense counsel can approach the merits phase and the sentencing phase as one, or what John Blume calls the integration of the guilt and penalty phase stories.¹⁸ The admission defense allows for a consistent, integrated, and comprehensive defense case that spans both the guilt *and* penalty phases.

Military attorneys may have heard of a defense counsel strategy in capital cases called “frontloading mitigation.”¹⁹ However, “frontloading mitigation” is not the actual trial strategy. The trial strategy is the admission defense. One of the benefits of an admission defense is that it allows the defense counsel to introduce mitigating evidence during the merits phase of the trial. We will see that simply frontloading mitigating factors into the merits phase without then tying the evidence back to a broader defense explanation on why the accused committed the offense—an explanation that spans the guilt and penalty phases—may not be effective.

This article will cover these themes in aggravation and mitigation and will discuss the underlying juror beliefs that drive those themes. Throughout, the article will explore how counsel on both sides of a capital case can use these findings to improve their trial practice but will pay special attention to how admission defenses address these themes. Finally, the article will conclude by looking at how some of the lessons learned from the CJP research can be applied to non-capital cases.

Aggravation Themes

The CJP research shows that jurors make the death penalty decision based on three main aggravating circumstances: fear, loathing, and lack of remorse.²⁰

Fear is the degree to which the defendant poses a risk of future danger if he were to be released from prison. In close cases, jurors err on the side of public safety: jurors would

¹¹ John H. Blume et al., *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA’S DEATH PENALTY 144, 147 (Stephen P. Garvey ed., 2003).

¹² *Id.*

¹³ *What is the CJP?*, *supra* note 9.

¹⁴ *Id.* For an in-depth discussion of the sampling design and data collection methods, see Bowers, *supra* note 3, at 1077–84.

¹⁵ *What is the CJP?*, *supra* note 9.

¹⁶ Scott E. Sundby, *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 88 CORNELL L. REV. 1557, 1584 (1998).

¹⁷ Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). See generally John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1039 (2008).

¹⁸ Blume et al., *supra* note 17, at 1043.

¹⁹ The Army Court of Criminal Appeals has recognized that frontloading mitigation evidence into the merits case is a legitimate trial tactic. *United States v. Kreutzer*, 59 M.J. 773, 781 n.9 (A. Ct. Crim. App. 2004).

²⁰ See Blume et al., *supra* note 11, at 162; Blume, *supra* note 17, at 1046–50 (using the terms, “vileness,” “future dangerousness” and “lack of remorse”); SUNDBY, *supra* note 8, at 31. See generally Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000) [hereinafter Garvey, *Emotional Economy*]; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) [hereinafter Garvey, *Aggravation and Mitigation*]. These aggravating circumstances may or may not be the same as the legal aggravating factors that a jurisdiction uses to limit the arbitrary application of the death penalty.

rather have the defendant's blood on their hands than the blood of a future victim. Interestingly, jurors are not just concerned about the safety of the public, but their own *personal* safety. Jurors express fear that the defendant might somehow get out of jail after conviction, either through parole or escape, and come after them.²¹ Evidence related to future dangerousness includes the facts surrounding the apprehension (i.e., Did the defendant submit peacefully to law enforcement or violently resist?), escape attempts, and how the defendant has adjusted to incarceration (i.e., Has he followed the rules or has he committed disciplinary violations?).²²

Loathing is how much the jurors hate the defendant for the crime he has committed or are otherwise disgusted by him. Jurors were more likely to vote for death when the killing was brutal (involving torture or physical abuse), was bloody or gory, or when the defendant mutilated the dead body.²³ If the victim was a child, jurors found this to be a highly aggravating factor. If the victim was a woman or had high social standing, jurors found this to be a somewhat aggravating factor.²⁴

Lack of remorse in this context does not mean that a defendant has failed to say he is sorry for what he has done. Jurors do not make their decisions based on whether the defendant gets up in court and says he is sorry—first, because it rarely happens (particularly when the defendant is claiming factual innocence) and second, because jurors do not believe the defendant when he does make an in-court apology.²⁵ Rather, jurors look to the moment of the crime and the period immediately following the crime for indications of a lack of remorse—factors such as whether the defendant shouted obscenities at the victim as he killed her, or bragged about it to his friends.²⁶ The more cold-blooded and vicious the crime, the less likely jurors are to believe that the defendant is remorseful,²⁷ believing the brutality of

the crime shows the defendant's lack of remorse. Jurors do give credit to expressions of remorse that are not associated with the trial, such as statements made and actions taken when the defendant did not have a self-serving reason to make them.²⁸

Jurors further assess remorse based on whether the defendant has accepted responsibility for the crime and has owned up to his actions.²⁹ If the defendant denies involvement in the crime, the jurors may perceive that the defendant is saying to everyone, "Oh, yeah? Prove it," and therefore is unremorseful. As Scott Sundby explains, "[A] death penalty trial is no ordinary criminal trial and invoking one's presumption of innocence can prove deadly."³⁰ And when the evidence shows that the defendant did commit the crime, the defense loses credibility and looks hypocritical and inconsistent in the penalty phase, particularly when the defense then presents mitigation evidence to explain why the defendant may have done the crime that he earlier denied committing.³¹

Presenting an admission defense does not involve those inconsistencies. Under an admission defense, the defendant is not saying he did not do the underlying act; rather, he is saying he is not as culpable as the government is trying to portray him to be.³² With an admission defense, the defendant accepts some responsibility for the underlying crime; the jurors perceive the defendant as remorseful; and the jurors are therefore more likely to vote for life instead of the death penalty.

Further, the CJP research shows that the more a crime looks like it was driven by the circumstances that surrounded the defendant—circumstances that suggest accident or mistake, self-defense, provocation, lack of intent, or mental illness—the jurors are more likely to find remorse.³³ Note that these circumstances describe the different types of admission defenses.

²¹ SUNDBY, *supra* note 8, at 36. See generally John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397 (2001).

²² Positive prison behavior is referred to as *Skipper* evidence. In *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986), the Court held that a capital defendant's right to present mitigating evidence includes evidence of positive prison behavior.

²³ Garvey, *Aggravation and Mitigation*, *supra* note 20, at 1555–56.

²⁴ *Id.* Some of this data was collected before the Supreme Court explicitly allowed victim impact evidence to be introduced at trial. *Payne v. Tennessee*, 501 U.S. 808 (1991). See also Garvey, *Emotional Economy*, *supra* note 20, at 46–50.

²⁵ Sundby, *supra* note 16, at 1568–69. If a military accused takes the stand, a military prosecutor may comment on the accused's lack of remorse if certain conditions are met. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007).

²⁶ Garvey, *Aggravation and Mitigation*, *supra* note 20, at 1561.

²⁷ Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1609–15 (1998).

²⁸ Sundby, *supra* note 16, at 1586.

²⁹ *Id.* at 1573–74.

³⁰ SUNDBY, *supra* note 8, at 33.

³¹ *Id.* at 33–35.

³² Granted, some defendants will not want to pursue any admission defenses, either because he did not do the crime, or, when faced with two unpleasant options—life without parole or death—he would rather pursue the chance of an acquittal, however small.

³³ Eisenberg et al, *supra* note 27, at 1609–15.

Jurors also assess remorse by looking at the defendant's relationship with his family: "Jurors perhaps think that defendants who are capable of showing love to their families also have the capacity to experience remorse."³⁴ This type of evidence includes how the defendant has helped—or hurt—the lives of the people around him who were not the direct victims of the crime.

Further, jurors look to in-court demeanor to decide whether the defendant is remorseful. Jurors often pay more attention to the defendant's demeanor than they do to the evidence being presented.³⁵ Jurors described that when the defendant looked clean-cut in court, he seemed to be trying to manipulate them, particularly when they compare that clean-cut image to the street image captured in his post-arrest mug shot.³⁶ If the defendant appears nonchalant or arrogant or tries to smile at or make eye contact with jurors, the jurors regard that as showing no remorse.³⁷ Jurors expect the defendant to show emotion at the emotionally tense portions of the trial; if the defendant does not, jurors believe he has no remorse.³⁸

Generally, military prosecutors may not comment on the accused's in-court demeanor unless certain rigorous conditions are met.³⁹ However, the panel members will likely determine whether the accused is remorseful based on the accused's in-court demeanor, regardless of whether the attorneys comment on it. The panel members' reliance on in-court demeanor may present a serious challenge to the defense counsel representing an accused who has a mental condition that causes him to have a restricted or flat affect, or who has low intelligence and so might not have a full grasp of the complex issues going on around him. Military defense counsel need to find a way to inform the jurors that the accused looks the way he does because of his illness or impairment and not due to a lack of remorse. The defense counsel can do this through the testimony of a mental health professional, or by asking for an instruction.

These major themes—fear, loathing, and lack of remorse—push jurors toward choosing the death penalty. Prosecutors should focus their evidence on these themes and defense counsel should work to rebut them. Defense counsel should also work to affirmatively present mitigating evidence to support themes that are important to jurors. We turn to those now.

³⁴ *Id.* at 1621.

³⁵ *Id.*

³⁶ SUNDBY, *supra* note 8, at 31.

³⁷ *Id.* at 32.

³⁸ *Id.*; Sundby, *supra* note 16, at 1561–64.

³⁹ United States v. Edwards, 35 M.J. 351, 354–56 (C.M.A. 1992); United States v. Paxton, 64 M.J. 484, 487–88 (C.A.A.F. 2007).

Mitigation Themes

The CJP's findings related to mitigation are extraordinary because most of the factors that attorneys think of as mitigating turn out not to be very mitigating. Shown below is a table⁴⁰ of classically mitigating factors detailing the percentage of jurors who *do not* think that factor is mitigating:

Percentages of Jurors Who Do Not See Classically Mitigating Factors as Mitigating

Defendant Was a Drug Addict	90.3%
Defendant Was an Alcoholic	86.3%
Defendant Had a Background of Extreme Poverty	85.0%
Defendant's Accomplice Received Lesser Punishment in Exchange for Testimony	82.9%
Defendant Had No Previous Criminal Record	80.0%
Defendant Would be a Well-Behaved Inmate	73.8%
Defendant Had Been Seriously Abused as a Child	63.0%
Defendant Was Under 18 at the Time of the Crime	58.5%
Defendant Had Been in Institutions But Was Never Given Any Real Help	51.8%
Defendant Had a History of Mental Illness	43.9%
Defendant Was Mentally Retarded	26.2%

A defense counsel might think that she has a great case in mitigation because her client was a drug-addicted alcoholic who grew up in the projects and whose buddy in the same killing got a life sentence, but this chart suggests that many jurors would not agree. Defense counsel should still investigate and pursue this type of evidence, but these statistics suggest that this evidence standing alone may not be persuasive to many jurors or panel members.

Note that while most jurors think mental illness and mental retardation are mitigating factors, a significant minority think these impairments are not. This significant minority may think that this impairment makes the defendant an *even greater* danger to the public if he were ever released.⁴¹

While the CJP has shown that many jurors do not find the classically mitigating factors to be very mitigating,⁴² the

⁴⁰ This table is taken directly from John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1229 (2001).

⁴¹ Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLOM. L. REV. 291, 299 (1989); see generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 405 (1966).

⁴² The findings reflected in this table are important for other reasons as well. Potential jurors cannot be "mitigation impaired"; they must still be able to consider mitigating evidence. Blume et al., *supra* note 40, at 1229; see also Morgan v. Illinois, 504 U.S. 719 (1992). Counsel can ask panel members questions during voir dire to determine if the panel members are mitigation impaired.

CJP has shown that jurors do find certain mitigating factors to be persuasive.⁴³ The best mitigating factor is *residual* or *lingering doubt* about the defendant's guilt, defined as doubt about the defendant's factual guilt or legal guilt.⁴⁴ For example, a juror might not have any doubt that the defendant committed the crime (factual guilt), but might have lingering doubts about whether the defendant had the full intent required for the capital offense (legal guilt).

Another proven mitigating factor is *shared culpability*. Under shared culpability, the defendant is blameworthy for the crime, but someone else also has unclean hands. The victim can share culpability based on his role in the crime (e.g., a drug dealer killed in a deal gone bad). Society can share blame because someone in an official position might have been able to prevent the crime but failed to act on signals or failed to give the defendant help when he sought it out before the crime.

Further, *reduced culpability* is also a mitigating factor. Reduced culpability arises when an impairment or circumstance out of the defendant's control is a significant reason why the crime occurred, such as mental health problems or diminished intelligence that may not rise to the level of a defense or provide an exclusion from the death penalty. Here, mental illness and mental retardation are mitigating factors not simply because the defendant suffers from one or the other, but because the impairment played a direct role in the crime. Note again that admission

The CJP has influenced one of the major revolutions in capital trial work: the development of the Colorado *voir dire* method. One of the CJP findings is that most juries start deliberations with at least some jurors who support a life sentence. Bowers et al., *supra* note 3, at 1491–96; Sandys, *supra* note 4. David Wymore recognized that the key for defense counsel was to find a way to preserve those potential votes. Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Prods. 2004), available at <http://www.thelifepenalty.com>. Called the Colorado *voir dire* method (Wymore was practicing in Colorado when he developed this method), the method has two basic parts. The first part is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges and to build grounds for challenges for cause. The second part is designed to address jury dynamics. See Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6. The method is grounded in constitutional law. See Blume et al., *supra* note 40.

For the military defense counsel who is detailed to a capital case, training in the Colorado method is the most important capital-specific training to receive. The method is generally taught over a three or four day hands-on seminar. The National Association of Criminal Defense Lawyers generally offers one training seminar on the Colorado Method every year. See <http://www.nacdl.org>. One of these seminars has been captured on video and is available for training. Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Productions 2004), available at <http://www.thelifepenalty.com>. See generally Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, THE CHAMPION, Jan. 2001, at 35; Blume et al, *supra* note 17, at 1039.

⁴³ Garvey, *Aggravation and Mitigation*, *supra* note 20, at 1561–67.

⁴⁴ Sundby, *supra* note 16, at 1585.

defenses—accident or mistake, self-defense, provocation, lack of intent, or mental illness—all work to reduce the accused's culpability.

Testimony from family members is also mitigating for several reasons. One reason, as shown above, is that the testimony can help jurors assess remorse. Another reason is that jurors find the impact of a possible execution on the defendant's family members to be mitigating. Further, testimony from a family member might be the only evidence by which jurors can conclude that the defendant "might have some good in him as well as evil."⁴⁵ This combination of mitigating effects leads to "the dark humor saying of capital defense attorneys that . . . learning that the defendant has a mother reduces the chances of a death sentence by half."⁴⁶

The Relationship Between Aggravation, Mitigation, and Juror Belief Systems

By looking at both aggravating and mitigating factors, we can see that in capital cases certain fundamental beliefs about human nature and punishment regularly come into conflict: free will versus environment, and an-eye-for-an-eye versus redemption. When we view the findings on aggravation and mitigation through these belief lenses, we can make some sense of why some circumstances are aggravating and some are mitigating—and find ways to develop cases to properly address those beliefs.

The first conflict is between the belief that the defendant is solely responsible for committing the crime through the exercise of free will, and the belief that people are complex and can be shaped by their environments in ways they cannot control. Jurors tend to view tales of hardship as running counter to their understanding of free will. Even if an offender came from a life of extreme hardship, many jurors will conclude, "Okay, but he still had a choice, and he chose to do this crime." This type of mitigation is viewed as a sneaky excuse: "There he goes again, placing blame on everyone but himself."⁴⁷ These jurors "very much shared the belief that individuals control their own destiny and generally should be seen as capable of making their own choices even under adverse circumstances."⁴⁸ This runs counter to the belief that people are shaped by their environment. Jurors who are influenced by this belief see people as "human supercolliders, their personalities buffeted and shaped in unseen ways by the numerous events, people, and influences that they come in contact with."⁴⁹

⁴⁵ SUNDBY, *supra* note 8, at 46.

⁴⁶ *Id.* at 47.

⁴⁷ *Id.* at 35.

⁴⁸ *Id.* at 43.

⁴⁹ *Id.* at 70.

The second conflict of beliefs is between the axiom belief in an-eye-for-an-eye (“[Y]ou take somebody’s life, you pay with yours”)⁵⁰ versus the belief in “the power of redemption and [the] essential hope that people could become better.”⁵¹ These beliefs are often deeply rooted in the juror’s religious tradition. The eye-for-an-eye beliefs are generally found in the Old Testament, to include, “Anyone who strikes a person with a fatal blow is to be put to death,”⁵² or, “Whoever sheds human blood, by humans shall their blood be shed,”⁵³ or, “If anyone strikes someone a fatal blow with an iron object, that person is a murderer; the murderer is to be put to death.”⁵⁴ However, the New Testament contains passages that call for forgiveness and acknowledge the power of redemption. The author of John describes how Jesus came upon a crowd that had caught a woman who had committed adultery and were preparing to stone her according to the laws described above.⁵⁵ Jesus said, “Let any one of you who is without sin be the first to throw a stone at her.”⁵⁶ The crowd began to dissipate until only Jesus was standing with the woman.⁵⁷ Jesus then told her he did not condemn her and told her to live the rest of her life without sin.⁵⁸ These are two sets of powerful and deeply-rooted belief systems that jurors will rely upon when making one of the most significant decisions of their lives—the decision to sentence someone to death or to life in prison.

With this understanding of juror belief systems, we can make some sense of the surprising findings about classically mitigating factors. We saw that evidence of a life of abuse, standing alone, does not help much. We can call this “freestanding mitigation.” This mitigation does not explain why the accused did what he did, or address any of the underlying beliefs. Rather, defense counsel need to go beyond the fact that something bad happened to the accused in order to reach the juror’s underlying beliefs. If the underlying belief is that a person acts according to his own free will, then the mitigation evidence needs to show that the person was constrained in exercising free will in a way that

regular people are not.⁵⁹ The mitigation evidence also needs to show that the accused was not in control of the situation. We can call this “connected mitigation.” As John Blume puts it, “[T]he devil is in the details.”⁶⁰ Defense counsel need to connect “a truly compelling case of [a mitigating factor] tied to events in the defendant’s life and *its role in the crime.*”⁶¹ When the impairment or condition is directly related to the commission of this crime, then jurors can reconcile the case before them with their deeply-held beliefs about free will.

The military uses the words *extenuation* and *mitigation*. Matters in extenuation are those things that “explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.”⁶² Matters in mitigation are those things that “lessen the punishment to be adjudged by the court-martial.”⁶³ From our discussion above, we can see that extenuation is really just a subset of mitigation: extenuating matters are those that show *why* the accused committed the crime and therefore will mitigate or lessen the punishment. Extenuation is *connected* mitigation and therefore more powerful.

For example, an accused may have grown up suffering from severe abuse and neglect. With nothing more, that would be freestanding mitigation. If, however, the attorney does the work to show that because of the abuse and neglect, the accused’s brain development was interrupted or his brain was otherwise damaged, then the attorney may be able to show that the accused became hard-wired to respond to certain situations with certain behavior. The attorney can use that information to then argue that the abuse and neglect explains why the accused behaved the way he did on this

⁵⁰ *Id.* at 17.

⁵¹ *Id.* at 73. For a detailed look at how religious themes impact death penalty decisions, see John H. Blume & Sheri Lynn Johnson, *Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL OF RTS. J. 61 (2000).

⁵² *Exodus* 21:12 (New International Version).

⁵³ *Genesis* 9:6 (New International Version).

⁵⁴ *Numbers* 35:16 (New International Version).

⁵⁵ *John* 8:3-5 (New International Version).

⁵⁶ *Id.* at 8:7.

⁵⁷ *Id.* at 8:9.

⁵⁸ *Id.* at 8:10–11.

⁵⁹ An interesting finding related to these conflicts in beliefs (and that is contrary to the belief of many trial attorneys) is that jurors who personally identify with the defendant (e.g., similar troubled background) generally *will not* side with the defendant. SUNDBY, *supra* note 8, at 14. If the juror came from that same background and overcame his circumstances to succeed in life, then that juror will not be sympathetic to claims that the defendant’s background is mitigating: “If I could do it, then so could he.” *Id.* However, someone who recognizes that one of his family members is like the defendant—a brother, son, or father—is more likely to be sympathetic to these claims: “The reaction often is a shared sense of helplessness with the defendant’s family members who had tried so hard to keep the defendant from slipping into a life of crime.” *Id.* at 114. This lesson is not limited to capital cases: prosecutors should try to keep jurors who identify closely with the defendant, whereas defense counsel should try to keep jurors who identify closely with the defendant’s family members. A counsel defending a drug addict does not necessarily want the reformed drug addict to sit on the jury, but would want the mother of a drug addict on a jury.

⁶⁰ Blume et al., *supra* note 17, 1039.

⁶¹ *Id.* (emphasis added).

⁶² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(c)(1)(A) (2008) [hereinafter MCM].

⁶³ *Id.* R.C.M. 1001(c)(1)(B).

certain occasion. The attorney will have converted mitigation into extenuation.

Note again the power of the admission defense. By using an admission defense (provocation, self-defense, insanity, diminished capacity, lack of specific intent, accident, or mistake), the defense counsel can connect the mitigation directly to the commission of the crime. Someone with impaired executive functioning, a mental illness, very low intelligence, or who finds himself in a precarious situation is limited in how he can exercise free will in a way that a person with a normal brain, or average mental health, or normal intelligence, or enough time and space to think is not otherwise limited.

The defense counsel might argue for the lack of mental responsibility defense, understanding those findings are extremely rare because the accused has to have a severe mental disease or defect, and that defect had to have caused the accused to be unable to appreciate the nature and quality or wrongfulness of his acts.⁶⁴ The defense counsel will not likely get that finding, but by giving notice of the defense,⁶⁵ presenting some evidence that tends to show the accused lacked mental responsibility,⁶⁶ and then seeking the instructions for the defense,⁶⁷ the defense counsel forces the panel to focus on and discuss the issue of the accused's mental health in the context of why the crime was committed. The key is to ensure that the mitigating factor is not freestanding, but is instead connected directly to the crime.

Other mitigation evidence must then supplement this by addressing the eye-for-an-eye versus redemption conflict. Defense counsel will have to address the eye-for-an-eye belief by reducing the jury's perception of the accused's vileness and dangerousness. Defense counsel must address the panel members' fears that the accused might one day be released from prison and be a potential future danger to society.⁶⁸ Defense counsel can mitigate the loathing generated by the crime by showing that the victim or society shared culpability. Defense counsel can also present evidence that the accused is genuinely remorseful or has accepted responsibility for his crimes.⁶⁹ Defense counsel will also need to introduce mitigation that works to increase the accused's redemptive value. Defense counsel can do this by showing the accused's genuine remorse and acceptance

of responsibility and through the testimony of family members, to include the impact that an execution would have on them. Those themes—free will versus environment, and an-eye-for-an-eye versus redemption—drive the jurors' reasoning processes, and therefore counsel should address them.

Admission Defenses and Residual Doubt

We have seen that an admission defense focuses the jurors on reduced culpability (a known mitigator), and allows the accused to appear remorseful (another known mitigator) by allowing him to accept some responsibility for his actions in the merits phase of the trial. Another benefit of the admission defense is that it allows the defense counsel to focus the panel on legitimate concerns about legal guilt, thereby implicating the most compelling capital mitigator: residual doubt.

For example, in a premeditated murder case, the defense counsel might introduce mental health evidence, fully knowing that in the end, every panel member will be convinced beyond a reasonable doubt of the accused's guilt. However, for the defense counsel, the real target is not reasonable doubt, but lingering doubt. The defense counsel is trying to take the certainty of legal guilt off of 100 percent, even if only to 99 or 98 percent.

In some cases, the accused might have believed that what he was doing was right. First, note that the test for lack of mental responsibility in the military is not "unable to know the wrongfulness of the acts." The test is "unable to appreciate the wrongfulness of the acts."⁷⁰ There is a big difference between *know* and *appreciate*. According to Joshua Dressler, jurisdictions that choose *know* have adopted a formalistic approach:

[T]he word "know" used . . . in the test may be defined narrowly or broadly. Some courts apply the word narrowly: a person may be found sane if she can describe what she was doing ("I was strangling her") and can acknowledge the forbidden nature of her conduct ("I knew I was doing something wrong"). This may be referred to as "formal cognitive knowledge."⁷¹

Under this test, if an accused knows that the conduct is against the law, then he will not satisfy the defense.

⁶⁴ UCMJ art. 50a(a) (2008); MCM, *supra* note 62, R.C.M. 916(k)(1).

⁶⁵ MCM, *supra* note 62, R.C.M. (701)(b)(2).

⁶⁶ U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 6-1 (1 Jan. 2010) [hereinafter MILITARY JUDGES' BENCHBOOK].

⁶⁷ *Id.* paras. 6-4, 6-7.

⁶⁸ Carpenter, *supra* note 42, at 6.

⁶⁹ See generally Blume et al., *supra* note 17, at 1046-50.

⁷⁰ UCMJ art. 50a(a) (2008).

⁷¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.04(C)(1)(a), at 350-52 (5th ed. 2009).

However, Congress and military appellate courts have rejected this approach and instead have used the word “appreciate.” This other approach is called the “affective” approach. According to Joshua Dressler:

Some courts, however, require a deeper meaning of “knowledge” (“affective knowledge”), which is absent unless the actor can evaluate her conduct in terms of its impact on others and appreciate the total setting in which she acts . . .

[S]uppose that *D*, due to mental illness, believes that God has instructed her to kill *V*, an act that *D* knows violates the secular law. In view of God’s edict, however, *D* believes that it is morally right to kill *V*. On these facts, *D* is sane if the right-and-wrong test is based on awareness of the *illegality* of an act; she should be found not guilty by reason of insanity, however, if [the test] requires knowledge of the *immorality* of her actions. . . . American law is sharply divided. In jurisdictions that apply a “moral right-and-wrong” standard, however, the issue is not whether the defendant personally and subjectively believed that her conduct was morally proper; the question is whether she knowingly violated *societal* standards of morality. Therefore, *D* is sane under this prong of [the test] if she commits an offense that she knows society will condemn, but which she is convinced is morally proper . . .

. . . [However, a] person who believes that God had decreed her act is likely to believe that society would approve of her conduct.⁷²

Military appellate courts, noting that Congress chose the word “appreciate,” have rejected the formalistic approach and have adopted the affective approach. In *United States v. Martin*,⁷³ the Court of Appeals for the Armed Forces discussed the meaning of “appreciate”:

The word “appreciate” was chosen with legislative care . . . The choice of the word “appreciate,” rather than “know” . . . is significant; mere intellectual awareness that conduct is wrongful, when divorced from appreciation of the moral or legal

import of behavior, can have little significance . . . This construct mirrors that contained in the legislative history. While Congress otherwise chose to adopt the [M’Naghten rule], in this word choice, Congress adopted the language of the Model Penal Code rather than the M’Naghten rule (“appreciate” vs. “know”) and thereby broadened the inquiry. (“Know” leads to an excessively narrow focus on “a largely detached or abstract awareness that does not penetrate to the affective level.”)⁷⁴

We see that the *Martin* court believed that “wrongful” means more than just knowledge that the act was illegal. The accused must be able to appreciate the wrongfulness of the act.

The accused must be able to evaluate his conduct in terms of its impact on others, appreciate the total setting in which he acts, and understand the consequences of his acts: “[A] defendant who is unable to appreciate the nature and quality of his acts is one that does not have *mens rea* because *he cannot comprehend his crimes, including their consequences.*”⁷⁵ The court also stated, “Other federal circuits recognize that a defendant’s delusional belief that his criminal conduct is morally or legally justified may establish an insanity defense under federal law.”⁷⁶ The court also offered this example: “He knew what he was doing, he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.”⁷⁷ The accused might know that what he is doing is illegal under the laws of man, but because of a severe mental disease or defect, he might believe that God is telling him to do the act or approves of the act and so may believe that the act is morally right, and therefore be unable to appreciate the wrongfulness of the act.

With that understanding of the meaning of the word “appreciate,” defense counsel can put on a case that might cause some panel members to have some residual doubt about the accused’s legal guilt. For example, the accused is a Muslim deployed to a Muslim country and is involved in conducting combat operations. His unit is going to go out on patrol the next day and he attacks his unit, killing some Soldiers. The defense theory could be that members in the unit continually joked that they were going to rape Muslim women and pillage mosques while out on the patrol.

⁷² *Id.* (emphasis in original).

⁷³ 56 M.J. 97 (C.A.A.F. 2001).

⁷⁴ *Id.* at 107–08 (internal citations omitted).

⁷⁵ *Id.* at 109 (emphasis added).

⁷⁶ *Id.*

⁷⁷ *Id.* at 108.

Because of the accused's mental illness (delusional and paranoid features), he is unable to understand that they were joking and actually believed that they would do these things. He already felt isolated and distrustful of members of the unit, to include law enforcement personnel. He therefore decided to take action against those members of his unit before they do what he believed would be a terrible thing. Further, he might have believed that he was the only person who could stop this terrible thing from happening.

Based on that theory, the defense counsel could argue that the accused was not able to appreciate the wrongfulness of his conduct. He might have known that the conduct was illegal, but not have appreciated the wrongfulness of his conduct because he had a mental illness that caused him to believe that he was doing the morally right thing. He might have even believed that society at large would be thankful that he prevented this other (delusional) tragedy. The defense counsel would recognize that she will still lose on this theory, but maybe one or two panel members will have some doubt about the accused's legal guilt (his mental responsibility) and so not vote for death later in the proceeding. And by pursuing this admission defense, the defense is able to frontload mitigation into the guilt phase. The panel members would see that the accused's reason for committing the offense, while twisted, was not as awful as it could have been. The panel members will see a fully-developed case about the accused's mental health. The panel members will hear about the accused's family history and upbringing and how that shaped his mental health. The panel members might further hear about how people in his unit missed the signs of his deteriorating mental health. Importantly, the panel will hear all of this during the merits.

Defense counsel can also argue for partial mental responsibility as a fallback position from the defense of lack of mental responsibility. The goal is to have at least one panel member experience residual doubt about the accused's legal guilt by casting the accused's intent in some way that is different than that required by the capital offense, even if the accused could appreciate the nature and quality or wrongfulness of his acts.

Partial mental responsibility falls into two main categories. The first is partial mental responsibility as a true defense, whereby if the defendant proves to a sufficient standard that he has the right degree of mental illness, then the fact finder can reduce culpability from first-degree murder to manslaughter, much like the way the defense of heat of passion operates to reduce culpability from first-degree murder to manslaughter.⁷⁸ The second is partial mental responsibility as an evidentiary rule, where evidence of mental illness may be admitted to explain that the defendant could not or did not form the specific intent that is required for any specific intent crime. In some jurisdictions,

⁷⁸ DRESSLER, *supra* note 71, § 26.03, at 373–76.

that evidence is admissible in any case; in some, that evidence is admissible in murder cases only; in others, that evidence is never admissible.⁷⁹ The military uses partial mental responsibility as an evidentiary rule. In the military, the evidentiary rule is broad, as evidence of mental illness may be admitted in any case to show that the accused could not form the required intent,⁸⁰ or to otherwise explain that he formed some other intent than the one charged.⁸¹

In a premeditated murder case, the defense counsel might use mental health evidence to argue that the accused could not premeditate. Note that “to premeditate” does not equal “to plan.” Premeditation requires more than just planning to do the murder or thinking about it for some short period of time before the act. The Court of Military Appeals has described what thought process is required: “The deliberation part of the crime requires a thought like, ‘Wait, what about the consequences? Well, I’ll do it anyway.’”⁸² Look at the actual word *premeditate* and note the root: *meditate*. The accused needs to *meditate* about the crime before doing it. And, premeditation requires a cooling-off period or “reflection by a cool mind.”⁸³ If someone is in such a rage that he cannot meditate or consider the consequences of his actions, then he did not premeditate. Again, this is much like the heat-of-passion defense. If someone catches his spouse in bed with another man and then goes to the car, grabs a gun, and kills the adulterers, then he has essentially not premeditated, even though he hatched a short-lived plan to kill the adulterers. Society has decided that because he acted in a rage, his culpability is lower and so his crime is reduced to a lower form of homicide. Once he has the time to cool off, the defense becomes unavailable.

Many trial advocates, military judges, and appellate judges tend to focus on whether an accused's mental health problem made him unable to plan the murder.⁸⁴ Yet an accused's mental health problem, even if extraordinarily severe, may not affect his ability to plan at all. People with severe mental health problems may have no problem with planning events. A paranoid schizophrenic could wake up and plan to go to the grocery store, or plan to go to his parents' house, or plan to go to the park. A person who is fully psychotic, who believes that God is telling him to murder his wife and children to save their souls, can still

⁷⁹ *Id.* § 26.02(B), at 369–73.

⁸⁰ MILITARY JUDGES' BENCHBOOK, *supra* note 66, para. 6-5.

⁸¹ *Id.* para. 5-17.

⁸² *United States v. Hoskins*, 36 M.J. 343, 346 (C.M.A. 1993).

⁸³ *United States v. Viola*, 26 M.J. 822, 829 (A.C.M.R. 1988); *United States v. Loving*, 41 M.J. 213, 279 (C.A.A.F. 1994).

⁸⁴ *See, e.g., United States v. Murphy*, 67 M.J. 514, 529–30 (A. Ct. Crim. App. 2008); *United States v. Dock*, 26 M.J. 620, 629 (A.C.M.R. 1988) (De Giulio, S.J., dissenting).

plan the murders: he could write down what he plans to do, then get a gun from a storage unit, load it, drive to his home, walk through the door, and kill his family. Someone with a severe mental disease or defect may fully satisfy the lack of mental responsibility defense (be unable to appreciate the nature and quality or wrongfulness of his acts) and still be able to plan.⁸⁵

The issue is not the ability to *plan*, but the ability to *premeditate*. Defense counsel should focus on how the accused's mental illness impacts that accused's ability to reflect with a cool mind or to meditate on the offense, not on whether the accused could plan. For example, the defense counsel might argue that because of the mental disease or defect (for example, something that impacts impulse control or executive functioning) the accused did not have the ability to calm down and contemplate the impact of his actions before he took them. If the accused becomes enraged and because of his mental disorder stays enraged for the ten minutes that it takes him to get his gun from the barracks room and return to the day room to kill the victim, then he has not reflected on the crime with a cool mind and so has not premeditated. If his mental disorder prevented him from thinking through the fallout or consequences of his act, then he has not premeditated.

The mental health condition can also provide evidence that the accused's intent was something other than what the government charged. The accused's mental disorder may provide the context for the panel member to see that he was engaged in a "suicide by cop," where he was trying to set in motion events that would lead to his death. He may have shot at police officers fully knowing that he was likely to hit and kill some of them, but because of his depression he may not have actually cared if he *did* kill any of them. In that case, he would not have had the specific intent to kill required for premeditated murder.⁸⁶ Instead, a panel member could vote to find him guilty of a lesser murder charge, like wanton disregard murder, where the specific intent required matches what he was thinking: "That the accused knew that death or great bodily harm was a probable consequence of the act."⁸⁷

In both instances, if the defense counsel has presented a complete case on the issue and has clearly made those distinctions before the panel, then some of the panel members may have a lingering doubt about the accused's guilt on the capital offense. The panel members may still

vote for guilt and be completely sure of factual guilt—but may retain a lingering doubt about legal guilt.

Conclusion and Lessons for Non-Capital Practice

Using an admission defense in the ways described above has many benefits for the defense counsel. The CJP findings tell us that many jurors make up their minds about life or death during the merits portion of trial—and even actively negotiate those positions during the merits deliberation. If a defense counsel uses an admission defense, she has an opportunity to help shape the sentencing negotiations that may be going on during the merits phase. When presenting this mitigating mental health evidence, the defense counsel's goal is to have a single panel member agree with her and either hold on to that vote for not guilty, or to negotiate off of that vote by committing to a vote for life early in the process, perhaps even in the merits deliberation.

Further, even if a panel member completely rejects the defense theory on intent, that panel member might still believe that the accused has reduced culpability when compared to a murderer who does not have that impairment, and this perception of reduced culpability is a known mitigator. If the military or other agencies could have taken action before the incident that may have prevented the accused from murdering someone, such as providing him mental health care or separating him from the military, then the panel member might find that the military or another agency shares some culpability, and this perception of shared culpability is a known mitigator. Finally, if the defense counsel brings in family members to testify on the merits about how they observed the accused's mental health or cognitive impairments throughout the accused's life, then the defense counsel can frontload family member testimony (a known mitigator) into the merits of the case while also helping to prove that the underlying mental health or cognitive problems exist.

Defense counsel should look at the merits phase and the sentencing phase as one, and admission defenses allow defense counsel to do this. Critically, if the defense counsel or military prosecutor waits until the presentencing hearing to put on sentencing evidence, she may have missed the opportunity to persuade more than half of the panel members with her mitigation (or aggravation) evidence because jurors often make up their minds about punishment while still in the merits phase of trial.

These broad lessons from the CJP can be applied to non-capital military justice practice. From our discussion above, we see that extenuation should be more powerful than freestanding mitigation because this evidence directly relates to the commission of the crime. If panel members think that the accused's free will could not be fully exercised or was overcome, then the panel members will be more likely to accept that the environment played a role in the

⁸⁵ See generally John H. Blume & Pamela Blume Leonard, *Principles in Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 2000, at 63.

⁸⁶ UCMJ art. 118(1) (2008); MILITARY JUDGES' BENCHBOOK, *supra* note 66, para. 3-43-1.

⁸⁷ UCMJ art. 118(3) (2008); MILITARY JUDGES' BENCHBOOK, *supra* note 66, para. 3-43-3.

crime and find the accused is not as blameworthy as someone who could fully exercise his free will.

However, many defense counsel focus on the freestanding mitigating factors without connecting those mitigators to the commission of the crime. Defense counsel present the life problems of the accused, but might not show the relationship between those problems and why the accused committed the crime. Rather, defense counsel should work to convert the freestanding classically mitigating factors (e.g., that he grew up in a certain environment) into connected extenuating factors by tying them into the reasons why the accused committed the offense. Classically mitigating factors that do not otherwise address free will may not do much on their own. Defense counsel should also concentrate on rebutting the proven aggravators (fear, loathing, and lack of remorse) and bolstering the proven mitigators (extenuation, reduced and shared culpability, acceptance of responsibility, impact on the family of the sentence, and evidence of “good” in the accused).

Defense counsel should consider using the admission defense much more often, and not just in capital cases. In the military, defense counsel tend to be conservative with guilty pleas. If a client has a mental health problem that does not rise to the defense of lack of mental responsibility, and if the client is facing a high likelihood of conviction, then the defense counsel understandably tries to plead the case. Under these circumstances, the mental health evidence often becomes a *liability* for a guilty plea inquiry. The defense counsel now becomes afraid that the military judge will reject the plea because of the client’s problem, or that the military judge might reopen the plea inquiry if the defense counsel introduces extenuating or mitigating evidence during the presentencing proceeding that might somehow raise the lack of mental responsibility defense.⁸⁸

Because of this, defense counsel often have the client minimize these problems when going through the plea inquiry with the military judge: “I was depressed, your honor, but I could still form the intent to do the crime; I meant to do the terrible thing I did; my depression played no role in this crime.”

When the defense counsel does that, she deflates what would have been a great extenuation and mitigation case. The defense case is now inconsistent—the defense has told the judge that mental health problems had nothing to do with anything, but now wants to come in during the presentencing proceeding and say how extenuating and mitigating the mental health problems are, if she even risks introducing the evidence at all.

This is not the only option available to defense counsel. Consider using an admission defense in an average case. Put on the merits case and show where the client’s actions were caused by his mental illness. Overtly, the defense counsel will argue lack of mental responsibility or partial mental responsibility. In the background, the counsel knows she will not win on the defense but hopes that the panel will instinctively apply the irresistible impulse⁸⁹ or product⁹⁰ tests—both of which are intuitive and help to frame mitigating evidence—during their deliberations on the sentence. The defense may lose on the merits, but now has a fully developed extenuation and mitigation case, and the defense counsel does not have to worry about the judge rejecting the plea inquiry. This strategy involves risk, but may be the right strategy for certain clients. At the very least, this discussion illustrates that by understanding the CJP’s findings, military justice practitioners can gain insight and new perspectives on other areas of their practice.

⁸⁸ This is an area that receives much attention from appellate courts. *See generally* United States v. Riddle, 67 M.J. 335 (C.A.A.F. 2009); United States v. Shaw, 64 M.J. 460 (C.A.A.F. 2007); United States v. Estes, 62 M.J. 544 (A. Ct. Crim. App. 2005).

⁸⁹ Under the irresistible impulse test, the insanity defense can apply if the defendant, because of a mental illness, had an impulse that he could not overcome and so lost the ability to avoid doing the criminal act. *See generally* DRESSLER, *supra* note 71, § 25.04(C)(2), at 353–54.

⁹⁰ Under the product or Durham test, the insanity defense can apply if the person’s conduct was caused by, or was the product of, a mental illness. *See generally id.* § 25.04(C)(4), at 355–56.

A View from the Bench: The Proper Use of Prior Statements

*Colonel Jeffery R. Nance**

Introduction

When a witness testifies at trial and has made a statement prior to trial, two Military Rules of Evidence (MRE)—MRE 801 and MRE 613—intersect to determine when and how the prior statement may be used to impeach. Together, these rules also tell us when a prior statement may be used as substantive evidence—that is, as proof of the matter asserted. Trial attorneys must also consider the law regarding when a prior statement is inconsistent or consistent so that they know when to request appropriate instructions be given the members.¹ Many interrelated considerations determine the proper use of prior statements. This article seeks to assist military justice practitioners in making proper use of prior statements.

The framework within the rules is fairly compact. Under MRE 801(d), certain prior statements are *excluded* from the hearsay definition in MRE 801(c). These statements are: admissions by a party-opponent² and certain prior statements by a witness.³ There are two types of prior statements: prior consistent statements⁴ and prior inconsistent statements.⁵ Military Rule of Evidence 613 details the rules for examining a witness on a prior statement and when extrinsic evidence of a prior inconsistent statement may be admitted. Military Rule of Evidence 801(d)(1) and MRE 613(b) control the use of prior consistent and inconsistent statements as substantive evidence. Let's look first at admissions by a party-opponent.

Admissions by a Party-Opponent

Under MRE 801(d)(2), a statement offered *against* the party who made it is not hearsay and admissible for any purpose as long as it is relevant and properly obtained.⁶

Admissions covered by this rule include: the party's own statement in either an individual or representative capacity, a statement adopted by a party, a statement by a person authorized by the party to make the statement, a statement by a party's agent made within the scope of agency,⁷ and a statement made by a co-conspirator during the course and in furtherance of the conspiracy.⁸ The two admissions most frequently encountered are a party's own statement and a statement by a co-conspirator.

These statements are not hearsay and are admissible as long as not otherwise excluded by some other rule. Thus, for example, if the statement is written, authenticity must be established before it can be admitted.⁹ If the statement is that of the accused, trial and defense counsel, in addition to the military judge, should consider whether to redact irrelevant or substantially prejudicial evidence, such as uncharged misconduct.¹⁰

If the statement is that of a co-conspirator, there are a number of additional requirements to consider before the statement may be admitted. First, the statement must have been made while the conspiracy existed or made in the establishment of the conspiracy.¹¹ Second, the person who made the statement must be part of the conspiracy at the time the statement was made.¹² Third, the accused must be part of the conspiracy at the time the statement is made or thereafter.¹³ Finally, the statement must be made in

provided to the defense prior to arraignment. *Id.* MIL. R. EVID. 304(d)(1) (emphasis added).

⁷ Defense counsel is such an agent. *But see id.* MIL. R. EVID. 410.

⁸ *Id.* MIL. R. EVID. 801(d)(2).

⁹ *See id.* MIL. R. EVID. 901.

¹⁰ *See id.* MIL. R. EVID. 404(b).

¹¹ *United States v. Evans*, 31 M.J. 927, 934 (A.C.M.R. 1990) (citing *United States v. Herrero*, 893 F.2d 1521, 1527 (7th Cir.1990)). So, for example, if Private Brown says to Private Green, "Do you want to rob the property book office and take some of those new computers that just arrived?" and Private Green agrees to the robbery, then the statement(s) by Private Green agreeing to the conspiracy would be admissible against Private Brown in his trial for robbery. *Id.* (citing *United States v. Overshon*, 494 F.2d 894, 899 (8th Cir), *cert. denied*, 419 U.S. 853 (1974)).

¹² *Bourjaily v. United States*, 483 U.S. 171 (1987).

¹³ *Id.* Although the accused must be a part of the conspiracy, he need not be charged with conspiracy for the statements to be admissible against him at trial.

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¹ *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 7-11-1 and 7-11-2 (1 Jan. 2010) [hereinafter BENCHBOOK].

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d)(2) (2008) [hereinafter MCM].

³ *Id.* MIL. R. EVID. 801(d)(1).

⁴ *Id.* MIL. R. EVID. 801(d)(1)(B).

⁵ *Id.* MIL. R. EVID. 801(d)(1)(A).

⁶ Remember, "Section III" disclosure requirements mandate that all statements by the accused in possession of the government must be