

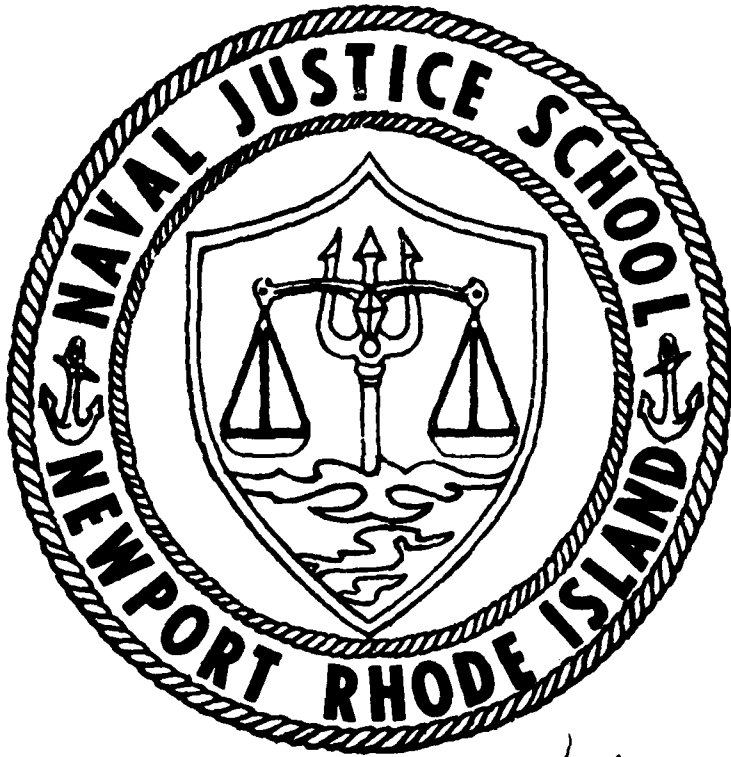
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FORENSIC PSYCHIATRY

A BRIEF INTRODUCTION

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FORENSIC PSYCHIATRY
A Brief Introduction

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INTRODUCTION

"If a mad man or a naturalle foole, or a lunatike in the time of his lunacie, or a child y apparently hata no knowledge of good or evil do kill a man, this is no felonious acte, nor any thing forfeited by it." So sayeth Judge Williams Lambard 400 years ago. While the nomenclature and techniques employed by the mental health profession have advanced since Judge Lambard had occasion to address the subject, the basic idea behind his words has not. Fundamental fairness prohibits an individual who does not realize the error of his ways from being criminally punished. This basic premise is under attack at the current time for a number of reasons, not the least of which is the ever increasing frequency with which the insanity defense is raised at criminal trials. In Hawaii, for example, the insanity defense is invoked in 7 percent of all criminal cases. It is not, however, the purpose of this publication to explore the theory behind the insanity defense or to discuss its merits and demerits. Rather, it is intended to briefly introduce the military practitioner to the modern mental health evaluation and acquaint him or her with the fundamentals of presenting or opposing an insanity defense. Users must keep in mind that a thorough treatment of the subject is beyond the scope of this pamphlet; it is but an introduction.

The first section discusses the legal aspects of the insanity issue, examining subjects from mental responsibility to mental evaluations under the Military Rules of Evidence. Section two contains the notetaking guide for a Naval Justice School lecture on this topic. Three appendices are included. The first two contain samples of material mentioned in the text and commonly encountered in the evaluation process, while the last is a brief bibliography for further reference.

THE LEGAL ASPECTS OF THE INSANITY ISSUE

General. The legal aspects of the insanity issue are generally raised by the accused before courts-martial either as a motion during an article 39a session or as a defense during the merits stage.

1. Types of insanity defenses. Insanity defenses are of three general types:

a. Mental responsibility. Lack of mental responsibility at the time of the commission of the offense is a complete affirmative defense on the merits.

b. Mental capacity. Lack of mental capacity to stand trial is a defense in bar of trial.

c. Partial mental responsibility. Partial mental responsibility at the time of the offense, though not a complete defense on the merits, is a defense to those offenses which have as an element thereof, the forming of a specific intent or the possessing of a requisite state of mind by the accused.

2. Lack of mental responsibility

a. Basis. The basis for the insanity defense is that society does not desire to hold an offender accountable for acts, which would otherwise be criminal, if they were committed at a time when the offender was not mentally responsible.

b. Standard. In the benchmark case of United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), on retrial, 7 M.J. 791 (N.C.M.R. 1979), petition denied, 8 M.J. 42 (C.M.A. 1979), the Court of Military Appeals rejected the M'Naughten and irresistible impulse standard of mental responsibility previously promulgated in paragraph 120 of the Manual for Courts-Martial, 1969 (Rev. ed.). The court held that the promulgation of such a standard was beyond the scope of the President's rule-making authority under Article 36, UCMJ, because the standard was a question of substantive, not procedural, law. The court went on to hold that the correct standard was that found in section 4.01 of the American Law Institute's Model Penal Code, which has been adopted with some modifications by ten of the eleven federal courts. The standard laid down in Frederick, supra, was incorporated into change 3 of the Manual and the current language of Rule of Court-Martial 916(k)(1), MCM, 1984 [hereinafter cited as R.C.M. ___] reflects that standard. The standard is:

A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. As used in this rule, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.

Thus, there are three aspects of the Frederick/ALI Standard:

(1) Incapacity - the presence of a mental disease or defect; and

(2) cognition - the individual's ability to appreciate the criminality of his conduct; or

(3) volition - the individual's ability to conform his conduct to the requirements of the law.

The effect of incapacity on the accused's volitive or cognitive abilities must be substantial. Accordingly, should incapacity not be found, then the accused will fail in his insanity defense. He also fails, if, despite a finding of incapacity, he still has volitive and cognitive abilities. On the other hand, if incapacity is found and the accused also has either no volitive or cognitive ability, then his insanity defense will be sustained. United States v. Smith, 404 F.2d 720 (6th Cir. 1968). But, the lack of volition or lack of cognition must be the result of a substantial lack of capacity. Finally, it is only the finder of fact who makes the legal, medical, and moral judgment of the validity of the defense based upon all of the evidence presented.

c. Definition of the three aspects of the standard. The decision in Frederick did nothing to define the three aspects of the standard it adopted; and, since the decision, there have been few decisions interpreting applications of the standard or the meanings of the three aspects of the standard. See United States v. Cortes-Crespo, 9 M.J. 717 (A.C.M.R. 1980), aff'd, 13 M.J. 420 (C.M.A. 1982); United States v. Martin, 7 M.J. 613 (N.C.M.R. 1979); United States v. George, 6 M.J. 880 (A.C.M.R. 1979), petition denied, 7 M.J. 65 (C.M.A. 1979); United States v. Chapman, 5 M.J. 901 (A.C.M.R. 1977), petition denied, 6 M.J. 290 (C.M.R. 1979); United States v. Walker, 14 M.J. 824 (A.C.M.R. 1982), petition denied, 15 M.J. 397 (1983); Binder, Psychiatry in the Everyday Practice of Law § 2 (2d ed. 1982).

(1) Definition of mental disease or defect. Should an accused not be found to have suffered from a mental disease or defect at the time he allegedly committed an offense, the defense of lack of mental responsibility is unavailable to him. United States v. Frederick, supra; United States v. George, 6 M.J. 880 (A.C.M.R. 1979); petition denied, 7 M.J. 65 (1979); United States v. Farmer, 6 M.J. 897 (A.C.M.R. 1979), petition denied, 7 M.J. 75 (1979). While the ALI/Frederick test provides a standard to use in determining the effect a mental disease or defect has on an accused before he can be relieved of criminal responsibility for his actions, it fails to define what a "mental disease or defect" is, with the exception of saying that the terms do not "include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." United States v. Cortes-Crespo, 9 M.J. 717, 721 (A.C.M.R. 1980).

It is important to note that the definition is a legal one vice a medical one for the two professions have decidedly different approaches to the problem. Medical experts tend to define disease in terms of susceptibility to treatment or capacity for separation from the patient as opposed to his innate and inherent characteristics. Thus, what the medical profession may consider to be a personality disorder may well amount to a "legal disease" and vice versa. Furthermore, the mental health profession changes its concept of disease or defect to conform to "advances" in medicine or medical theory. These changes may have no relationship whatsoever to legal concepts or to actual advances in medical practice. For example, until quite recently, homosexual behavior was considered a medically significant disease, defect or character disorder (depending upon to whom one was talking) but recently the medical profession removed it from these classifications and now simply refers to it as an "alternate lifestyle." Thus, what may be considered a mental disease by today's medical profession may not be by tomorrow's.

One Federal court has ruled that "a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962). This definition, as well, adds very little to the understanding of the term. The Army Court of Military Review, after expressing its frustration with the Court of Military Appeals for failing to fashion a definition, fashioned its own definition in United States v. Cortes-Crespo, 9 M.J. 717, 725 (A.C.M.R. 1980):

The terms "mental disease or defect" include any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls and are the result of deterioration, destruction, malfunction, or nonexistence of the mental, as distinguished from the moral faculties. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions. A "mental disease" is distinguished from a "mental defect" in that the former condition is considered capable of either improving or deteriorating, while a "mental defect" exists when there is present a condition not capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease. The terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct (footnotes omitted).

On review, however, the Court of Military Appeals expressly rejected this proposed definition by noting that "we can no better define the terms 'mental disease or defect' than by the use of the terms themselves" and that "attempts at further definition will be confusing rather than clarifying." United States v. Cortes-Crespo, 13 M.J. 420, 422 (C.M.A. 1982).

Accordingly, the procedure that trial judges must continue to follow involves the receipt of testimony on the particular personality disorder of the accused with submission to the trier of fact of the issue of whether such a disorder falls within the parameters of the ALI Standard. See, e.g., United States v. Bush, 14 M.J. 900 (N.M.C.M.R. 1982); United States v. Walker, *supra*; Military Judge's Benchbook (DA Pam. 27-9, 1982) at 6-3. In this regard:

Instructions given to a lay jury regarding the insanity defense must be clear, concise, and unambiguous. First, they should set forth that the defendant has denied criminal responsibility because of a mental disease or defect. Second, they should reflect that "mental disease or defect" does not "include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." . . . Third, if the finder of fact has a reasonable doubt as to the fact of whether the defendant was suffering from a mental disease or defect at the time of the alleged commission of the offense, there should then be a finding of not guilty by reason of insanity. United States v. Cortes-Crespo, *supra*, at 422.

(a) Alcoholism and voluntary intoxication. Voluntary intoxication by alcohol or drug, even when combined with an existing mental condition, does not raise the issue of insanity if the mental condition alone is insufficient to raise such an issue. This is subject to the proviso that consistent use of an intoxicant can itself cause a mental disease. United States v. Thompson, 3 M.J. 271 (C.M.A. 1977). Voluntary intoxication, which does not in itself constitute a mental disease, can negate a requisite specific intent and thereby preclude convictions for specific intent offenses, but it will not absolve one of criminal responsibility where the crime requires no specific intent or other state of mind. Nor is alcoholic induced amnesia a defense to a crime. United States v. Riege, 5 M.J. 938 (N.C.M.R. 1978), *petition denied*, 6 M.J. 196 (1979); United States v. Sexton, 1 M.J. 679 (N.C.M.R. 1975); United States v. Martin, 7 M.J. 613 (N.C.M.R. 1979); United States v. Triplett, 21 U.S.C.M.A. 228, 43 C.M.R. 68 (1970).

How, then, does the military treat "pathological intoxication?" Section 2.08(5)(c) of the Model Penal Code recognized "pathological intoxication" as a defense when the intoxication is "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." The Court of Military Appeals has not affirmatively applied this "pathological intoxication" defense to military law. In United States v. Santiago-Vargas, 5 M.J. 41 (C.M.A. 1978), however, the court "assumed" that the defense would have applied but noted that the accused failed to come within its scope since he knew that, "when intoxicated, he behaved in a violent manner." *Id.* at 43.

(b) Drug use. Drugs are treated the same as alcohol for purposes of criminal responsibility. Intoxication which is the result of voluntary drug ingestion is not a defense to offenses which are general intent crimes; however, the intoxication may negate the formulation of such an intent and hence constitute a defense to offenses requiring a specific

state of mind. See, e.g., United States v. Reitz, 47 C.M.R. 608 (N.C.M.R. 1973), rev'd on other grounds, 22 U.S.C.M.A. 584, 48 C.M.R. 178 (1974); United States v. Brown, 50 C.M.R. 374 (N.C.M.R. 1974); United States v. Foley, 12 M.J. 826 (N.M.C.M.R. 1981) (mental defect resulting from voluntary ingestion of drugs not a defense to general intent offenses).

(c) Substance within a substance. The fact that a substance, itself legally consumable (such as coffee or beer) was adulterated with a dangerous drug, may be a defense to criminal liability even for a general intent offense. Where the substance consumed is itself a contraband drug, however, the mental disease or defect will not be held to have been "nonculpably incurred" and the accused can be found guilty. See United States v. Ward, 14 M.J. 950 (A.C.M.R. 1982) (accused ingested marijuana adulterated with PCP).

(2) Definition of "appreciate the criminality of his conduct." The most helpful decision for explaining the meaning of the second aspect, i.e., cognition, of the standard is United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966), wherein Judge Kaufman, writing for the majority stated: "The choice of the word 'appreciate' rather than 'know' in the . . . test . . . is significant; mere intellectual awareness that conduct is wrongful [or criminal as used in the military standard], when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance." The adoption of the word "criminality" vice "wrongfulness" by the Court of Military Appeals is based upon the following rationale:

If a defendant possesses substantial capacity to both appreciate the criminality of his conduct and to conform his conduct to the law, he should not escape criminal responsibility because his personal moral code is not violated. Contrarily, if his delusion is of such a nature that he believes his otherwise criminal act is not criminal, he will not be held responsible.

United States v. Frederick, *supra*, at 128.

Thus, the distinction in terms concerns the accused's cognition of the morality of his act. The courts adopting "wrongfulness" do so "in order to exclude from the criminally responsible category those who, knowing an act to be criminal, committed it because of a delusion that the act was morally justified." United States v. Frazier, 458 F.2d 911 (8th Cir. 1972); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (*en banc*); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967) (*en banc*); Wion v. United States, 325 F.2d 420 (10th Cir. 1963).

(3) Definition of "conform to the requirements of the law." There has been very little discussion as to the meaning of the volition aspect of the Frederick standard, unless something can be garnered from a discussion of what it is not. Specifically, in United States v. Martin, 7 M.J. 613 (N.C.M.R. 1979), the Navy Court of Military Review indicated that this third aspect of the standard was not a restatement of the M'Naughton "able to distinguish right from wrong as to the acts charged and able to

adhere to the right" standard. That court found that the military judge, in his instructions to the court members, had "molded" the proper Frederick standard with the rejected M'Naughton standard and had thus misled the court. Therefore, the court ruled the instruction erroneous per se.

d. Burden of proof

(1) Presumption of sanity. The law presumes all persons to be sane, unless the contrary appears. R.C.M. 916(k)(3)(A). Therefore, even though the burden is on the prosecution to prove the accused's mental responsibility, there is a rebuttable presumption that the accused is sane. This presumption of sanity, standing alone, may be sufficient to outweigh testimony and evidence to the contrary. United States v. Johnson, 3 U.S.C.M.A. 725, 14 C.M.R. 743 (1954). Further, a mere assertion that one is insane is not necessarily sufficient to require inquiry or to raise the issue of insanity. United States v. McMahon, 4 M.J. 648 (A.F.C.M.R. 1977).

(2) Once "some evidence" which could reasonably tend to show that the accused is insane or was insane at the time of the offense is introduced, either by the prosecution, the defense, or on behalf of the court, then the sanity of the accused is an essential issue and must be proved by the prosecution beyond a reasonable doubt. United States v. Morris, 20 U.S.C.M.R. 446, 43 C.M.R. 286 (1971); United States v. Cockerell, 49 C.M.R. 567 (A.C.M.R. 1974); United States v. Grembowicz, 17 M.J. 720 (N.M.C.M.R. 1983) (mere assertions of insanity do not trigger a duty to inquire into sanity of accused); United States v. Heard, 17 M.J. 1118 (N.M.C.M.R. 1984) (issue raised during providency); R.C.M. 916(b).

(3) While the military judge may determine that the evidence offered by the accused was insufficient to raise the issue of mental responsibility, he may not bar the accused from presenting that evidence to the members. United States v. Coleman, 11 M.J. 856 (N.M.C.M.R. 1981).

3. Lack of mental capacity to stand trial

a. Basis. Lack of mental capacity is an interlocutory question for the military judge. By asserting it, the defense seeks to postpone trial until the accused is mentally competent to stand trial, if ever. The law recognizes lack of mental capacity as a bar to trial because it would be fundamentally unfair to try an accused who could not understand the nature of the proceedings against him or who was incapable of cooperating intelligently in his own defense.

b. Standard. The standard enunciated in R.C.M. 909(a) is applicable to trials by court-martial:

No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case.

(c) The most explicit amplification of this standard is found in the case of United States v. Williams, 5 U.S.C.M.A. 197, 204, 17 C.M.R. 197, 204 (1954). The court in that case held that the accused must:

be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense.

The Supreme Court in the case of Dusky v. United States, 362 U.S. 402 (1960) held that a trial court must not base its determination that the accused is mentally competent to stand trial upon a mere finding that he is oriented to time and place and has some recollection of events; the test must be "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 402. See also United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981), petition denied, 13 M.J. 232 (1982).

(a) The question of amnesia as it affects the mental capacity to stand trial is an interesting one. As noted above with regard to mental responsibility, amnesia alone, usually of an alcoholic origin, is not a defense on the merits. Similarly, the contention that loss of memory alone constitutes lack of mental capacity has generally been rejected by the courts. United States v. Olvera, 4 U.S.C.M.A. 135, 15 C.M.R. 134 (1954); United States v. Lopez-Malave, 4 U.S.C.M.A. 341, 15 C.M.R. 341 (1954). In Olvera, supra, at 142, the court said, "The accused may well be characterized by a genuine amnesia as to certain events, yet be able to deal rationally with them, to cooperate with his counsel, and to remember the events taking place at the trial." See also Wilson v. United States, 391 F.2d 460, 462 (1968). This general rule may vary, however, if it is shown that the amnesia is accompanied by or is caused by a mental defect or disease. See Wilson, supra; United States v. Jones, 147 F.Supp. 265, 267 (1956). It should be noted that amnesia does not prevent the accused from testifying in his own behalf, even if he can't recall the events surrounding the alleged crime. This is because, other things being equal, the accused still has the ability to testify that he just "doesn't remember." This is not as unusual as it may sound for many witnesses often cannot remember specific events and testify accordingly. If the accused possesses the ability to deal rationally with his inability to remember, his inability to recall may be a tactical handicap, but it is not to bar a trial. See, e.g., United States v. Dunaway, 39 C.M.R. 908 (A.F.B.R. 1968), petition denied, 39 C.M.R. 293 (1968).

(b) It is significant to note that the second part of the test is posed in the disjunctive: "to conduct or cooperate intelligently in his own defense." Thus, if an accused has such a personality disorder that he is unable to get along with or accept the advice of any lawyer, that is, to cooperate, he is not immune from trial if he does have "the substantial ability to intelligently conduct his own defense and understands the nature of the proceedings." United States v. Koch, 37 C.M.R. 843, 851 (A.F.B.R. 1966), findings rev'd, 17 U.S.C.M.A. 79, 37 C.M.R. 343 (1965).

(2) It is important to note that unlike mental responsibility issues, to assert a lack of capacity defense successfully, the accused need not be suffering from a mental defect or disease. Lack of mental capacity may be based on character disorders and other maladies not thought generally to qualify as mental diseases. United States v. Wisener, 46 C.M.R. 1100 (C.G.C.M.R. 1973).

(3) When the issue of the accused's capacity to stand trial is raised, the court-martial may not proceed unless it is established by a preponderance of the evidence that the accused possesses sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(c)(2).

4. Partial mental responsibility. R.C.M. 916(k)(2) states: "A mental condition not amounting to a general lack of mental responsibility . . . but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element." The partial mental responsibility defense originated in the cases of United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954); United States v. Edwards, 4 U.S.C.M.A. 299, 15 C.M.R. 299 (1954); and United States v. Higgins, 4 U.S.C.M.A. 143, 15 C.M.R. 143 (1954). The following basis for the court's adoption of a defense of partial mental responsibility was explained by the Court of Military Appeals in United States v. Vaughn, 23 U.S.C.M.A. 343, 49 C.M.R. 747, 748 (1975):

Recognizing that advances in modern psychiatry have enabled an accused's mental condition to be more accurately diagnosed and that the degree of one's guilt should take into consideration his capacity to entertain the intent of knowledge required to prove the crime charged, those cases concluded that mental incapacity to entertain a premeditated design to kill, a requisite specific intent or knowledge, or any particularized state of mind should be a defense to a charged offense requiring such a state of mind.

Thus, even though an accused may be capable of standing trial and not have a mental disease or defect, he may still have a partial defense to a specific intent crime if his "mental condition" prevented him from formulating the requisite intent. United States v. Higgins, 4 U.S.C.M.A. 143, 15 C.M.R. 143 (1954). For example, in the case of United States v. Vaughn, *supra*, the Court of Military Appeals held that the doctrine of partial mental responsibility, if established, was a defense to premeditated and unpremeditated murder, as well as to voluntary manslaughter; and, therefore, the accused could be convicted of no greater degree of homicide than involuntary manslaughter. *Id.* at 346, 49 C.M.R. at 750. For further discussion of this defense see United States v. Storey, 9 U.S.C.M.A. 162, 15 C.M.R. 474 (1958); United States v. Dunnahoe, 6 U.S.C.M.A. 745, 21 C.M.R. 67 (1956); United States v. Sommerville, 48 C.M.R. 885 (N.C.M.R. 1974); United States v. Parker, 11 M.J. 757 (1954); United States v. Gertson, 15 M.J. 990 (N.M.C.M.R. 1983), petition denied, 16 M.J. 309 (1983). The question which now arises is whether there is a distinction between voluntary intoxication, which has

already been described as only a defense to offenses requiring specific intent or other states of mind, and partial mental responsibility. The answer appears to be that voluntary intoxication is only one specific example of a mental condition that must meet the mental shortcomings required for the defense of partial mental responsibility. It appears that, historically, society recognized the defense of voluntary intoxication as a defense to specific intent crimes but had not so recognized other mental conditions in the same light. The development of these two defenses and their interrelationship can be found in Hopt v. People, 104 U.S. 631 (1882); Fisher v. United States, 328 U.S. 463 (1946); United States v. Kunak, *supra*; United States v. Higgins, *supra*; and United States v. Edwards, *supra*. The rationale for the similarities in result have been described as follows:

Moreover, if an accused person may lessen his criminal responsibility by a showing that he was not able to entertain premeditation intent, or knowledge due to voluntary intoxication -- a condition largely within his own control, and disapproved by society and the law -- we would regard as anomalous a refusal to permit a showing that premeditation, intent, or knowledge was or might be wanting due to some mental derangement -- usually without the accused's control. It would seem to follow that if an accused person produces evidence of an underlying mental state, which might have served to affect his intent at the time of the acts alleged, then the law officer should advise the court that its members may properly consider the evidence of mental condition in determining the accused's capacity to entertain premeditation, intent, or knowledge -- when any of these is relevant to an offense charged. However, a showing of amnesia without more would not necessitate such an instruction.

United States v. Higgins, *supra*, at 148.

5. Procedural aspects of insanity issues

a. Inquiry

(1) Before referral of charges. If any commanding officer, investigating officer, trial counsel, or defense counsel has reason to believe that an accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, such fact and support for the belief or observations should be reported to the convening authority. R.C.M. 706(a). If the convening authority determines that a reasonable basis for inquiry exists, a board of one or more physicians will be convened to examine the accused as to his mental capacity to stand trial and/or his mental responsibility. At least one member should be a psychiatrist. R.C.M. 706(c)(1). In United States v. Nix, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965), a pretrial request to the convening authority for such an examination was granted, but the commanding officer of the hospital refused to conduct the examination. The law officer at trial denied a defense request for a continuance. The Court of Military Appeals held that the denial was error. The order that the accused be evaluated was a judicial order and the court was without power to proceed pending compliance with the order. A continuance should have been granted.

- b. Consists of true/false questions which pertain to the individual (see appendix 1 for samples)
 - c. Varying length - between 350 and 700 questions
 - d. Results are broken up into different scales, which are supposed to reflect particular aspects of person being tested; however, overall pattern is what is important
3. Rorschach Thematic Appreciation Test - Designed to uncover accused's self-perception

J. Psychiatric interview

-- Series of questions designed to inquire into

- a. Early development
- b. Family history
- c. Preoccupations and thought content
- d. Feelings regarding offense(s) and court-martial

K. The report - The Board will state its findings in its report, which has three basic parts

- 1. The cover letter - May be a "form" or tailored cover sheet. It will state:
 - a. The findings of the board, hopefully, in Frederick language
 - b. Whether the findings were unanimous or whether dissenting opinions exist
 - c. That the board's work and report has been received and approved by the commanding officer of the medical facility at which the board sat
- 2. Opinions of the participating members of the board, including individual diagnoses, recommendations, etc.

H. Physical tests

1. EEG (electroencephalogram) - Measures electrical brain waves and patterns in effort to discover organically caused abnormalities. Problem is that such patterns are not always present, so abnormalities cannot be ruled out if results are "normal."

-- Can increase likelihood of discovery by inducing stress

- (1) Drugs - lights
- (2) Placing leads closer to brain
- (3) Sleep deprived

2. CAT SCAN - X/rays over surface of brain designed to reveal any discernible physical abnormalities

3. Neurological tests - Designed to assess any discernible problems with nervous system. Many and varied.

I. Psychological tests - Designed to isolate the abnormal by comparison to others and by "unusual quality" of responses. Many and varied. Common three:

1. WAIS - Wenshler's Adult Intelligence Scales
 - a. Consists of 11 subscales ranging from word association to interpretation of proverbs
 - b. Most reliable of all psychological tests
 - c. Designed to measure intelligence
 - d. See appendix 2 for sample questions
2. MMPI - Minnesota Multiphasic Personality Inventory
 - a. Designed to assess personality by comparing accused's results to results achieved by "knowns"

-- United States v. Matthews, 14 M.J. 656 (A.C.M.R. 1982)

3. Scope of Mil.R.Evid. 302

-- United States v. Matthews, *supra*

F. Related issues

1. Cross-examination of civilian defense expert

-- United States v. Parker, 15 M.J. 146 (C.M.A. 1983)

2. 18 U.S.C. § 4244 (1982)

-- United States v. Holley, 17 M.J. 361 (C.M.A. 1984)

G. Package delivered to board

1. Service record

2. Medical record

3. NIS report

4. Article 32

5. Statements of witnesses before and after the offense

6. Statements from family, friends, shipmates detailing particular "traits"

7. Civilian records of prior hospitalization, police reports, etc.

8. Cover letter

c. Sanity board may be ordered by CA or MJ

6. Partial mental responsibility

a. Frederick did not change

b. Diminished mental responsibility, which does not amount to a complete defense, but which prevented the accused from forming requisite intent

c. Can be result of voluntary intoxication

-- United States v. Gertson, 15 M.J. 990 (N.M.C.M.R. 1983), petition denied, 16 M.J. 309 (1983)

II. The sanity board (R.C.M. 706)

A. Request

B. Ordering an inquiry

C. Board membership

D. Directions to the board

E. Privilege (Mil.R.Evid. 302)

1. Statements/derivative evidence

2. Exceptions

a. Defense introduction of statements/derivative evidence

b. Defense introduction of expert testimony

c. Defense introduction of lay testimony

- c. United States v. Walker, 14 M.J. 824 (A.C.M.R. 1982),
petition denied, 15 M.J. 397 (1983)

- d. United States v. Wattenbarger, 15 M.J. 1069 (N.M.C.M.R.
1983)

- e. Military Judges' Benchbook, DA Pam. 27-9, 1982, at 6-3

- 3. "Appreciate the criminality of his conduct"
 - United States v. Freeman, 357 F.2d 606 (2d Cir. 1966)

- 4. "Conform to requirements of the law"
 - United States v. Martin, 7 M.J. 613 (N.M.C.M.R. 1979)

- 5. Procedure
 - a. Presumption of sanity

 - b. Issue may be raised by anyone and, once raised, burden
is on government to prove sanity beyond a reasonable
doubt
 - (1) United States v. Heard, 17 M.J. 1118 (N.M.C.M.R.
1984)

 - (2) United States v. Grembowicz, 17 M.J. 720
(N.M.C.M.R. 1983)

 - (3) United States v. Coleman, 11 M.J. 856 (N.M.C.M.R.
1981)

4. Procedures

a. Presumption of capacity

b. Interlocutory question of fact determined by MJ

c. Burden

-- Government must prove capacity by a preponderance of the evidence

d. Remedy

-- Continuance or dismissal

C. Mental responsibility [R.C.M. 916(k)]

1. Standard - United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), on retrial, 7 M.J. 791 (N.C.M.R. 1979), petition denied, 8 M.J. 42 (C.M.A. 1979)

a. Incapacity - The presence of a mental disease or defect

b. Cognition - The accused's inability to appreciate the criminality of his conduct

c. Volition - The accused's inability to conform his conduct to the requirements of the law

2. Mental disease or defect

a. United States v. Cortes-Crespo, 9 M.J. 717 (A.C.M.R. 1980), aff'd, 13 M.J. 420, 422 (C.M.A. 1982)

b. United States v. Bush, 14 M.J. 900 (N.M.C.M.R. 1982)

FORENSIC PSYCHIATRY IN THE NAVAL SERVICE
NOTETAKING GUIDE

I. Insanity

A. Two issues

1. Mental capacity - Insanity at the time of trial
2. Mental responsibility - Insanity at the time of the offense

B. Mental capacity to stand trial (R.C.M. 909)

1. Standard: The accused must possess sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his own defense
 - a. United States v. Williams, 5 U.S.C.M.A. 197, 204, 17 C.M.R. 197, 204 (1954)
 - b. Dusky v. United States, 362 U.S. 402 (1960)
 - c. United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981), petition denied, 13 M.J. 232 (1982)
 - d. United States v. Koch, 37 C.M.R. 843, 851 (A.F.B.R. 1966), findings rev'd, 17 U.S.C.M.A. 79, 37 C.M.R. 343 (1965)
2. Need not result from mental disease or defect
3. Amnesia is not a defense
 - a. United States v. Olvera, 4 U.S.C.M.A. 134, 15 C.M.R. 134 (1954)
 - b. United States v. Riege, 5 M.J. 938 (N.M.C.M.R. 1978), petition denied, 6 M.J. 196 (1979)

participation in the criminal acts charged and not a psychiatrist's opinion regarding whether an accused possesses the requisite mental responsibility. This interpretation is a sensible one. To hold otherwise would result in concealing from the fact finders otherwise relevant and admissible evidence and require the Government to rely on lay witnesses of its own or the hypothecating conjectures of expert psychiatrists who have only observed the accused from afar. Id. at 659.

For a further discussion of the impact of the new Military Rules of Evidence on mental evaluations, see Yustas, Mental Evaluation of an Accused under the Military Rules of Evidence An Excellent Balance, The Army Lawyer (May 1980); Ross, Rule 302 - An Unfair Balance, The Army Lawyer (March 1981).

g. Post-trial incarceration of the criminally insane. The secretaries of several armed forces have been empowered to commit insane service persons and to retain them in medical custody so long as mental disorders persist. See 24 U.S.C. 191; White v. Treibly, 19 F.2d 712 (D.C. Cir. 1927); Overholser v. Triebly, 137 F.2d 705 (D.C. Cir.), cert. denied, 326 U.S. 730 (1945). There are no mandatory requirements regarding the criminally insane, however, and an accused who is found not guilty because of insanity may be treated, administratively discharged, or simply sent back to duty. In fact, the military has no medical facilities designed for the long-term treatment of the insane, although the Veterans Administration does. See United States v. Schlomann, 16 U.S.C.M.A. 414, 37 C.M.R. (1966). For this reason, the Schlomann court rejected a requested instruction that, "if the accused is acquitted by reason of insanity, he will be presumed to be insane and may be confined in a hospital as long as necessary." This instruction, espoused by the District of Columbia courts in Lyels v. United States, 254 F.2d 725 (D.C. Cir.), cert. denied, 356 U.S. 961 (1957), was based on the mandatory commitment requirement of the District of Columbia. See United States v. Gray, 9 U.S.C.M.A. 208, 25 C.M.R. 470 (1958).

(4) Non-military experts used by the defense

-- If the defense uses civilian experts, the prosecution could seek a continuance and an order from the military judge that the accused submit to an R.C.M. 706 sanity board. See Mil.R.Evid. 302(d). The full report less any specific statements of the accused would then be releasable to the prosecution. See United States v. Frederick, 7 M.J. 791 (N.C.M.R. 1979), petition denied, 8 M.J. 42 (C.M.A. 1979).

f. Potential problem areas under the new rules

(1) Neutral/false statements: While Mil.R.Evid. 302 protects any statement of the accused, the Babbidge case, supra, sought to protect only incriminating statements (as do its progeny). Consequently, the rule's breadth is overbroad. Further, most psychiatric opinions are based upon what the accused tells the psychiatrist as well as how he tells it. So, if the accused lies, the possibility of an inaccurate assessment is great, yet the prosecution will be prohibited from finding out what the accused told the psychiatrists to gauge the validity of their opinions. See United States v. Thompson, 3 M.J. 271, 273-274 (C.M.A. 1977), where the Court of Military Appeals said: ". . . psychiatrists cannot reach their conclusion to answer the question of criminal responsibility at a time certain in a vacuum, but must rely upon the history supplied both by the person examined and others; if that history is faulty, then the credibility of the conclusion of the psychiatrists may be faulty and must be tested."

(2) Defense use of lay testimony. The plain language of Mil.R.Evid. 302 indicates that the government is entitled to call expert witnesses in rebuttal only if the defense utilizes the testimony of psychiatric experts in presenting the insanity issue to the court. This could occasion the successful assertion of such a defense even though all experts concur that the accused was sane. That judicial application of this provision may rectify this legislative oversight is evident from United States v. Matthews, supra, where the Army Court of Military Appeals noted that:

In our view, such an interpretation is unwarranted. The purpose of the Rule is to protect an accused's right against self-incrimination. In this regard the federal courts have drawn a sharp distinction between the use of the results of compulsory psychiatric examinations on the issue of insanity and the use of an incriminatory statement made during a compulsory examination on the issue of guilt. The former is permissible; the latter is constitutionally forbidden (case cites omitted). A similar interpretation is engrafted in Rule 12.2 of the Federal Rules of Criminal Procedure. See United States v. Leonard, 609 F.2d 1163 (5th Cir. 1980). This is also consistent with military case law prior to adoption of Rule 302. United States v. Babbidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969). We believe a similar interpretation was intended by the drafters of the military rule and construe the proscription against the use of statements and any "derivative evidence obtained through the use of such a statement" to pertain to facts concerning an accused's

(b) It purports to extend to any statement made by the accused and any derivative evidence obtained through the use of such a statement.

(c) It applies during trial on the merits and during sentencing proceedings.

(d) In conjunction with the conforming provisions of R.C.M. 706, it also creates three different levels of disclosure:

-1- The results of the examination;

-2- the full report of the board less any statements of the accused; and

-3- the specific statements of the accused.

(e) The results of the sanity board, i.e., the ultimate conclusions as to the accused's sanity of the board members, (number -1- above) are furnished to the officer who ordered the examination, the accused's commanding officer, the article 32 officer, if any, all counsel, the convening authority and the military judge, if after referral. The full investigative report (numbers -2- and -3- which usually appear in one document) are provided immediately to the defense but to no one else outside medical channels. Disclosure (release) of the sanity board report to non-prosecution (trial counsel) members is authorized without consent of the defense or the accused if:

-1- The release is authorized by the convening authority, or

-2- the commanding officer requests the full report.

These exceptions are to allow administrative determinations to be made, e.g., should the accused's security clearance be revoked, and to protect society, e.g., the accused tells the psychiatrist that he intends to commit future crimes. But such release will create problems for the prosecution in showing that its evidence was not derived from the report.

(f) If the defense raises the insanity defense by offering expert testimony concerning the accused's mental condition, then the military judge, upon request (motion) shall order the disclosure (release) of the full report to the prosecution less any specific statements of the accused.

(g) If the defense offers specific statements of the accused, the military judge may upon motion of the prosecution order the disclosure of such statements of the accused "as may be necessary in the interests of justice."

-3- Release of evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to paragraph 121 of this Manual (now R.C.M. 706). If the defense offers statements made by the accused at such an examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

-4- Noncompliance by the accused. The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under paragraph 121 of the Manual (now R.C.M. 706) from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

-5- Procedure. The privilege in this rule may be claimed by the accused only under the procedure set forth in rule 304 (confessions and admissions) for an objection or a motion to suppress.

(b) Limitations

-1- The protections of Mil.R.Evid. 302 do not apply to mental examinations not ordered under R.C.M. 706. Hence, independently requested examinations are outside the protection of the rule. This may decrease the number of civilian psychiatric examinations. See United States v. Matthews, 14 M.J. 656 (A.C.M.R. 1982) (Mil.R.Evid. 302 did not apply to psychiatric examination for purpose of determining fitness for administrative separation held prior to commission of the offenses).

-2- The rule also does not apply to determinations of the competency of the accused to stand trial. R.C.M. 706(c)(3) of the Manual, however, does prohibit access to the sanity board report by the trial counsel except as specifically authorized. If competency to stand trial is at issue, the trial counsel may request the military judge to disclose the sanity board report to the prosecution. The analysis to the rule indicates that the trial counsel who has read the report under such circumstances will be disqualified from prosecuting the case in chief if mental responsibility is raised later in the proceedings, and the rule is applicable. Mil.R.Evid. 302 analysis.

-3- Failure to move for suppression of such information, or failure to object, constitutes waiver (Mil.R.Evid. 304 cited above).

(3) Operation of Mil.R.Evid. 302

(a) Mil.R.Evid. 302 creates a limited testimonial immunity which prohibits the use of any statement made by the accused during any mental examination ordered under R.C.M. 706. This immunity is effective even if Article 31, UCMJ, warnings have been given to the accused.

e. Mental evaluations of an accused under the Military Rules of Evidence

(1) 1969-1980 procedures. In the Court of Military Appeals case of United States v. Babbidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969), it was held that an accused must submit to a government psychiatric evaluation as a condition precedent to the introduction of defense expert evidence on a sanity issue. Other cases were similar in their effect. See United States v. Wilson, 18 U.S.C.M.A. 400, 40 C.M.R. 112 (1969); United States v. Schell, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969); United States v. Ross, 19 U.S.C.M.A. 51, 41 C.M.R. 51 (1969); and United States v. White, 19 U.S.C.M.A. 338, 41 C.M.R. 338 (1970). Under this procedure, the examining physician could only testify as to his conclusions concerning the accused's sanity or lack thereof. Specific statements made by the accused during the examination were not admissible without a showing of compliance with Article 31, UCMJ and Miranda/Tempia requirements. Accord United States v. Parker, 15 M.J. 146 (1983); United States v. Holley, 17 M.J. 361 (C.M.A. 1984) (cases tried before the effective date of the Military Rules of Evidence).

The new Military Rules of Evidence [hereinafter referred to as Mil.R.Evid. ___] disregard the formality of whether article 31 and Miranda/Tempia warnings were given and focus instead upon the substantive use of the information received.

(2) Mil.R.Evid. 302, privilege concerning mental examination of an accused

(a) The text of the rule

-1- General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under paragraph 121 of this Manual (now R.C.M. 706) and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during the sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by rule 305 at the examination.

-2- Exceptions

-a- There is no privilege under Mil.R.Evid. 302 when the accused first introduces into evidence such statements or derivative evidence.

-b- An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

b. Litigation of the issues

(1) Litigation of mental capacity to stand trial. Once the issue is raised at trial as to the present mental capacity of the accused, a ruling must be made. Whether the issue is raised as a result of formal inquiry, by motion for continuance (see United States v. Williams, supra) or through introduction of evidence at trial, the issue is always an interlocutory question to be ruled upon finally by the military judge. If it is determined that the government has not shown by a preponderance of the evidence that the accused is mentally capable of standing trial, the proceedings shall be suspended and the record shall be forwarded to the convening authority. R.C.M. 909 (c) (2) discussion.

(2) Litigation of mental responsibility. The issue of mental responsibility may be raised by evidence presented by the defense, the prosecution, or the court. R.C.M. 916(b) discussion. This issue may not be raised as an interlocutory matter. R.C.M. 916(k) (3) (C). Once this defense is placed in issue by some evidence, the prosecution has the burden of proving beyond a reasonable doubt that the accused did not lack mental responsibility for the offense. R.C.M. 916(k) (3) (A) discussion.

c. Action by convening authority

(1) A finding by a court that the government did not meet its burden with regard to the accused's mental responsibility at the time of the offense is a finding of not guilty which may not be disturbed by the convening authority.

(2) When the trial has terminated due to a finding of lack of mental capacity, the record of all procedures held in the case is forwarded to the convening authority. Depending on the nature and potential duration of the accused's incapacity, the case may be continued or charges withdrawn or dismissed. When appropriate, administrative action may be taken to discharge the accused from the service on mental disability grounds. R.C.M. 909(c) (2) discussion. Although the convening authority may ask for a rehearing, it is the military judge who rules finally on the mental capacity of the accused. R.C.M. 909(c) (1) discussion.

d. Guilty plea cases. If there is any indication that the accused is or was insane at the time of the offense, the military judge must inquire into the matter to determine the providency of the plea, even though the defense does not wish to raise insanity as a defense. See United States v. Leggs, 18 U.S.C.M.A. 245, 39 C.M.R. 245 (1969), which reversed a conviction based on a guilty plea that had been received after the verbal assurance of the defense counsel that his client was sane, when that same client's conduct at earlier sessions of the trial had caused the trial to be continued and an inquiry made into his sanity.

(2) After referral of charges. Whether or not the accused has petitioned the convening authority to inquire into the sanity of the accused, once the case has been referred to trial, the defense (or any other party) may request the military judge to do so. The convening authority may also order an inquiry after the charges have been referred but prior to the convening of the first article 39(a) session, if the military judge is not reasonably available. R.C.M. 706(b)(2).

(3) Inquiry after trial. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a question is raised as to the requisite mental capacity of the accused, the convening authority must be satisfied by a preponderance of evidence -- including matters outside the record of trial -- that the accused has the requisite mental capacity before approving the sentence. The convening authority may direct an examination of the accused in accordance with R.C.M. 706 before deciding whether the accused lacks mental capacity. The lack of mental capacity does not, however, prohibit the convening authority from disapproving findings of guilty and/or the sentence.

(4) Sanity board requirements. Regardless of whether the inquiry was ordered before, during or after trial, R.C.M. 706 requires the sanity board to answer each of the following questions together with any others that the authority ordering the inquiry may pose:

(a) At the time of the alleged criminal conduct did the accused have a mental disease or defect? (The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.)

(b) What is the clinical psychiatric diagnosis?

(c) Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to appreciate the criminality of the accused's conduct?

(d) Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to conform the accused's conduct to the requirements of law?

(e) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

The answers to these questions must be included in the sanity board report. This report is not evidence but may be considered by the military judge as to whether any further inquiry is needed. In order to support or refute the accused's allegation of insanity, the appropriate party will have to present other evidence (see the discussion below).

3. Attachments - Can include detailed explanation of tests rendered, including opinions of consulting professionals

- a. Psychologists
- b. M.D.'s
- c. Neurologists
- d. EEG, CAT SCAN interpretation

L. The diagnosis - Like all medical boards, mental health evaluations will result in a diagnosis

1. "Mental" diagnoses are made from a book entitled Diagnostic and Statistical Manual (3rd Ed. 1980) [DSM III]

-- Used in Navy since 1 July 1980

2. This book lists hundreds of diagnostic labels, which are used in a variety of ways

M. Possible findings

1. Does accused presently have a mental disease or defect? If so, what?

2. How was that determined?

3. What is the psychiatric diagnosis?

4. To what extent is this abnormality manifested by repeated antisocial misconduct?

5. At the time of the offense, did the accused have a mental disease or defect? If so, what?

6. How was that determined?

7. What is the psychiatric diagnosis?

8. To what extent is this abnormality manifested by repeated antisocial misconduct?

9. What is the causal relationship, if any, between the mental disease or defect diagnosed and the commission of the alleged offense?

10. Did the accused at the time of the alleged offense, as a result of such mental defect or disease, lack capacity to appreciate the criminality of his conduct?
11. If so, what was the degree of impairment?
12. Did the accused at the time of the alleged offense, as a result of such mental defect or disease, lack capacity to conform his conduct to the requirements of the law?
13. If so, what was the degree of impairment?
14. Did the accused lack capacity to formulate a relevant specific intent?
15. Etc.

III. Presenting expert testimony

- A. "When did you examine the accused?"
 1. If months have elapsed since the examination, the professional's opinion or lack of capacity is worth little
 2. If months (or even weeks) separated the examination and the offense, the professional's opinion on mental responsibility will be worth little
- B. "How often did you examine him?"

-- The more the better, once is seldom enough
- C. "What was the duration of your examination?"
 1. All time spent on the case should be counted - not just the interview
 - a. All material reviewed (which you provided)
 - b. All tests reviewed
 - c. All professionals consulted
 2. "A few hours" is suspect

D. "Of what did your examination consist?"

1. All tests)
2. All interviews) All should be summarized
3. Etc.)

E. "What did you find?"

1. The diagnosis, if relevant
2. Insist upon explanation for all medical terms
3. Have witness explain what information elicited in response to previous question supports the findings
4. Relate it to ultimate issue

-- For example, if issue is mental capacity, ask:

- (1) Does accused know why he was apprehended?
 - (2) Does he know why he was charged with an offense?
 - (3) Does he know what can happen to him as a result of trial?
 - (4) What is his understanding of the function of the military judge? Trial counsel?
 - (5) What is his ability to identify witnesses?
 - (6) Etc.
5. Ask witness to explain all conclusions

MMPI

1. I like mechanics magazines.
2. I have a good appetite.
3. I wake up fresh and rested most mornings.
4. I think I would like the work of a librarian.
5. I am easily awakened by noise.
6. I like to read newspaper articles on crime.
7. My hands and feet are usually warm enough.
8. My daily life is full of things that keep me interested.
9. I am about as able to work as I ever was.
10. There seems to be a lump in my throat much of the time.
11. A person should try to understand his dreams and be guided by or take warning from them.
12. I enjoy detective or mystery stories.
13. I work under a great deal of tension.
14. I have diarrhea once a month or more.
15. Once in a while I think of things too bad to talk about.
16. I am sure I get a raw deal from life.
17. My father was a good man.
18. I am very seldom troubled by constipation.
19. When I take a new job, I like to be tipped off on who should be gotten next to.
20. My sex life is satisfactory.
21. At times I have very much wanted to leave home.

22. At times I have fits of laughing and crying that I cannot control.
23. I am troubled by attacks of nausea and vomiting.
24. No one seems to understand me.
25. I would like to be a singer.
26. I feel that it is certainly best to keep my mouth shut when I'm in trouble.
27. Evil spirits possess me at times.
28. When someone does me wrong I feel I should pay him back if I can, just for the principle of the thing.
29. I am bothered by acid stomach several times a week.
30. At times I feel like swearing.
31. I have nightmares every few nights.
32. I find it hard to keep my mind on a task or job.
33. I have had very peculiar and strange experiences.
34. I have a cough most of the time.
35. If people had not had it in for me, I would have been much more successful.
36. I seldom worry about my health.
37. I have never been in trouble because of my sex behavior.
38. During one period when I was a youngster I engaged in petty thievery.
39. At times I feel like smashing things.
40. Most any time I would rather sit and daydream than do anything else.
41. I have had periods of days, weeks, or months when I couldn't take care of things because I couldn't "get going."

42. My family does not like the work I have chosen (or the work I intend to choose for my life work).
43. My sleep is fitful and disturbed.
44. Much of the time my head seems to hurt all over.
45. I do not always tell the truth.

WINCHLER'S ADULT INTELLIGENCE SCALE QUESTIONS

COMPREHENSION

DIRECTIONS. Start with item 3 for all subjects. If any one of items 3, 4, or 5 is failed, administer items 1 and 3 before presenting further.

Sometimes a subject finds it difficult to remember the entire question. In such an instance the examiner may repeat the question, but may not alter or abbreviate it. If it is necessary to encourage a subject, say Yes or Go ahead. If a response is not clear, add Please explain further or Tell me more about it.

If a subject gives no response after 10 or 15 seconds, the examiner should repeat the question.

DISCONTINUE. After 4 consecutive failures (responses scored 0).

SCORING. Items 1 and 2 are scored 2 or 0 points apiece; items 3-14 are each scored 2, 1, or 0. Credit 4 points for subjects to whom items 1 and 2 are not administered. See next page for specific scoring criteria and sample answers.

MAXIMUM SCORE: 28

TEST QUESTIONS

1. Why do we wash clothes?
2. Why does a train have an engine?
3. What is the thing to do if you find an envelope in the street that is sealed, and addressed, and has a new stamp?
4. Why should we keep away from bad company?
5. What should you do if while in the movies you were the first person to see smoke and fire?
6. Why should people pay taxes?
7. What does this saying mean? "Strike while the iron is hot."
8. Why are child labor laws needed?
9. If you were lost in the forest in the daytime, how would you go about finding your way out?
10. Why are people who are born deaf usually unable to talk?
11. Why does land in the city cost more than land in the country?

12. Why does the state require people to get a license in order to be married?
13. What does this saying mean? "Shallow brooks are noisy."
14. What does this saying mean? "One swallow doesn't make a summer."

SCORING CRITERIA AND SAMPLE ANSWERS: COMPREHENSION

Responses are scored 2, 1, or 0 (except for items 1 and 2, which are scored 2 or 0) depending on the degree of generalization and the quality. Since no attempt has been made to list all possible replies, the examiner will have to use his judgment when he encounters unusual responses. Poor verbalization should not be penalized - a satisfactory 2-point response may be badly worded. Where it is indicated that a response should be questioned, as shown by (Q), the reply to the questioning should be evaluated according to the stated criteria.

For every item, the general criterion for each level of credit is shown, followed by some typical answers. Most of the 0-point examples given typify marginal responses.

1. CLOTHES

2 points - Any response which includes the idea of cleaning.

To get them clean . . . To have a clean suit . . . To get the dirt out . . . To get the germs out . . . So they'll look good and clean.

0 points - Response not including reference to cleaning.

Because it's Monday . . . It's a good thing to do . . . To keep out of mischief . . . Because the Bible says so.

2. ENGINE

2 points - Response showing knowledge that engine provides power to move the train.

To pull it . . . For it to have power . . . In order to pull the load . . . To push it and the passengers.

0 points - Response not including idea of moving the train.

To keep the engineer warm . . . To load the passengers or freight; you couldn't go anywhere without a leader, like a captain in the army . . . To pay attention to the signals . . . To whistle when they come to a crossroads or a curve.

3. ENVELOPE

2 points - Any response which shows recognition that letter should be put into mails immediately.

Return it to post office . . . Mail it . . . Drop it in nearest box.

(Both "Post Office" and "Mail it" responses always get 2 points regardless of urban or rural residence of examinee.)

1 point - Recognition that letter is property of someone else but poor idea as to disposition of it.

Give it to policeman . . . Take it to dead letter office . . . Try to find owner.

0 points - No idea of what to do with letter or that the letter is the property of someone else.

Leave it alone . . . Open it.

4. BAD COMPANY

2 points - Any response containing the idea that a person is changed for the worse, corrupted or improperly influenced by bad company.

Corrupts your own way of thinking . . . They make you bad . . . They will lead you into temptation . . . So that you wouldn't be bad yourself . . . Influence our behavior - our thoughts . . . Keep you from being spoiled by them . . . Usually follow in their footsteps . . . Become like them . . . They teach you to be bad.

1 point - Reference to specific outcome rather than a generalization of effects of bad company.

Ruin reputation . . . So you won't get into trouble . . . Being classed as bad company yourself . . . Cause you trouble all your life if you stay with them . . . To keep your reputation . . . Finally become criminal yourself . . . Teaches you to be a crook.

0 points - Reference to badness alone without further explanation, or idea of keeping out of trouble without explanation of why person would be in trouble.

Bad company is no good . . . Keep better company . . . Get involved in a situation we couldn't control . . . 'Cause don't learn anything good . . . They give you trouble . . . So we wouldn't be picked up.

5. MOVIES

2 points - Recognition that a person in authority on the scene, such as manager or usher, should be notified.

Report it to usher . . . Report it to manager . . . Tell the man who shows you to your seat.

1 point - Recognition that responsible action, though not so immediately effective, should be taken.

Ring the fire alarm . . . Try to put the fire out or call fire department.

0 points - Description of actions which would create a panic or would not avert disaster.

Shout, "Fire!" . . . I'd try my best to get out . . . Stay calm . . . Warn the other people . . . Run out . . . Walk to nearest exit . . . Go for water.

6. TAXES

2 points - Support of the government or government institutions (City, community or state may be given in place of government.).

Keep up the government . . . Support the government . . . So government should keep going . . . To run country (explained).

1 point - Specific mention of two or more institutions supported by the government.

Pay the police department, for roads, etc. . . . Keep all state schools, keep the institutions . . . For upkeep of institutions of all kinds.

0 points - Reference to one specific institution, organization or job showing no grasp of the idea that taxes are used for the entire government structure.

So pay city workers . . . It's their government - for their protection from gangsters, etc. . . . For unemployed . . . So that other people could make more money . . . Help city and city helps you.

7. IRON

If the response is another proverb, ask for an explanation and score according to criteria.

2 points - An abstract generalization.

When an opportunity comes, take advantage of it . . . Do it when the time is ripe . . . Do it when you have the chance.

1 point - A specific instance, or a related but not quite equivalent generalization.

Iron has to be hot to be bent . . . Do it today . . . If you have a good idea, go ahead with it before something changes his mind.

0 points - No recognition that statement is a proverb. Responses about labor strikes, ironing. Vague explanation of taking advantage of a situation on a personal level. Literal translation or elaboration.

If somebody is mad at you, get even with them when you're both mad . . . It's a "get even" idea . . . Do the first thing that comes to mind . . . Iron your clothes when the iron is hot . . . Go by your impulse.

8. CHILD LABOR

2 points - Mention of any two of these reasons: health, education, general welfare, exploitation, avoid cheap labor.

Avoid exploitation - protect health . . . To allow children to get an education and mature before being forced to work.

1 point - Mention of one of the reasons.

To protect children by keeping them in school . . . Most businessmen would take advantage of children and have them work for nothing.

0 points - Vague idea of protection alone or no explanation of why child labor is bad. Idea that child labor laws are to protect jobs for adults.

Cheaper labor . . . Injurious to children . . . If you don't, labor would be so cheap you wouldn't get much for your labor . . . Children can't take care of themselves . . . To prepare children for adult life.

9. FOREST

2 points - Any explained use of natural phenomena in order to find a way out or a systematic approach to the problem.

Try to go in one direction by using sun (or a stream, moss, etc.) . . .
. . . Use of watch as a compass (explained fully) . . . look for a stream or path and follow it to avoid circles.

1 point - Mention of a haphazard means of getting out, or a partial 2-point response unexplained.

By the sun (unexplained) . . . Moss (unexplained) . . . Follow a path . . .
. . . Walk in the direction of the sun . . . Climb to top of tallest tree and try to locate landmark . . . Look for landmarks for bearings. (Q).

0 points - Use of unreliable or senseless phenomena or reliance on people.

Try to find a policeman to help you find your way out . . . Keep on walking . . . Try to find the way you got in . . . Wait for a forest ranger . . . I usually watch the way I go in and follow the moon . . . I would shout.

10. DEAF

2 points - A knowledge that one must hear sounds or speech before being able to repeat them.

Have to hear to imitate sounds . . . They haven't heard other people talk and don't learn how to talk . . . Because you can learn to talk by hearing.

1 point - The idea that hearing and talking are connected without the knowledge of how.

Can't hear so can't talk . . . Can't hear how sounds are produced . . .
. . . They are never able to tell correct form of words . . . Because he can't hear what is said . . . Can't talk because he can't hear. (Q).

0 points - No idea of interdependence of hearing others and learning to talk.

The glands are connected . . . Must be that nerves are bad . . . That's the way you are born.

11. CITY LAND

2 points - Mention of demand with the implication of limited supply.

Law of supply and demand . . . More people want city land . . .
Because there is less of it and more people want it . . . Being used
more, more people want the location . . . Harder to get in the city
(explained as demand).

1 point - The idea of supply without the implication of demand, or
mention of more than one convenience located in the city such as:
theaters, stores, transportation, safety control, utilities,
sanitation, streets.

More people in the city . . . Less land in the city . . . Because you
have better roads and more facilities - police, water, fire department
. . . Scarce in city (unexplained) . . . Better business
possibilities.

0 points - Response which shows little or no understanding of economic
law involved.

More work available in city . . . Has more value . . . Factories could
be built on city land . . . Buildings are larger in city, they cost
more . . . Because hardly anyone wants to live in the country . . . In
the city there are more things - taxes, congestion.

12. MARRIAGE

2 points - Knowledge that it is for a public record or for the control
of the institution of marriage.

To keep a record of who is married . . . To control and regulate the
state of marriage; to be certain individuals have requirements for
marriage - health, age, etc. . . . So that they could keep track of
marriages.

1 point - A response which implies the use of a record without so
stating; a specific reason well explained; two or more specific
reasons mentioned but not elaborated.

To prevent people under age from marrying . . . To prevent bigamy . .
. . . To prove you are married . . . For census purposes . . . Proof
that you're married in case of legal matters . . . To prevent spread
of disease and prevent mentally ill people from getting married.

0 points - No recognition of need for record, or reference to
irrelevant or trivial consequences.

To protect the home . . . People tend to live with different people .
. . . Moral code . . . For revenue . . . Teachings from Bible . . .
Because of protection of offspring . . . So they can be legally
married and the lady's name can be changed.

3. BROOKS

If the response is another proverb, ask for an explanation and score according to criteria.

2 points - An abstract generalization.

Water is shallow, tendency is to talk a lot . . . Shallow people talk a lot . . . People who have something on the ball don't have to brag.

1 point - A reversal, or a specific instance.

Water running over rocks with no depth makes noise . . . People who have a complex often make a lot of noise to cover up their shortcomings. . . People who talk a lot don't think very deep.

0 points - No recognition that statement is a proverb; a specific description of a personal nature.

People that don't think deeply are easily disturbed and not rational . . . Idle minds are the devil's workshop . . . Because they have frogs in them.

4. SWALLOW

If the response is another proverb, ask for an explanation and score according to criteria.

2 points - An abstract generalization.

Don't generalize from a single instance . . . Shouldn't jump to conclusions . . . Can't predict from a single experience.

1 point - A specific instance, or a related but not quite equivalent generalization.

One indication of success does not presuppose complete success . . . One part doesn't make a whole . . . One violin doesn't make a string section . . . If one wins once, it doesn't mean you will win all the time . . . One bird might be ahead of all the others and summer may still be a long way off.

0 points - No recognition that statement is a proverb, or a distortion of meaning of proverb at very specific level.

When you do something good once, you are not the boss . . . There are more things to summer than that . . . A flock of swallows would all be gone at summertime . . . Takes lots of people together to solve a problem . . . There's a lot more to life than just trivial things.

SIMILARITIES

DIRECTIONS. Start with item 1 for all subjects. Introduce the item by saying In what way are an ORANGE and a BANANA alike? If the subject replies that they are both fruit or that they are both food, say Good and proceed with item 2.

If the subject mentions a difference, fails to respond, or says that they are not alike, score 0 for the item and say They are alike in that they are both fruit, you eat both, both have skins and then go on to item 2.

Ask Now, in what way are a COAT and a DRESS alike? Give no help on this or on the succeeding items. Introduce each item in the same manner.

DISCONTINUE. After 4 consecutive failures (responses scored 0).

SCORING. Each item is scored 2, 1, or 0. See next page for specific scoring criteria and sample answers.

MAXIMUM SCORE: 26

TEST ITEMS

1. Orange Banana
2. Coat Dress
3. Axe Saw
4. Dog Lion
5. North West
6. Eye Far
7. Air Water
8. Table Chair
9. Egg Seed
10. Poem Statue
11. Wood Alcohol
12. Praise Punishment
13. Fly Tree

SCORING CRITERIA AND SAMPLE ANSWERS: SIMILARITIES

The general criteria for scores of 2, 1, and 0 for any item are as follows:

2 points - Any general classification which is primarily pertinent for both members of the pair.

1 point - Any specific properties common to both and which constitute a relevant similarity.

0 points - Specific properties of each member of the pair, generalizations which are not pertinent, or differences.

The following examples are some typical responses from the standardization population and illustrate how they were scored. The words "Both are" or "Both have" may be understood as preceding most of the responses.

1. ORANGE - BANANA

2 points - Fruit.

1 point - Food . . . To eat . . . Have peels . . . Same color . . .
Grow . . . Contain vitamins.

0 points - Round . . . Same shape . . . Contain calories.

2. COAT - DRESS

2 points - Garments . . . Wearing apparel . . . Clothing.

1 point - Made of cloth . . . Keep you warm . . . To wear . . . Cover the body . . . Things to put on.

0 points - Coat is warmer than dress . . . Made of same material . . .
You put coat on top of dress . . . Have buttons.

3. AXE - SAW

2 points - Tools . . . Cutting implements.

1 point - Used by carpenters . . . To cut . . . Hardware.

0 points - Made of metal . . . People are afraid of them . . . Have handles . . . For sawing and chopping.

4. DOG - LION

2 points - Animals . . . Mammals.

1 point - Legs . . . Fur . . . Tails . . . Belong to same species.

0 points - Look alike . . . Lions growl, dogs bark . . . Dangerous.

5. NORTH - WEST

2 points - Directions . . . Compass points.

1 point - Tell you where you're going . . . Places on a map.

0 points - Distance . . . Go either way.

6. EYE - EAR

2 points - Senses . . . Sense or perception organs . . . Receptors of stimuli.

1 point - Organs . . . Parts of the body . . . You know from them . . . You get knowledge through them.

0 points - Necessary to man . . . See with eye, hear with ear . . . Both have an opening . . . Can tell what you are saying . . . You read lips and ear hears what you say . . . You need both.

7. AIR - WATER

2 points - Necessary for life . . . Have to have air to live and must have water to live . . . Necessary for functioning of the human body . . . Can't live without them.

1 point - Elements . . . Have oxygen . . . Help us to live . . . Means of transportation . . . You need both . . . Fluids.

0 points - Everywhere on earth . . . Nature's products . . . Contain water . . . Nature's gifts . . . Breathe the air and drink water . . . Water is a substance and air is a substance . . . Keeps on going, so does water keep on going . . . in clouds.

8. TABLE - CHAIR

2 points - Furniture . . . Articles of furniture.

1 point - Household objects . . . Found in kitchens or restaurants . . . Used when you eat a meal.

0 points - Table to eat on; chair to sit on . . . Have four legs . . . Wooden objects.

9. EGG - SEED

2 points - Beginnings of life . . . Reproduce what they come from . .
. . . Embryonic substances . . . Young come from both.

1 point - Things grow from both . . . Produce . . . Give life
(incompletely explained) . . . Can create . . . Have shells . . .
Something grows from both . . . Means of reproduction (not further
explained).

0 points - Grow . . . Food . . . One comes from other . . . You can
eat both . . . Have a yolk . . . Are round.

10. POEM - STATUE

2 points - Works of art . . . Artistic creation . . . Expression of
artistic feeling.

1 point - Man made . . . Symbolic . . . Beautiful things . . . Stir
feelings . . . Are memorial, make you remember . . . Tell stories . .
. . . Express an emotion or idea.

0 points - Poem describes statue . . . By famous people . . . Lifeless
. . . You read a poem and look at a statue . . . People like them . .
. . . Last a long time, if good.

11. WOOD - ALCOHOL

2 points - Organic substances . . . Have carbon . . . Contain hydrogen
and carbon.

1 point - Burn . . . Used in manufacturing . . . Used as fuel.

0 points - Tree products . . . Alcohol comes from wood . . . Useful .
. . . Knocks you out.

12. PRAISE - PUNISHMENT

2 points - Means of discipline . . . Method of criticism . . . Means
of influencing behavior of others . . . Methods of motivation.

1 point - For training people . . . To express your attitude . . .
Used on people to get them in a certain emotional state . . . Means of
getting things done.

0 points - Benefit a person.

13. FLY - TREE

2 points - Living things . . . Have life.

1 point - Breathe . . . Grow . . . Need food . . . Created by nature .
. . Need sunlight to live.

0 points - Up in air, outdoors . . . Fly has wings, tree has leaves .
. . Fly is small, tree is big . . . Useful to man . . . Carry germs.

APPENDIX THREE

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