Case Preparation for Your ASD Case

The single most important step in your case begins with *you*. When you first sit down with a client who has been charged with CP or a non-contact 120 (exhibitionism, voyeurism, stealing panties, rubbing up against strangers (frotteurism), etc., pay attention to your perceptions.

Deeper Dive:

Individuals with ASD will feel neurologically "different". They present varying degrees with many of the following characteristics:

- problems with eye contact; facial expressions and body posture may seem odd or out of context
- being oblivious to the emotional context of a discussion or situation
- communication deficits - speech may be stilted, non-spontaneous, or at times idiosyncratic
- tendency to adhere rigidly to rules and to be concrete and moralistic in their understanding of right and wrong
- mind-blindness, often referred to as "theory of mind" ASD individuals have a difficult time appreciating what others might be thinking or feeling
- lack of empathy, largely the result of their mind-blindness; it is difficult to feel empathy for another's misery if a person has little ability to discern their misery
- difficulty responding emotionally in an interpersonal relationship
- social isolation due to repeated rejection and ridicule as a result of their idiosyncrasies
- difficulty with impulse control
- inability to catch the subtleties of sarcasm or humor and a tendency to take a figure of speech literally
- difficulty being flexible in their routines and rituals; finding change very difficult
- extreme social and emotional immaturity and naivety

Childhood history of . . .

- delays in motor development (e.g. clumsiness) and repetitive behaviors such as arm flapping or whole body movements
- sensory dysfunction such as being hypersensitive to tactile stimulation and easily distracted by bright lights and loud sounds
- problems with central coherence - that is, they become hyper-focused on details and have difficulty stepping back to see the "big picture"; this often manifests as black-and-white thinking. • problems with fluid reasoning - that is, they find it difficult applying principles or lessons previously learned to solve new problems.
- often a childhood history of being bullied
- restricted interests, behaviors, activities, and concepts
- tendency to be over-focused or preoccupied with a single topic
- compulsive, repetitive behaviors and self-stimulation
- comorbid conditions including ADHD, anxiety, depression, and obsessive-compulsive disorder (OCD).

Be sure to ask your client if they were ever diagnosed with autism, ADHD or obsessive-compulsive disorder. Consider talking with your client's mother about your client's childhood and development. But you should know that persons with high functioning autism can often go undetected for the condition.

A. Getting a Forensic Expert

I recently assisted defense in a non-contact 120 case where the defendant was clearly high-functioning autistic. Government had retained the services of an experienced, well-respected forensic psychologist. I was disappointed to learn that he knew little about autism as it relates to

sex offense, appropriate evaluation tools, or future risk. The point is – not just any forensic psychologist will fit the bill. You need to find someone who knows the ins-and-outs of autism and sex offense. Take the time to interview/email several experts to see who really knows these issues.

These cases often require expert testimony regarding the nature of an autism spectrum disorder (ASD) and its bearing on certain legal issues such as diminished or lack of criminal responsibility, competency, determination of sentence under existing guidelines, ineffective assistance of counsel, Miranda compliance, and risk assessment."

Lawrence A. Dubin and Emily Horowitz (2017). *Caught in the Web of the Criminal Justice System*, (p. 25).

B. Evaluating for Autism

Early in your case you will want to arrange for a psychological evaluation to identify current autism in your client. Options to consider:

Local Evaluation: You can do this with military resources. But if you want to keep the evaluation hidden from the prosecutor, cyou might want to have it done through a civilian evaluator. Explore locally for psychologists or neuropsychologists who have this specialty. Consider having your client pay out-of-pocket so that the assessment remains secure as attorney work product.

Request an RCM 706. The problems are the sanity board may have little experience assessing for autism or understand how it relates to non-contact 120s. The short form will be disclosed to government, which might include a non-diagnosis for autism because evaluators didn't screen for it.

Tele-forensic Evaluation: Consider having your forensic expert conduct a "*tele-forensic*" evaluation for autism a couple months before trial. To cover the cost, ask for 15 hours of pretrial assistance rather than 10. All the interview and testing can be conducted remotely. You get the results well in advance and the findings remain confidential. Go to my website to see how to prevent the results of the tele-evaluation from being discovered until you are ready to disclose them (https://arizonaforensics.com/tele-forensic/). Here's the bottom line on this idea:

In 2019 Maj. Stein and Dr. Younggren published a book for the American Psychological Association regarding forensic psychology services in military courts. Here's their recommendation on the dual-role dilemma.

> *"Consider the following example: A forensic psychologist was asked to consult with defense counsel in a criminal matter. The psychologist reviewed the case files and offered what the attorney considered to be helpful theories in defending her client. The lawyer then asked the psychologist to evaluate her client for mitigation purposes; the psychologist agreed to do so and concluded that the defendant was a psychopath. In the civilian world, the consulting psychologist would have been wise to refuse the additional assignment. This is because, if he or she were testifying about scientific and noncase specific matters, he or she might be required to disclose the results of the evaluation and, in doing so, could significantly damage the defense's case. However, under the MRE (JSC, 2019) such disclosures are not required, and the testimony of the expert about the negative mitigation evaluation would remain privileged. Therefore, the consulting psychologist would be free to fill both these roles without fear of jeopardizing the accused's case. However, the psychologist would have to be extremely careful to not inadvertently open the door to this evaluation during testimony because doing so could lead to its results being disclosed. Therefore, the forensic psychologist and the attorney would have to*

carefully craft direct testimony in order to avoid this possibility."
Christopher Stein and Jeffery Younggren (2019). *Forensic Psychology in Military Courts*. American Psychological Association. Chapter 5.

This introduces a significant option for defense JAGs to consider. A risk assessment can be an important tool in plea negotiations and mitigation in sentencing and does not open the door to being discovered during the trial phase.

And there is an additional development. The COVID pandemic brought about the American Psychological Association's encouragement of forensic psychologists to conduct tele-assessments across secure video conferencing. The ability to do tele-forensic evaluations was in place before. But the APA greatly expanded their use due to the quarantine.

These developments open exciting potential for military courts. For example, an ADC at Kunsan could have her client evaluated weeks before the trial date. The interview is conducted while the psychologist is state side. The ADC can then use the completed report for pretrial negotiations (or not). Let's assume the ADC decides not to disclose the report. The forensic expert can still come out to consult with her team, provide expert testimony in the trial phase, and testify about mitigation in sentencing. The ADC simply needs to be careful during her direct so the expert isn't forced to disclose the results of the evaluation. It's attorney work product that did not help form the basis for expert testimony.