Tips for Persuasive Criminal Defense of Your Client Suffering from Posttraumatic Stress Disorder

Molly Lizbeth Roth
August 2008

What is Posttraumatic Stress Disorder (PTSD)? A person suffers from PTSD when he or she 1) has experienced, witnessed, or confronted an event that involved actual or threatened death, serious injury, or threatened physical integrity; 2) has responded with intense fear, helplessness, or horror; and 3) experiences certain symptoms, including re-experiencing of the event, avoidance of reminders of the event, and hyper-vigilance/hyper-arousal.[1]

Who suffers from PTSD? Anyone can suffer from PTSD; a diagnosis is made when a person meets the DSM criteria. In addition to becoming sensitive to behavior that may indicate PTSD, be aware of its possible presence among immigrant clients from areas of social unrest or conflict, clients who are veterans, clients who live in neighborhoods with especially high rates of violence, and clients who suffered from sexual or physical abuse.[2]

How can I know whether or not my client suffers from PTSD? Look for clues when talking to your client, such as drug or alcohol abuse, numbing of emotions, difficulty sleeping (nightmares, waking up startled), and depression.[3] When speaking about your client's military service, childhood, neighborhood, or family, ask whether he has experienced any traumatic event. Of course, only an expert can diagnose PTSD. Even if your client has a prior diagnosis of PTSD, it is necessary to hire an expert during the pendency of your case to review this diagnosis, provide

---

[1] American Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders*, DSM-IV-TR 309.81 (4th ed. 2000). Examples of the symptoms include nightmares, intrusive memories, avoiding the neighborhood where a trauma occurred even if it means going out of your way, avoiding watching television shows or news that remind you of the event, jumpiness, being easily startled, scanning the environment for danger, and irritability.

[2] *Id*. Battered spouses may be diagnosed with posttraumatic stress disorder. *See* M.C. Austin et al., *Posttraumatic Stress Disorder Among Battered Women: Risk and Resiliency Factors*, 8 Violence & Victims 17 (1993). Sometimes "battered woman's syndrome" is called posttraumatic stress disorder in the courtroom for strategic reasons. *See Paine v. Massie*, 229 F.3d 1194, 1197 (10th Cir. 2003).

[3] Reviewing the DSM-IV's diagnostic criteria is helpful, but so are news articles that discuss the disorder in laypeople's terms. *See* Wendy Basil, *Vets Help Themselves and Others by Identifying PTSD*, Ventura County Star, May 26, 2008, available online at http://www.venturacountystar.com/news/2008/may/26/vets-help-themselves-and-others-by-identifying/). Academic articles can be insightful but sometimes overwhelming. *See* P. Ouimette, M. Wade, A. Prins, M. Schohn, *Identifying PTSD in Primary Care: Comparison of the Primary Care-PTSD Screen (PC-PTSD) and the General Health Questionnaire-12 (GHQ)*, J. Anxiety Disord. 22(2): 337–43 (2007).

an updated evaluation, and understand how his disorder impacted his actions in this case.

What should I seek in an expert? Look for an expert, respected by lawyers you trust, who has experience diagnosing and treating people with posttraumatic stress disorder, as well as experience testifying in criminal proceedings. You may decide to hire an expert who is board certified in a specialized field of psychiatry[4] or psychology,[5] although there is no certification solely for posttraumatic stress disorder. In addition to professional organizations[6] which may direct you to a qualified expert, commercial internet resources[7] are fairly prevalent and may help. Most importantly, be sure to obtain references from other attorneys who have had actual experience with the expert you contact.

How should I communicate with my expert? Your expert can help you talk to your client, question your own witnesses, and prepare for cross-examination of government experts, in addition to evaluating your client. Utilize your expert's experience and knowledge beyond simply discussing his report and observations of your client.

- ***Think of questions in advance of your conference, and talk to your expert several times***. Sample questions include:[8]

  How can this disorder—PTSD—affect a person's mental state, behavior, and judgement?
  How did my client's PTSD affect his ability to form the [knowing, willful, etc.] mental state alleged?
  How did it affect his judgment at the time of the alleged offense?
  How was my client's PTSD linked to her behavior in this case?
  How did my client's PTSD contribute to the criminal activities?
  Did my client's disorder cause him to take the action he did?
  Did my client's disorder cause him to take the action he did at the time he did it?
  Did my client's disorder affect his motivation in committing this action?
  I will be speaking today with my client's [mother, spouse, Army buddy, coworker]; what questions do you suggest I ask of [him, her]?

---

[4] The American Board of Psychiatry and Neurology, Inc. **http://www.abpn.com**

[5] The American Board of Professional Psychology **http://www.abpp.org**

[6] The American Psychological Association **http://www.apa.org** and the American Psychiatric Association **http://www.psych.org** are examples.

[7] Examples can be found at **http://www.hgexperts.com** and **http://expertpages.com/medical/ptsd.htm**)

[8] Additional sample questions for your expert witness are suggested by Nicholas J. Motherway, *Post-Traumatic Stress*, 49 Am. Jur. Proof of Facts 2d 73 (updated July 2008).

What are your suggestions to me about how to speak sensitively to my client?
In your opinion, what are the most significant articles written about my client's disorder?
What are the most recent articles written about my client's disorder?

● ***You are the bridge between the courtroom and your expert, which requires careful attention to language and meaning***. Legal definitions may vary significantly from psychiatric definitions of the same concepts, such as insanity and competency.[9] Although tedious, take the time to review concepts—not just words—with your expert to ensure you are on the same page. In addition to your investigation notes and the government's discovery, provide your expert with a copy of the statute under which your client is charged and the legal definition of the mental state alleged. If you are at the sentencing phase, give your expert a copy of 18 U.S.C. § 3553(a) and any guidelines provisions you wish to argue. This will help bring your expert into the legal world of your client's case and understand the language you are required to use. To help walk the jury or judge into the mental health profession, it is necessary to ask your expert to do more than testify as to the evaluation and diagnosis. Ask her detailed questions about the length and history of your client's disorder, its inception, and its impact on various aspects of your client's life. This information will help you explain why the disorder results in (for example) angry episodes, but does not impair your client's ability to maintain employment.

● ***Psychiatrists and psychologists are not interchangeable***. Recognize that the professions of psychology and psychiatry "do not otherwise overlap" even though both "are qualified to diagnose and treat mental disorders," and determine which expert or experts should be hired.[10] A rule of thumb for lawyers to remember is that psychiatrists are "qualified to assess medical factors and prescribe medication," while psychologists are "qualified to administer psychological tests."[11] You may want to hire both, and you may also want to include testimony from a treating social worker.[12]

---

[9] Michael N. Burt & John T. Philipsborn, *Assessment of Client Competence: A Suggested Approach*, 22-Jun Champ 18 (1998).

[10] John H. Blume and Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, 24-Nov Champ 63 (2000). This article is a comprehensive guide to presenting a mental health defense at pretrial, trial, and sentencing stages.

[11] *Id*.

[12] *Id*.

At what stages do I raise the fact of my client's PTSD?[13] If you are concerned about your client's ability to assist you in her defense, you may wish to request a competency evaluation.[14] Posttraumatic stress disorder may provide a defense at trial,[15] either by supporting an insanity defense[16] or by showing inability to form a mental state.[17] If your client is convicted, it should be

---

[13] It can constitute ineffective assistance of counsel to fail to investigate and present evidence of PTSD. *Lambright v. Schiro*, 490 F.3d 1103 (9th Cir. 2007) (defense attorney performed deficiently by failing to investigate and present evidence of mental health problems; this failure was prejudicial, even though there is no requirement that there be a nexus between the crime and mitigating evidence); *Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005) (defense counsel was ineffective for failing to present physicians' testimony regarding medical and psychological problems during punishment phase).

[14] 18 U.S.C. § 4241

[15] For a comprehensive description of how to raise this defense at trial, read Barry L. Levin, *Defense of the Vietnam Veteran With Post-Traumatic Stress Disorder*, 46 Am. Jur. Trials 441 (updated April 2008). *See also United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998) (defendant charged with air piracy raised defenses of insanity due to posttraumatic stress disorder and obedience to military orders; he called several family members and three psychiatric experts but was found guilty by the jury); *United States v. Cartagena-Carrasquillo*, 70 F.3d 706 (1st Cir. 1995) (although the defense timely raised its intention to put on a PTSD defense, the trial court did not err in excluding relevant testimony because the expert's report was "at best conclusory in that it did 'not show in what way the PTSD syndrome could relieve the defendant of the responsibility for the crimes charged'"); *United States v. Long Crow*, 37 F.3d 1319 (8th Cir. 1994) (defendant was not entitled to an instruction on insanity, where the trial record contained "no evidence of a clinical diagnosis of PTSD").

Counsel must provide proper notice when raising an insanity or mental state defense at trial or in capital sentencing mitigation. In *United States v. Toner*, 728 F.2d 115 (2nd Cir. 1984), the defendant sought to raise a defense based on his client's posttraumatic stress disorder, brought on by prolonged combat in Northern Ireland. The court denied the defendant's motion to explore this defense, made on the day of trial, because he "had not shown 'good cause' for the late filing of his notice of a defense based on mental condition as required by Fed.R.Crim.P. 12.2." *Id*. at 123. *See also United States v. Moore*, 2008 WL 1944810 (E.D. Ark. 2008), for a discussion of the government's option under rule 12.2(c)(1)(B) to request that the defendant be examined and how numerous districts have handled such requests.

[16] 18 U.S.C. § 17, § 4242; FED. R. CRIM. P.12.2(a)

[17]F ED. R. CRIM. P. 12.2(b)

raised at sentencing, either as a grounds for downward departure,[18] or as a basis for a non-guideline sentence.[19]

How does PTSD relate to the commission of a crime? Your client's PTSD may provide a defense to the crime, either because he was insane at the time of the offense, or unable to form the charged mental state. Your client's suffering from PTSD may also be presented as mitigation at the time of sentencing, because it reduces her culpability. Whether you pursue one or both of these defenses is a significant strategic decision you will need to make after consulting your client and the expert—or experts—you hire. Whichever strategy you follow, it is critical that you are able to describe to the jury or judge the relationship between your client's PTSD, the *actus reus*, and the *mens rea* (or lack thereof) of the crime. "Why did he commit that assault?" might be answered by identifying an event (September 11) or factor (warm, humid weather) that triggered your client. "What was his motive in attempting to murder the victim?" might be answered by explaining how your client was in a dissociative state indicative of PTSD, and thought he was protecting himself against attack; in other words, by providing a defense to the *mens rea* element. Superficial understanding is not enough; below are ideas to help you dig deeper.

- ***Explore the link between the crime and the disorder in detail***. You will not be able to effectively advocate unless you understand this link yourself, and that can only be achieved by significant investigation and coordination with your expert. When speaking with your expert, you may want to use some of the questions suggested above to guide your conversation.

  - *Talk to your client*: Your client may be very unwilling to discuss her PTSD with you. Be patient. If she has been released on bond, schedule office visits more frequently or ask if you can meet with her at a mutually convenient location to discuss her case. Move for continuances so that you have time to prepare effectively, including time during which she can become comfortable speaking with you. In short, allow her to develop a trusting relationship. Learn about your client's traumatic event from independent sources (i.e., develop a basic understanding of the combat zones in Vietnam, or review the latest footage from the Darfur region of Sudan) so that you can follow up with accurate questions.

---

[18] Downward departure motions may be based on your client's diminished capacity and sought under USSG §5K2.13. *See Downward Departure Under §5K2.13 of the United States Sentencing Guidelines* 128 A.L.R. Fed. 593. If your client suffers from battered spouse syndrome, you may decide a motion under USSG §5K2.12 is warranted. As expected, pre-*Booker* case law required the defendant to connect his or her PTSD to the crime committed. *United States v. May*, 359 F.3d 683 (4th Cir. 2004); *United States v. Holden*, 61 F.3d 858 (11th Cir. 1995); *United States v. Johnson*, 49 F.3d 766 (D.C. Cir. 1995).

[19] 18 U.S.C. § 3553(a); *United States v. Jojola*, 2007 WL 2304845 (D.N.M. 2007).

Seek guidance from your expert, or a mental health expert or counselor, about how to best communicate with your client. Do not assume you know how.

• *Interview witnesses*: Close friends, family members, and coworkers should be able to relate observations about your client's behavior. Ask specific questions and record the answers, even if you don't consider them important, because your expert might find them significant. Is he despondent? Does he make statements about his life ending earlier than expected? Is he able to express his positive feelings towards you? Was he receiving treatment at time of offense? Was he taking medication at the time of the offense? What was he doing in the days leading up to the offense?

• *Obtain records*: Medical and psychiatric records created near the time of the crime are critical, but so are records that show your client's mental health history. Persons with PTSD may have sought veterans' benefits through the Veteran's Administration or disability benefits with the Social Security Administration. School counseling records, physician's history and physical workups, substance abuse provider notes, and attorney's records may all provide relevant observations of your client and former diagnoses. Neighborhood crime rate data, military service records (especially showing combat), police reports, rape kit evaluations, and accident scene re-enactments show critical details of the source of your client's trauma.

• *Provide your expert with all information*: If your expert does not know about your investigation's results, this information will not be discussed in her report. If she does not know about the evidence you have when she evaluates your client, she will not be able to address related topics with him. Give your expert what you have, as soon as you obtain it. Deliver the information in a way that allows you to document your tender, and make sure your expert understands that under your agency agreement, this information is confidential and privileged.

● ***Explain the link between the crime and the disorder by presenting evidence about the disorder as well as evidence about your client***. Just as it would never be sufficient to present the court only with a treatise on PTSD, it is not enough to present only the report of your client's psychological examination. Judges and juries need to be provided with enough information to set your client's disorder in the proper context, and to understand the full impact her disorder had on her judgement, volition, and culpability. This includes general information about PTSD and its impact on people, and specific historical information about the traumatic event your client suffered in the past.

Is evidence about my client's PTSD admissible? Yes.[20] PTSD is recognized as a legitimate mental disorder and as a valid defense.[21] Evidence about it is admissible in criminal, civil, and military proceedings.[22] Courts frequently admit evidence of a victim's PTSD, and defense counsel should consider using case law permitting this evidence to bolster their requests for consideration at sentencing.[23]

---

[20] This does not mean presentation of your mental health defense will be obstacle-free. Presentation of relevant evidence at trial requires strategic planning. *See Dixon v. United States*, 548 US 1 (2006) (defendant bears burden to establish duress defense, due to battered spouse syndrome, by a preponderance of the evidence, and government does not bear burden to disprove duress defense beyond a reasonable doubt); *Clark v. Arizona*, 548 US 735 (2006) (Arizona's exclusion of expert evidence of mental illness on issue of *mens rea* did not violate due process). Presentation of evidence at non-capital sentencing should not face such roadblocks. 18 U.S.C. § 3553(a), § 3553(d), and § 3661; FED. R. CRIM. P. 32; *see also* USSG §6A1.3(a).

[21] Lindsey C. Perry, *A Mystery of Motherhood: the Legal Consequences of Insufficient Research on Postpartum Illness* 42 Ga. L. Rev. 193, 209 (Fall 2007). In the past twenty years, posttraumatic stress disorder "has become more widely asserted" as a defense. *Bell v. Cone*, 535 US 685, 704 n.1 (2002) (citing Levin, *Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder*, 46 Am.Jur. Trials 441 (1993 and Supp.2001), and noting that "as of 1980, the American Psychiatric Association began formally to recognize posttraumatic stress disorder (PTSD), which can derive from disturbing war experiences. See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 463-468 (rev. 4th ed.2000).").

[22] Major Timothy P. Hayes. Jr., *Post-Traumatic Stress Disorder on Trial*, 190/191 Mil. L. Rev. 67 (Winter 2006/Spring 2007).

[23] Courts are often inclined to consider whether the crime's victim suffered from post-traumatic stress disorder. *United States v. Guy*, 340 F.3d 655 (8th Cir. 2003) (victim suffered from well-documented PTSD and depression for over a year, beginning with the defendant's rape of her); *United States v. Spinelli*, 352 F.3d 48, 58 (2d Cir. 2003) ("The emotional agony suffered by victims of violent crime eludes precise measurement and often defies description. There is no question that emotional or psychological injuries can be 'permanent or life-threatening,' and that they may, in some instances, cause the 'loss or substantial impairment of the function of a ... mental faculty.'"); *United States v. Rodgers*, 122 F.3d 1129, 1133 (8th Cir. 1997) ("While PTSD may not always rise to the level of serious bodily injury, it certainly can....We hold that in this case, in combination with the other injuries suffered, it did. The district court did not clearly err in finding that Mr. Wright had suffered serious bodily injury as a result of the murder attempt."). Defense counsel can use this line of precedent to show PTSD's debilitating impact.

Defense counsel should also consider that a defense request for restorative justice may actually assist a victim in overcoming post-traumatic stress syndrome. *See* Bruce Archibald, *Let*

Questions to Ponder

What if my client needs help before I determine that his mental state impacted his commission of this offense, or is a defense to the crime charged?

If United States Pretrial Services offers my client treatment and counseling while on bond, what should I advise my client? Will the counseling records be confidential?

What if my client is diagnosed with PTSD and other problems, such as major depression, a mood disorder, or schizophrenia? How do I deal with this in the courtroom?

What are the best indicators of PTSD that will help me identify this disorder in my client?

My People Go: Human Capital Investment and Community Capacity Building Via Meta/Regulation in a Deliberative Democracy-A Modest Contribution for Criminal Law and Restorative Justice, 16 Cardozo J. Int'l & Comp. L. 1, 81–82 (Spring 2008).