

CHAPTER 6

TRIAL MATTERS UNIQUE TO CAPITAL CASES

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[6.1.] Self-Represented Defendants

In 1975, the U.S. Supreme Court recognized a criminal defendant's constitutional right to defend him- or herself.⁵⁴⁵ Fortunately, the incidence of self-represented defendants in capital cases is rare. However, self-represented defendants always require extraordinary protocols, and presiding over a capital self-represented defendant's trial necessitates the pre-establishment, implementation, and publication of those protocols to all who will be present during the trial. The court should consider what the defendant will be allowed to say, how the defendant will be allowed to act, and how to deal with the defendant's lack of understanding of the judge's rulings. The court must also instruct the courtroom staff and counsel as to how they should interact with the self-represented defendant.

The court should also ensure that two important steps are taken. First, the defendant should sign a written waiver. Second, the court should conduct a detailed hearing on the record informing the defendant of the rights he is waiving by proceeding *pro se*. A written waiver and questionnaire forms are contained in Appendix 6-1.

[6.2.] Overriding Principles

Courts should be cognizant of six fundamental principles when defendants wish to represent themselves:

- ✓ The right to self-representation must be afforded all defendants, *even in capital cases*.⁵⁴⁶
- ✓ The defendant's desire to represent him- or herself must be clear and unequivocal.⁵⁴⁷
- ✓ After a trial has commenced, the decision whether to grant a defendant's request to represent himself is within the discretion of the trial court.⁵⁴⁸
- ✓ The appropriate criteria for a trial judge to consider are the defendant's reasons for the self-representation request, the quality of the counsel representing the party,

⁵⁴⁵ See *Faretta v. California*, 422 U.S. 806 (1975).

⁵⁴⁶ *Commonwealth v. Davis*, 388 A.2d 324 (Pa. 1978).

⁵⁴⁷ See *U.S. v. McKinley*, 58 F.3d 1475 (10th Cir. 1995).

⁵⁴⁸ See *Robards v. Rees*, 789 F.2d 379, 384 (6th Cir. 1996).

- ✓ and the defendant's prior proclivity to substitute counsel.⁵⁴⁹
- ✓ The defendant has a constitutional right to self-representation if a valid waiver of the right to counsel is made. The waiver must appear from the record to be made knowingly and intelligently with a full understanding of the consequences.⁵⁵⁰
- ✓ The U.S. Supreme Court permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point that they are not competent to conduct trial proceedings by themselves. Judges may take a realistic account of a particular defendant's mental capacities by asking whether the defendant who seeks to conduct his own defense at trial is mentally competent to do so.⁵⁵¹

[6.3.] Protocols

Once the court has determined that the defendant is voluntarily, knowingly, and intelligently waiving the right to counsel, the trial court faces certain logistical difficulties. Serious consideration must be given the following issues:

1. The jailed defendant may need someone to coordinate the appearance of his or her witnesses. The court will need to consider providing the defendant with someone to prepare and file the subpoenas, call witnesses, and answer any questions about these and other arrangements.
2. A defendant handling weapons during trial will likely create concerns; however, different rules for the defendant and the prosecutor would create a problem of appearances. Consider imposing the requirement that a sheriff's deputy handle all weapons.
3. In addition, the potential for the defendant coming into close contact with witnesses and jury members is also a cause for concern. Consider partitioning the courtroom to create an area within which the prosecutor and defendant can operate that does not permit the defendant and counsel close contact with witnesses and the jury. Use the courtroom deputy to hand exhibits to witnesses from both parties. These arrangements may require that a

⁵⁴⁹ U.S. v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986).

⁵⁵⁰ See Commonwealth v. Payson, 723 A.2d 695 (Pa. Super. Ct. 1999); Faretta v. California, 422 U.S. 806 (1975).

⁵⁵¹ Indiana v. Edwards, 128 S.Ct. 2379 (2008).

- larger than normal number of deputies or court personnel be present.
4. Depending on the courtroom’s configuration, special arrangements for sidebar conferences may be required. If necessary, the jury may need to be removed for sidebar conferences.
 5. How much latitude will the judge give the defendant to “lead” direct examination? Will the judge act as a guardian against the prosecutor who takes advantage of the defendant’s lack of knowledge of the rules of evidence? A defendant has no right to standby counsel, but one should always be appointed to deal with these issues. Standby counsel attends all proceedings and is available to the defendant for consultation and advice.
 6. How will the defendant’s own testimony be given? What if a defendant does not testify and, instead, uses closing argument as an opportunity to do so without cross-examination? Will the judge allow the defendant to pick up exhibits and demonstrate, as the prosecutor is able to do? Special attention must be given to prohibit anything that may be used as a weapon. This includes hard pens and pencils.

[6.4.] Jury View

The court should not automatically grant a jury view. The parties should be required to specify exactly why the jury view would help the jury understand the evidence.

If a jury view is granted, the judge should plan the details beforehand with foresight. The judge should keep in mind that the jury will be out of the courthouse and subject to improper influence, accident, and other difficulties that may lead to a mistrial or adverse publicity.

The court should require the parties to stipulate in writing to everything the bailiff is pointing out to the jury. In addition, the court should prohibit the parties from rearranging or changing the script for items to be pointed out to the jury. The judge should specify that any disputes between the parties will be resolved after a hearing.

The court should advise the jury members that they are not to comment or gesture to each other or anyone else. The judge should require them to speak to the bailiff privately about anything they need.

During jury views, the judge should make it clear that the bailiff, or other designated person, is in charge and order the parties and other participants to take their orders from that person. He or she will effectively be the court’s representative on the scene. All of these measures set a tone of control that will help the process run smoothly.

The court should arrange for the appropriate law enforcement authority to protect and escort the jury and court staff to the scene during the view and

their return trip to the courthouse. The court should also consider the amount of media involvement, if any, that will be permitted during the jury view. If media involvement at the scene is permitted, the court should order the media to refrain from photographing any body part of any juror. It is the judge's responsibility to ensure that all jury members feel safe, and many jurors may fear any media presence.

The court should take measures to obtain a waiver of the defendant's right to attend the jury view. If a waiver is not executed, the defendant should remain in the custody of the sheriff and in the sheriff's vehicle. Also, the court should order the defendant to refrain from making any gesture or uttering any sounds at the scene. Likewise, the jury should not see the defendant in handcuffs or jail attire. However, the jury should be told upfront that the defendant will attend the view but will stay inside a sheriff's vehicle with a deputy. The court may be wise to anticipate that someone connected to the defendant, the victim's family, or the community at-large may attempt to make a statement or stage a demonstration at the scene and plan to circumvent this possibility. Prepare the jury members for anything that might surprise them or make them uncomfortable.

The following instructions are an example of what may be given to the jury before visiting the scene:

You are going to be taken to the premises or scene involved in this case. You will be required to remain together under the supervision of the bailiff until you return to the courtroom. Counsel and the parties may be present at the time, but they may not discuss this case or demonstrate anything in relation to it. The bailiff may point out certain things to you.

What you observe at the scene is not evidence since conditions may have changed since the time of the events in this case. The evidence as to the physical appearance of the scene must come to you from the witnesses who testify at trial. The sole purpose of viewing the scene is to help you understand the evidence as it is presented during the trial.

[6.5.] Confrontation Issues

The Sixth Amendment provides that every criminal defendant shall have the right to confront the witnesses against him or her at trial. The landmark case of *Crawford v. Washington*⁵⁵² effected a "fundamental re-conception of the Confrontation Clause."⁵⁵³ Prior to *Crawford*, the U.S. Supreme Court in *Ohio v. Roberts* held that the Confrontation Clause permitted a hearsay statement to be used as evidence against a criminal defendant either if the statement fell under a "firmly rooted hearsay exception" or, if not, at least had "particularized

⁵⁵² 541 U.S. 36 (2004).

⁵⁵³ U.S. v. Cromer, 389 F.3d 662, 671 (6th Cir. 2004).

guarantees of trustworthiness.”⁵⁵⁴ Essentially, the effect of the *Roberts* doctrine was to constitutionalize the traditional hearsay exceptions of evidence law and to offer the possibility of expanding those exceptions with modern ones based on guarantees of trustworthiness.

The key test of a Confrontation Clause violation in *Crawford* is whether the hearsay statement offered against a criminal defendant is testimonial.⁵⁵⁵ If the statement is testimonial, the Sixth Amendment requires that the hearsay statement be excluded from the evidence against a criminal defendant, even if the statement falls within a traditional hearsay exception, unless the person who made the out-of-court statement is unavailable at the trial and the criminal defendant had an opportunity to cross-examine the declarant before trial.⁵⁵⁶ The majority did not define what is and is not testimonial; however, they concluded that testimonial hearsay includes prior testimony at a preliminary hearing, prior testimony before a grand jury, prior testimony at a former trial, or statements made in answer to police interrogations.⁵⁵⁷ Moreover, *Crawford* suggests that unconstitutional testimony may include hearsay statements made by one who subjectively expects, or even reasonably expects, the statement to be used in a criminal prosecution.⁵⁵⁸

Therefore, put simply, *Crawford* only applies when four elements are present:

1. The statement is offered against the defendant by the state in a criminal prosecution;
2. The statement at issue is testimonial;
3. The declarant of the statement is unavailable to testify at trial; and
4. The defendant did not have a prior opportunity to cross-examine the declarant regarding the statement at a prior formal legal proceeding, preliminary hearing, or deposition.

[6.6.] *Davis v. Washington*⁵⁵⁹

As stated, *Crawford* does not apply to non-testimonial statements that the declarant did not intend to be preserved as evidence at trial.⁵⁶⁰ In *Davis*, the U.S. Supreme Court considered two consolidated cases – one from Washington, involving the admissibility of statements during a 911 call; and one from Indiana, involving the admissibility of statements made to police officers at a crime scene – to determine whether the statements in each case violated the respective

⁵⁵⁴ 448 U.S. 56, 66 (1980).

⁵⁵⁵ See *Crawford*, 541 U.S. at 53.

⁵⁵⁶ See *id.* at 42-50.

⁵⁵⁷ *Id.* at 51.

⁵⁵⁸ *Id.* at 51-52.

⁵⁵⁹ 547 U.S. 813 (2006).

⁵⁶⁰ *Id.*

defendants' rights under the Confrontation Clause.⁵⁶¹ The U.S. Supreme Court held that statements made in the course of a police interrogation, under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, are non-testimonial.⁵⁶² Statements made when the circumstances objectively indicate there was no such ongoing emergency, and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution are testimonial.⁵⁶³ Therefore, *Davis* suggests that courts should focus on the primary purpose of the interrogation when determining whether a statement is testimonial under *Crawford*.⁵⁶⁴

If a statement is found to be testimonial, it must be excluded unless a court finds that the declarant is unavailable as a witness at trial and that the defendant had a prior opportunity to cross-examine the declarant. If a statement is non-testimonial, then it does not implicate the Confrontation Clause, and the only consideration before the court is whether it may be admitted under one of the hearsay exceptions.

[6.7.] Dying Declarations

The *Crawford* majority conceded that some historical exceptions to the general rule against hearsay admissibility exist and that some were established prior to the adoption of the Sixth Amendment in 1791.⁵⁶⁵ However, the U.S. Supreme Court left open the question regarding whether the Confrontation Clause as interpreted by *Crawford* includes an historical exception for dying declarations.⁵⁶⁶

An exception for dying declarations defies the logic of *Crawford*. For example, a statement given to a police officer by a living hearsay declarant unavailable at trial, such as the wife in *Crawford* who incriminates her husband by giving a statement to the police and becomes unavailable at trial because of the marital privilege, is barred by the Confrontation Clause.⁵⁶⁷ However, if the same wife were to give the same statement on her deathbed to police interrogators in order to implicate her husband in her death, the Confrontation Clause might not be a bar for historical reasons.⁵⁶⁸ Therefore, the U.S. Supreme Court's refusal to label all dying declarations as non-testimonial suggests that lower courts should consider the specific circumstances surrounding the statement.

The California Supreme Court decided that the Sixth Amendment does incorporate an exception for dying declarations.⁵⁶⁹ In that case, a murder victim

⁵⁶¹ *Id.* at syllabus.

⁵⁶² *Id.* at syllabus ¶ 1.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at syllabus ¶ 2.

⁵⁶⁵ *Crawford*, 541 U.S. at 46.

⁵⁶⁶ *Id.* at 56.

⁵⁶⁷ *See id.* at 36.

⁵⁶⁸ *See id.* at 56.

⁵⁶⁹ *People v. Monterroso*, 101 P.3d 956, 971 (Cal. 2004).

made a statement at the crime scene, which described the perpetrator.⁵⁷⁰ That statement was admissible as a dying declaration even though the victim lingered for eleven more days before dying from gunshot wounds.⁵⁷¹ The officer testified that the victim knew he was shot, was in great pain and on the ground in the fetal position, was fearful of dying, and never spoke again.⁵⁷² Other states have reached a similar conclusion.⁵⁷³

[6.8.] Is *Ohio v. Roberts* Still Applicable to Non-Testimonial Statements?

Some state and federal courts hold that *Ohio v. Roberts* is still applicable to non-testimonial statements.⁵⁷⁴ Some read *Crawford* to suggest that *Roberts* is still applicable to non-testimonial statements because of this language:

Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny all together.⁵⁷⁵

In *Whorton v. Bockting*,⁵⁷⁶ the U.S. Supreme Court held that the *Crawford* decision, which overruled *Roberts*, did not announce a “watershed rule” of criminal procedure, which could be applied retroactively on collateral review.⁵⁷⁷ Therefore, *Crawford* only applies to cases still on direct review and does not apply retroactively in collateral proceedings.

[6.9.] Expert Testimony

There are a variety of people whose expertise may be called upon in a capital trial. For example, you may have ballistics experts, investigators, forensic experts, psychologists, mitigation experts, and jury selection experts on behalf of the defendant. The court should limit the amount that may be spent to appoint experts. The standard for appointing experts is whether defense counsel provided a *prima facie* showing that the funds or experts requested are needed to pay for services necessary to a competent defense.⁵⁷⁸

⁵⁷⁰ *Id.* at 763.

⁵⁷¹ *Id.* at 764.

⁵⁷² *Id.*

⁵⁷³ *Harkins v. State*, 143 P.3d 706 (Nev. 2006); *Wallace v. State*, 836 N.E.2d 985 (Ind. Ct. App. 2005); *State v. Martin*, 695 N.W.2d 578 (Minn. 2005) (*en banc*); *People v. Gilmore*, 828 N.E.2d 293 (Ill. App. Ct. 2005).

⁵⁷⁴ See *State v. Murray*, No. 20301, 2004 WL 2659176 (Ohio Ct. App. Nov. 19, 2004); *U.S. v. Saget*, 377 F.3d 223, 230 (2d Cir. 2004).

⁵⁷⁵ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

⁵⁷⁶ 549 U.S. 406 (2007).

⁵⁷⁷ *Id.* at 421.

⁵⁷⁸ *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[6.10.] *Frye v. U.S.*⁵⁷⁹

Frye is an early D.C. Circuit Court case setting forth the “General Acceptance” test for admissibility of expert opinion testimony. This case involved the issue of whether the defendant could offer expert witness testimony on the result of a systolic blood pressure deception test that was given to him. The systolic blood pressure test was a predecessor to the polygraph test.

The U.S. Supreme Court held that “while courts will go a long way in admitting expert testimony deducted from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have *gained general acceptance in the particular field in which it belongs.*”⁵⁸⁰

[6.11.] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵⁸¹

The U.S. Supreme Court found that the Federal Rules of Evidence supersede the *Frye* “General Acceptance” test. The U.S. Supreme Court held that “‘general acceptance’ is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a *reliable foundation* and is relevant to the task at hand.”⁵⁸² The trial judge is to make a preliminary assessment of “whether the testimony’s underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at issue.”⁵⁸³

The U.S. Supreme Court found that many factors must be taken into account when making this assessment and set forth the following four:

1. Whether the theory or technique in question has been tested;
2. Whether it has been subjected to peer review and publication;
3. Its known or potential error rate and the existence and maintenance of standards controlling its operation; and
4. Whether scientific evidence has gained widespread acceptance within a relevant scientific community.⁵⁸⁴

The U.S. Supreme Court also found that the inquiry must be flexible, and that the focus must be “solely on principles and methodology, not on the conclusions that they generate.”⁵⁸⁵

⁵⁷⁹ 293 F. 1013 (D.C. Cir. 1923).

⁵⁸⁰ *Id.* (emphasis added).

⁵⁸¹ 509 U.S. 579 (1993).

⁵⁸² *Id.* at 595 (emphasis added).

⁵⁸³ *Id.* at 592.

⁵⁸⁴ *Id.* at 593-95.

⁵⁸⁵ *Id.* at 595.

[6.12.] Kumho Tire Co. Ltd. v. Carmichael⁵⁸⁶

The holding in *Kumho Tire* states that *Daubert* and its progeny apply to expert testimony grounded in the soft sciences and experience or skilled-based methodology as well as the hard sciences. When empirical evidence may not be suitable to determine the reliability of an expert's methodology, the trial court must make certain that the expert employs the same "intellectual rigor" that defines the expertise of practitioners in the relevant field.⁵⁸⁷ In sum, under *Daubert* and *Kumho Tire*, the trial judge's role as gatekeeper extends to all forms of proffered expert testimony and not merely "novel" or "scientific" evidence. It would apply to all forms of "technical" or "other specialized" knowledge.⁵⁸⁸

Therefore, trial courts should conduct pre-trial hearings to determine the admissibility of the proffered testimony in order to aid the trial court in fulfilling its gatekeeper function of ensuring that the proffered expert testimony is both relevant and reliable. However, the *Daubert* process should not be considered a strict set of rules with which must be complied prior to the admission of expert testimony. The ultimate goal both under *Daubert* and *Kumho Tire* is to ensure that the proffered expert testimony is relevant and reliable.

[6.13.] Voluntary Intoxication

States take very different approaches concerning a voluntary intoxication defense. For example, in Kentucky a criminal defendant can assert the defense if, because of his or her intoxication, an element of the charged crime did not exist when the criminal act was committed.⁵⁸⁹ Kentucky courts allow the defense for intentional crimes, but voluntary intoxication is not a defense for unintentional crimes.⁵⁹⁰ Similarly, Wisconsin law allows a defendant to assert the voluntary intoxication defense when his or her intoxication negates specific intent.⁵⁹¹

Indiana law allows a criminal defendant to assert voluntary intoxication as a defense for offenses that either use the phrase "with intent to" or "with an intention to."⁵⁹² California takes a very different approach than that of Indiana, Kentucky and Wisconsin. In California, a defendant can submit evidence of intoxication to the trier of fact to assert that he or she had not formed the requisite intent.⁵⁹³ In addition, when charged with murder, a defendant can argue that because of intoxication he or she was incapable of deliberating, premeditating, or harboring malice aforethought.⁵⁹⁴ Many other jurisdictions are in line with the

⁵⁸⁶ 526 U.S. 137 (1999).

⁵⁸⁷ *Id.* at 152.

⁵⁸⁸ FED. R. EVID. 702.

⁵⁸⁹ KY. REV. STAT. ANN. § 501.080 (West 2007).

⁵⁹⁰ *See Brown v. Kentucky*, 575 S.W.2d 451, 452 (Ky. 1979).

⁵⁹¹ *See WIS. STAT.* § 939.42 (West 2005).

⁵⁹² *See Terry v. State*, 465 N.E.2d 1085, 1088 (Ind. 1984).

⁵⁹³ CAL. PENAL CODE § 22 (West 1999).

⁵⁹⁴ *Id.*

approach taken by California.⁵⁹⁵ Twelve states, including Montana, follow the common law rule that intoxicated offenders are fully responsible for their conduct, regardless of their intoxication.⁵⁹⁶

In Pennsylvania, neither voluntary intoxication nor a voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negate the element of intent of the offense.⁵⁹⁷ An exception exists for evidence of such intoxication whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.⁵⁹⁸ Virginia courts have taken a similar approach, holding: “Voluntary drunkenness, where it has not produced permanent insanity, is never an excuse for crime; Except, where a party is charged with murder, if it appears that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree.”⁵⁹⁹

[6.14.] Post-Traumatic Stress Disorder

Extreme cases of post-traumatic stress disorder (PTSD) may serve as the qualifying “mental disease or defect” for an insanity defense.⁶⁰⁰ However, if the level of impairment does not rise to the level of insanity, PTSD may still be used as an element of diminished capacity. The acceptance of PTSD as a form of diminished capacity has not been universal, in spite of the generally accepted proposition that PTSD impairs an individual's mental functioning.⁶⁰¹

Some critics have challenged the diagnosis of the disorder as being overly subjective.⁶⁰² There are efforts underway to provide a physiological basis for PTSD diagnosis, rather than relying on the patient's subjective assertions.⁶⁰³ For now, in those jurisdictions that allow the use of diminished capacity evidence, mental health professionals are generally allowed to testify as to not only whether the

⁵⁹⁵ See Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 518-20 (1997) (providing a comprehensive listing of states that recognize the voluntary intoxication defense).

⁵⁹⁶ *Id.*

⁵⁹⁷ 18 PA. CONS. STAT. ANN. § 308 (West 1998).

⁵⁹⁸ *Id.*

⁵⁹⁹ See *Gills v. Commonwealth*, 126 S.E. 51, 53 (Va. 1925).

⁶⁰⁰ Debra D. Burke & Mary Anne Nixon, *Post-Traumatic Stress Disorder and the Death Penalty*, 38 HOW. L. J. 183 (1994); Michael J. Davidson, *Note, Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415 (1988).

⁶⁰¹ Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 54 (Apr. 2007).

⁶⁰² See, e.g., Roger K. Pittman & Scott P. Orr, *Psychophysiological Testing for Post-Traumatic Stress Disorder: Forensic Psychiatric Application*, 21 BULL. AM. ACAD. PSYCHIATRY L. 37, 39 (1993).

⁶⁰³ *Id.*

defendant has PTSD, but also whether the disorder influenced the defendant's capacity to form the requisite criminal intent at the time of the offense.⁶⁰⁴

[6.15.] Battered Spouse Syndrome

Dr. Lenore Walker began researching battered woman syndrome in the late 1970s. Dr. Walker's research was first introduced to the public in her 1979 book, *The Battered Woman*.⁶⁰⁵ Since then, expert testimony on battered spouse, or partner, syndrome for defense purposes has been admitted in some form in every state.⁶⁰⁶ The traditional self-defense doctrine recognizes the use of force only when necessary to prevent an imminent attack from unlawful force. In many cases, a battered woman acts against her abuser when there is not an imminent attack, and, therefore, is not acting within the technical requirements of self-defense. However, evidence of battered woman syndrome can help explain why a woman might reasonably believe, in light of her history of abuse, that her life was in danger, even though to the lay person she was not facing what objectively looked like a threat of imminent, unlawful force.⁶⁰⁷

Some cases that are important in this area are as follows:

- ✓ California: Expert testimony that a defendant was suffering from battered woman syndrome was generally admissible in murder prosecution not only on question of whether defendant actually believed that it was necessary to kill in self-defense, but also on question of reasonableness of that belief.⁶⁰⁸
- ✓ Indiana: Where a defendant claims that the battered woman syndrome affected her ability to appreciate the wrongfulness of her conduct, she must proceed under the insanity defense.⁶⁰⁹
- ✓ Nevada: Jury instruction in prosecution for involuntary manslaughter improperly limited the consideration of battered woman syndrome evidence to the defendant's perceptions that the victim's conduct put her in imminent fear of her life or great bodily harm. In addition, the instructions failed to reflect that the syndrome could be used to evaluate the defendant's state of mind at the time of the shooting and her claim that the

⁶⁰⁴ *Id.*

⁶⁰⁵ LEONORE E. WALKER, *THE BATTERED WOMAN* (Harper 1980).

⁶⁰⁶ See Janet Parrish, U.S. DEPARTMENT OF JUSTICE, *TREND ANALYSIS: EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS IN CRIMINAL CASES*, at 12-17 (1996).

⁶⁰⁷ *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984) (allowing battered woman syndrome testimony because it aided juries "in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life."); see also *Ibn-Tamas v. U.S.*, 407 A.2d 626, 634 (D.C. 1979) (same).

⁶⁰⁸ See *People v. Humphrey*, 921 P.2d 1 (Cal. 1996).

⁶⁰⁹ See *Marley v. Indiana*, 747 N.E.2d 1123 (Ind. 2001).

- shooting was an “accident.” Evidence was presented that women who suffer from battered woman syndrome often claim they accidentally killed their batterers.⁶¹⁰
- ✓ Wyoming: Defense of battered woman syndrome deemed improper where a wife claimed that her husband jumped onto the hood of her car and was thrown off by accident when state statute charged reckless conduct.⁶¹¹
 - ✓ New Mexico: Defense counsel made a strategic decision to present the defense of battered woman syndrome. Based upon the testimony of two trial experts on the syndrome, a professional conclusion as to whether the defendant suffered from the syndrome required a profound examination into the lives of both the defendant and her victim – “an examination that encompassed matters that would otherwise ordinarily be improper subjects of inquiry in a criminal trial.” Thus, inquiry into the religious beliefs of the victim was proper.⁶¹²
 - ✓ New York: The court held that a man has the right to bring in “Battered Syndrome” evidence in order to support a claim of self-defense.⁶¹³

[6.16.] **Insanity**

The insanity defense is an affirmative defense in that the defendant, who usually carries the subsequent burden of persuasion at trial, must raise it. It is also considered a complete defense, which means that it results in a complete acquittal, even if the government has proven all the elements of the crime beyond a reasonable doubt. A defendant who intends to assert a defense of insanity at the time of the alleged offense must notify the prosecutor in writing within the time provided for filing a pre-trial motion, or at any later time the court sets, and file a copy of the notice with the clerk.

There are multiple standards for the insanity defense, each with distinct differences. However, all of these variations trace their roots to three traditional insanity standards: the M’Naghten standard, the irresistible impulse test, and the Durham test. The various elements used by different jurisdictions incorporate elements from each of these standards.

The traditional M’Naghten rule provides that a defendant be entitled to an acquittal if the proof establishes that a disease of the mind caused a defect in reason such that the defendant lacked the ability at the time of his or her actions

⁶¹⁰ See *Boykins v. State*, 995 P.2d 474 (Nev. 2000).

⁶¹¹ See *Duran v. State*, 990 P.2d 1005 (Wyo. 1999).

⁶¹² *State v. Swavola*, 840 P.2d 1238, 1241 (N.M. 1992).

⁶¹³ *People v. Colberg*, 182 Misc.2d 798 (N.Y. County Ct. 1999).

to either know the wrongfulness of the actions; or understand the nature and quality of the actions.⁶¹⁴

Under the irresistible impulse test, defendants are entitled to acquittals if the proof establishes that because of mental illness they were unable to control their actions or conform their conduct to the law. Contrary to what the name irresistible impulse might imply, this inability need not come upon the defendant suddenly.⁶¹⁵ A number of jurisdictions apply both M’Naghten and the irresistible impulse test. Thus, a person is entitled to acquittal if he or she meets either standard.

Under the Durham or New Hampshire test, a defendant is entitled to an acquittal if the proof establishes that the crime was the “product of a mental disease or defect.”⁶¹⁶ A crime is a “product of” the disease if it would not have been committed but for the disease.⁶¹⁷ In this way, the Durham test is broader than either the M’Naghten or irresistible impulse tests; it was intended primarily to give psychiatrists greater liberty to testify concerning the defendant’s mental condition. Although severely criticized for being vague, the Durham rule was followed in the District of Columbia from 1954 until 1972, at which time the court of appeals replaced it with the American Law Institute test. Currently, the Durham test is only employed in the state of New Hampshire.⁶¹⁸

Under the American Law Institute (“A.L.I.”) or Model Penal Code test, the defendant is entitled to an acquittal if the proof shows that he or she suffered from a mental disease or defect and as a result lacked substantial capacity to either: appreciate the criminality of his or her conduct; or conform his or her conduct to the requirements of law.⁶¹⁹ Notably, this test combines the M’Naghten and the irresistible impulse tests by allowing for the impairment of both cognitive and volitional capacity. The A.L.I. test is rapidly becoming the most popular standard, and the prevailing trend is toward its use.⁶²⁰

The purpose of the insanity defense is to ensure that criminal responsibility is imposed only on those persons who have the mental understanding and capacity to comply with the law. A person who suffers from a mental disorder is deprived of this capacity; he is neither culpable nor capable of being deterred and is therefore not subjected to the same penalties as are others who are sane. It is also important to bear in mind that insanity, as affecting the determination of criminal responsibility, is a legal and not a medical question:

⁶¹⁴ See generally *U.S. v. Freeman*, 357 F.2d 606, 615-21 (2d Cir. 1966) (surveying the history and development of the M’Naghten standard, including contemporary criticisms).

⁶¹⁵ Harlow M. Huckabee, *Mental Disability: Evidence on Mens Rea versus the Insanity Defenses*, 20 W. ST. U. L. REV. 435, 442 (1993).

⁶¹⁶ *Durham v. U.S.*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

⁶¹⁷ *Id.*

⁶¹⁸ *State v. Jones*, 50 N.H. 369 (1871) (stating New Hampshire’s product test for insanity).

⁶¹⁹ MODEL PENAL CODE § 4.01 (1985).

⁶²⁰ *Phenis v. U.S.*, 909 A.2d 138 (D.C. 2006); *Norskog v. Pfiel*, 755 N.E.2d 1 (Ill. 2001); *Commonwealth v. Johnson*, 663 N.E.2d 559 (Mass. 1996); *State v. Martinez*, 651 A.2d 1189 (R.I. 1994).

At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical, but a legal, social or moral judgment. Ideally, psychiatrists—much like experts in other fields—should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities. But once this information is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts.⁶²¹

[6.17.] Conclusion

Presiding over a capital case is like no other matter handled by a trial court judge, and handling a capital case need not be an excruciating experience. No other type of case is so microscopically reviewed, so prone to error, and so often reversed. Therefore, the preceding materials are meant to highlight possible problems that a trial judge may encounter during the trial phase of a capital case, and make the process that much easier. They are only intended for reference purposes. Any judge should use his or her own judgment as to what is proper or not proper for a particular case.

⁶²¹ U.S. v Freeman, 357 F.2d 606 (2d Cir. 1966).