

ASSESSING THE VOLITIONAL PRONG OF THE INSANITY DEFENSE

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In reviewing recent reports submitted to the DFP Training and Credentialling Committee, it appears that the most difficult task for DFP applicants has been evaluating the volitional prong of the insanity defense (i.e., analyzing the degree of impairment relative to ability to conform conduct to the requirements of the law). It is generally accepted in the field that this prong is more difficult to assess than the cognitive prong (i.e., ability to appreciate the wrongfulness of conduct). Indeed, a number of jurisdictions, including the Federal government, have eliminated the volitional prong from consideration as part of the insanity defense. However, Massachusetts continues to include it and therefore we need to address it in our reports. In an effort to help examiners formulate a framework for assessing this prong, the DFP Training and Credentialling Committee offers the following brief guidelines. These are adapted from Richard Rogers' article in the American Psychologist, (APA's position on the insanity defense: Empiricism versus emotionalism. *Vol 42(9), Sep 1987, 840-848*). It is recommended that DFP's who are not familiar with that article read it in its entirety. A few of the criteria outlined in that article are adapted here with my comments.

The most useful approach is to first ask the defendant for a narrative version of the alleged offense and then inquire closely about the specific elements. Sometimes, DFP candidates incorporate only the defendant's account, without evidence of specific detailed questioning. Regarding the volitional prong, the detailed questioning should focus on the three domains listed below: 1) capacity to make choices; 2) capacity for delay; and 3) regard for apprehension. Of course, it is also important to tie any deficits in these areas to specific symptoms of a mental illness (as opposed to a response to intense anger, jealousy, or other emotion or to the direct effects of intoxication). It is not always possible to obtain good data in all these domains, but it is necessary to make reasonable attempts to explore them.

Once the data are obtained, there is no formula for combining the elements to arrive at a clear conclusion. It will still be up to the clinical judgment of the forensic evaluator to assign relative weights to these areas. For instance, although a defendant may demonstrate evidence that she was capable of delaying her actions, you may arrive at a conclusion that the deficits in capacity to make choices were so severe that this becomes the dominant factor in your analysis. As always, you are not required to provide a definitive opinion on this issue, although you should provide the data and the relevant analyses regarding the specific domains.

I. Capacity to make choices

The first factor involves an assessment of the defendant's capacity to make choices. This would include questions and analysis of whether the defendant perceived alternatives to the criminal behavior. Did the defendant believe that the only response to the situation was the specific criminal behavior or did he/she consider alternatives? If so, how did the defendant exercise choice? Another aspect of this factor is whether the criminal behavior was part of goal-directed behavior aimed at accomplishing a specific outcome.

It is important to note that none of these elements, taken individually, are dispositive regarding whether the defendant maintained or lacked substantial capacity to make choices. Rather, these elements should be assessed in the context of the totality of the circumstances. A delusional defendant may act in a purposeful and goal-directed manner but nonetheless may have been so influenced by the delusions that he was unable to perceive any other option but the criminal act. For example, a schizophrenic man walks into a bank and hands a note to the teller demanding \$10,000, threatening to detonate a grenade if he does not receive the money. He indicates to the forensic examiner that he chose this particular bank, rather than others in the area, because he knew that it was not crowded. He also chose to threaten with a grenade (which he did not really have) because he thought that would be easier to fake than claiming he had a gun. He explained that he heard the voice of God telling him that if he did not get \$10,000 and distribute it to the poor then his mother would die. He decided that going to this particular bank was the best way to fulfill this commandment and avoid the terrible consequence. In this case, one could argue that although the defendant demonstrated ability to choose between alternative means of obtaining the money, he was so influenced by delusions and hallucinations that his capacity to choose not to commit a criminal act was significantly impaired.

II. Capacity for delay

This factor involves inquiry and analysis of why the defendant initiated the behavior at the particular time. Did the defendant choose the circumstances and place for the offense? Was there planning and preparation? For example, one might inquire of an individual charged with a sex offense why he chose the particular time and place for the offense. In one case in which I was involved, the defendant was a committed patient in a psychiatric hospital with documented delusions and hallucinations. He was charged with attempted rape on a staff member. The defendant indicated that he waited outside the office until all the other staff left, hid behind a door, and did not assault the woman until he was sure that she was alone. Thus, despite clear indications of mental illness, the data indicated that he was able to choose the time and circumstances, plan out the behavior, and was able to delay acting on his impulses.

III. REGARD FOR APPREHENSION

For this factor, one would inquire and analyze whether the defendant took steps, both prior to and after the criminal act, to avoid apprehension. If so, this would indicate a

significant degree of control over behavior. It should be noted that this dimension is also very relevant to the cognitive prong – appreciating wrongfulness. So, if the defendant put on gloves and a mask prior to a B&E, this would suggest planful, controlled behavior (again, as well as indication of ability to appreciate that the behavior was wrong). Of course, the examiner should not rely solely on this evidence but needs to inquire as to why the defendant put on the gloves and mask.

These three factors are useful in operationalizing the concept of capacity to conform conduct. In different circumstances, one or more of these factors may be more relevant to the specific facts of the case. Also, in some cases there will be disjunctions between these factors; i.e., a defendant may have demonstrated capacity for delay but no regard for apprehension. Therefore, one cannot simply derive a score for these factors. Rather, the task of the forensic evaluator is to assess these factors in the context of the totality of the circumstances and offer an analysis of the extent to which the defendant's capacity to conform conduct was impaired or not, due to specific symptoms of a mental illness.

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