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## **Extreme emotional disturbance: Legal frameworks and considerations for forensic evaluation**

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## Abstract

A significant minority of jurisdictions in the United States offer extreme emotional disturbance (EED) as a partial defense to murder. The form of this defense, as established by statute and case law, varies widely among jurisdictions. Empirical research on EED is scant with little guidance to forensic mental health professionals on how to approach and conceptualize potential EED cases. This paper addresses these issues by being the first known published work to (1) set forth a contemporary map of the varying definitions and scope of EED across the United States, (2) translate legal terminology into constructs accessible to forensic evaluators, and (3) provide legal and clinical analyses of sample EED cases to highlight key differences in the form of the defense and the admissibility of evidence between jurisdictions.

## KEYWORDS

extreme emotional disturbance, extreme mental or emotional disturbance, legal analysis, mental health defense, partial defense, partial excuse

In July 2021, Ian Kazer of Long Island, New York, was sentenced to several years in prison after killing his mother in a reported fit of rage (Chasan, 2021). By all accounts, Kazer, who was diagnosed with autism and attention-deficit/hyperactivity disorder as a youth, struggled with controlling his emotions and behavior. At 31 years old, he still lived with his parents due to chronic instability. In the weeks leading up to his mother's murder, Kazer was fired from a retail position for stealing, which created increasing conflict with his parents. In 2019 during an argument in which his parents reportedly suggested he move out and stated his "life was over," Kazer snapped, brutally stabbing his mother 47 times and attempting to kill his father, who was stabbed once in the chest but managed to escape (Murphy, 2021). During legal proceedings, Kazer's attorney claimed his client was under the influence of "extreme emotional disturbance" (EED), the nature of which made it extremely difficult to control his behavior in the face of perceived threats.

After deliberation, the jury found Kazer guilty not of first-degree murder, but of manslaughter, attempted murder, assault, and grand larceny. He was sentenced to 16 years in prison—a punishment reflective of the court's belief that, were it not for the magnitude of his emotional response, he would not have harmed others.

Kazer's case is illustrative of the complex and often headline-grabbing nature of cases involving EED, or intentional homicides following provocation or an unusual stressor that allegedly overwhelmed the defendant's reason and resulted in a loss of behavioral control. This partial excuse originated with the Model Penal Code (MPC), but the few states that have adopted it differ in their application of the defense, including the permitted role of mental disorder and the degree the defense deviates from the traditional heat-of-passion defense. This article seeks to be the first to explore the differing state approaches to EED defenses, and discuss relevant case law for additional context. Furthermore, unlike the majority of the available EED literature, this article serves to provide guidance on the appropriate role of mental health experts in these cases, and practical suggestions for conceptualizations of EED within forensic evaluation.

## 1 | THE LEGAL LANDSCAPE

In 1962, the American Law Institute (ALI) proposed EED as a partial defense to murder (MPC Proposed Official Draft, 1962, p. 126). MPC § 210.3(1)(b) provides for the mitigation of murder to manslaughter when:

[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be (MPC and Commentaries, p. 43).

The ALI intended EED to be a substantial expansion of the common law partial defense of heat of passion (HOP) (MPC and Commentaries, 49). As such, the provision holistically recognizes the diminished culpability of a person whose intentional killing was impelled by overwhelming mental or emotional stress. It eliminated “rigid” limitations in the traditional defense, including the “arbitrary exclusion of some circumstances” from “adequate provocation,” the requirement that the victim be the provoking agent, and the necessity that the killing soon follow the provoking event (MPC and Commentaries, p. 61).

The ALI dictated that the trier of fact assess the reasonableness of the excuse for the disturbance from the actor's perspective, in this way softening “the rigorous objectivity” of the common law (MPC and Commentaries, pp. 61–62). Assessment should include the defendant's “personal handicaps and some external circumstances” like “blindness, shock from traumatic injury, and extreme grief,” while excluding any idiosyncratic moral values (MPC and Commentaries, p. 62).<sup>1</sup> Courts retain discretion over whether to permit consideration of other characteristics less clearly associated with diminished blameworthiness, such as extreme sensitivity to insults or “an abnormally fearful temperament” (MPC and Commentaries, pp. 62–63).

The ALI noted that EED's emphasis on the actor's subjective mental state could allow for inquiry into areas traditionally associated with responsibility (MPC and Commentaries, p. 54). The MPC's defense may thus be conceptualized as offering two bases for mitigation: (1) the emotional disturbance prong, which significantly enlarges common law HOP, and (2) the extreme mental disturbance prong, a form of a partial responsibility defense that recognizes mental impairment short of insanity (Buchhandler-Raphael, 2020).<sup>2</sup>

Eleven states currently include EED-like provisions in their criminal codes.<sup>3</sup> All but three of these jurisdictions (Hawaii, Montana, and New Hampshire) omit the term “mental” in the MPC's suggested “extreme mental and emotional disturbance” standard in favor of simply “extreme emotional disturbance,” typically to distance EED from responsibility defenses (State v. Counts, 1991). In addition, states diverge in which features of common law HOP they retain and the extent to which they consider mental disorder in the EED analysis. The following sections identify

varying definitions of EED, explore the preservation of HOP limitations, and discuss the admissibility and sufficiency of various types of evidence in EED cases.

## 2 | DEFINITIONS OF EED

The most prevalent definition of EED among the states derives from *People v. Shelton* (1976). There, the New York court defined the affirmative mitigating defense of EED as applying to a person who<sup>4</sup>

- (a) has no mental disease or defect that rises to the level [of insanity]; and
- (b) is exposed to an extremely unusual and overwhelming stress; and
- (c) has an extreme emotional reaction to it, as a result of which there is a loss of self-control and reason is overcome by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions (p. 717).

The *Shelton* court stressed the “key factor” of loss of self-control and the importance of the time interval between the provocation and the act (pp. 717–718). The main components of the *Shelton* definition have been adopted in Connecticut (*State v. Elliott*, 1979), Hawaii (*State v. Perez*, 1999),<sup>5</sup> Oregon (*State v. Ott*, 1984), and North Dakota (*State v. Trieb*, 1982). Other jurisdictions, such as Kentucky (*McClellan v. Commonwealth*, 1986), employ a similar definition but specify that EED is a temporary *State* of mind and cannot merely reflect the effects of mental illness.

States also differ in their approach to defining the term “extreme” for the jury. Connecticut defines the term restrictively as “the greatest degree of intensity away from the norm for that individual” (*State v. Elliott*, 1979, p. 10). In *State v. Crespo* (1998), the state supreme court considered a killing which occurred during a fight between the defendant and his girlfriend and found the trial court could have reasonably concluded the disturbance did not meet that standard because “[c]ircumstances were not significantly different from those surrounding any. . . prior fights” (p. 934).<sup>6</sup> Other states, such as Oregon, have chosen not to replicate Connecticut’s definition of “extreme” (*State v. Ott*, 1984). Some jurisdictions forgo defining EED for the jury at all, instead leaving the issue to the jury’s common understanding of the phrase (*Ross v. State*, 1984; *State v. Halli*, 2003).

## 3 | ABOLITION OF COMMON LAW LIMITATIONS

Although EED was proposed as an alternative to the common law HOP defense, most states retain some common law features.<sup>7</sup> To qualify for the traditional HOP defense, a defendant typically must show:

- (1) adequate provocation; (2) a passion or emotion such as fear, terror, anger, rage or resentment;
- (3) [the] homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and (4) a causal connection between the provocation, passion[,] and homicide (*Tryon v. State*, 2018, p. 638).

Moreover, the test for adequate provocation is objective, calling for assessment from the perspective of an “ordinary person of average disposition” (*People v. Beltran*, 2013, p. 1129) and “preclud[ing] consideration of the innate peculiarities of the individual defendant” (*State v. Molina*, 2014, p. 1152). While many EED jurisdictions have substantially broadened these stipulations, most preserve certain limitations, as reflected in Table 1. Indeed, a handful of EED states retain so many common law HOP elements that, in practice, they are nearly indistinguishable from their ancestors.<sup>8</sup>

As under HOP, a majority of EED states require a provoking event to trigger the emotional disturbance (e.g., *Foster v. Commonwealth*, 1991; *State v. MacGregor*, 2013; *Murder, N.D.*, 2020). Many states specify that provocation

TABLE 1 Summary of key characteristics of states' EED provisions

State	Treats evidence of mental illness as probative	Hybrid or objective reasonable standard	Traditional HOP requirements		
			Provoking event	Insufficient cooling time	Provocation by victim
Arkansas	Restricts defense to extreme emotional (not mental) disturbance; does not permit consideration of mental disorder in any part of EED test ( <i>Bankston v. State</i> , 2005; <i>Kail v. State</i> , 2000)	Hybrid to some degree (Manslaughter, 2020a)	Retains ( <i>Kail v. State</i> , 2000); provocation can only be met through physical fighting, a threat or brandished weapon ( <i>Bankston v. State</i> , 2005)	Retains ( <i>Kail v. State</i> , 2000)	Retains ( <i>MacKool v. State</i> , 2005)
Connecticut	Restricts defense to extreme emotional (not mental) disturbance; permits evidence of mental disorder not rising to the level of insanity to demonstrate presence of EED ( <i>State v. Elliott</i> , 1979); defendant must establish their emotional disturbance was not a mental disease or defect that rose to the level of insanity (Connecticut Criminal Jury Instructions, 2020; Blue, 1990)	Hybrid	Rejects ( <i>State v. Elliott</i> , 1979)	Rejects ( <i>State v. Elliott</i> , 1979)	Rejects ( <i>State v. Kaddah</i> , 1999)
Delaware	Restricts defense to extreme emotional (not mental) disturbance, but allows mental disorder not rising to the level of insanity to support EED defense, including adjustment disorder ( <i>State v. Magner</i> , 1997)	Hybrid	Retains ( <i>Moore v. State</i> , 1983)	Rejects ( <i>Boyd v. State</i> , 1978)	Retains (Extreme Emotional Distress, 2020)
Hawaii	Defense extends to extreme mental or emotional disturbance; permits mental disorder not rising to the level of insanity to demonstrate presence of EED ( <i>State v. Perez</i> , 1999), including personality disorders ( <i>State v. Dumlao</i> , 1986)	Hybrid to some degree	Appears to reject ( <i>State v. Espiritu</i> , 2008)	Rejects ( <i>State v. Dumlao</i> , 1986)	Rejects ( <i>State v. Russo</i> , 1987)

TABLE 1 (Continued)

State	Treats evidence of mental illness as probative	Hybrid or objective reasonable standard	Traditional HOP requirements		
			Provoking event	Insufficient cooling time	Provocation by victim
Kentucky	Restricts defense to extreme emotional (not mental) disturbance; evidence of mental illness will not suffice to establish EED, but it can be relevant to subjective prong of reasonableness test ( <i>McClellan v. Commonwealth, 1986</i> )	Hybrid ( <i>Fields v. Commonwealth, 2001</i> )	Retains ( <i>Foster v. Commonwealth, 1991</i> )	Retains ( <i>Fields v. Commonwealth, 2001</i> )	Rejects ( <i>Gall v. Commonwealth, 1980</i> )
Montana	Defense extends to extreme mental or emotional disturbance; evidence of serious mental illness can contribute to EED ( <i>State v. Scarborough, 2000</i> )	Hybrid to some degree	Retains ( <i>State v. MacGregor, 2013</i> )	Rejects ( <i>Hans v. State, 1997</i> )	Uncertain
New Hampshire	Defense extends to extreme mental or emotional disturbance; appears to permit evidence of mental illness to support EED defense (battered spouse syndrome, <i>State v. Briand, 1988</i> )	Objective ( <i>State v. Smith, 1983</i> )	Retains ( <i>Manslaughter, 2020</i> )	Retains ( <i>State v. Soto, 2011</i> )	Retains ( <i>State v. Smith, 1983</i> )
New York	Restricts defense to extreme emotional (not mental) disturbance; permits evidence of mental disorder not establishing insanity to contribute to both prongs of EED test ( <i>People v. Shelton, 1976</i> ; <i>People v. Moye, 1985</i> ; <i>People v. Young, 1985</i> )	Hybrid	Rejects ( <i>People v. Patterson, 1976</i> )	Rejects ( <i>People v. Patterson, 1976</i> )	Rejects ( <i>Patterson v. New York, 1977</i> , dissent)
North Dakota	Restricts defense to extreme emotional (not mental) disturbance; permits evidence of mental disorder not rising to the level of insanity to support EED defense ( <i>State v. Trieb, 1982</i> )	Hybrid	Retains ( <i>Murder, 2020</i> )	Retains to some degree ( <i>State v. Kirkpatrick, 2012</i> )	Rejects ( <i>State v. Huber, 1985</i> )

(Continues)

TABLE 1 (Continued)

State	Treats evidence of mental illness as probative	Hybrid or objective reasonable standard	Traditional HOP requirements		
			Provoking event	Insufficient cooling time	Provocation by victim
Oregon	Restricts defense to extreme emotional (not mental) disturbance; permits evidence of mental disorder not rising to the level of insanity, but not personality disorder, to support both prongs of EED ( <i>State v. Zielinski, 2017; State v. Ott, 1984</i> )	Hybrid to some degree	Rejects ( <i>State v. Corbin, 1973</i> )	Rejects ( <i>State v. Ott, 1984</i> )	Rejects
Utah	Restricts defense to extreme emotional (not mental) disturbance; evidence of mental illness cannot be used to establish EED (SMMI, 2020) or to determine whether the explanation or excuse for the disturbance is reasonable ( <i>State v. Bishop, 1988</i> )	Objective (SMMI, 2020)	Retains (SMMI, 2020)	Retains (SMMI, 2020)	Retains (SMMI, 2020)

Note: The case law in Guam and American Samoa was too limited to include in this table.



cannot be “comprised of words alone”<sup>9</sup> (e.g., SMMI, 2020), but instead must consist of highly provoking conduct by the victim or a reasonable belief of the same (e.g., Extreme Emotional Distress, 2020). For instance, Arkansas limits adequate provocation to “physical fighting, a threat, or a brandished weapon” (*Spann v. State*, 1997, p. 540). Some states even require that the victim’s conduct have been unlawful (*State v. Smith*, 1983). However, the provocation requirement of other EED states is less demanding than under the common law. For example, Delaware holds that provoking events merely must be external to the accused and not attributable to them (*Moore v. State*, 1983). In addition, Kentucky maintains that any event, even words, may evoke EED (*Gall v. Commonwealth*, 1980).

About half of EED jurisdictions follow the common law approach in requiring “uninterrupted” provocation, mandating there be insufficient time between the provocation and the killing for the defendant’s emotions to cool (*Fields v. Commonwealth*, 2001, p. 359). The remainder, like the MPC, reject the “cooling time” limitation. For instance, New York has recognized that under EED “significant mental trauma [may affect] a defendant’s mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore” (*People v. Patterson*, 1976, p. 908). Similarly, Connecticut has found a killing under EED may be “brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation” (*State v. Elliott*, 1979, p. 7).

Finally, some states have weakened the subjective aspect of the “reasonable person” test. Most EED states follow the MPC in directing that the reasonableness of the explanation for a disturbance be evaluated from the perspective of a person in the actor’s situation under the circumstances that they perceived at the time (*People v. Casassa*, 1980; *State v. Ortiz*, 1991; *State v. Dumlao*, 1986; *State v. Magner*, 1997). However, other states have made the test more objective. For instance, Oregon’s EED statute requires that reasonableness “be determined from the standpoint of an ordinary person in the actor’s situation under the circumstances as the actor reasonably believed them to be” (Extreme Emotional Disturbance, 2020). At least two states, Utah and New Hampshire, employ a completely objective standard (*State v. Bishop*, 1988; *State v. Smith*, 1983).

## 4 | ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE IN EED CASES

Defendants typically support their EED claims with forensic mental health testimony (*People v. Shelton*, 1976; *People v. Moyer*, 1985).<sup>10</sup> Notably, such testimony need not pertain to a mental health condition but rather can be used to establish the defendant’s overwhelming emotion or loss of self-control (*State v. Elliott*, 1979). The below subsections discuss the importance of various categories of evidence, including mental disorder, intoxication and substance abuse, and loss of self-control.

### 4.1 | Mental disorder

Table 1 summarizes the extent to which evidence of mental illness may be probative to an EED claim. Although only Hawaii, Montana, and New Hampshire explicitly permit a defense for a “mental disturbance” without extreme emotional effects, several other states permit mental disorder to help establish the presence of an extreme emotional disturbance or to support the reasonableness of the explanation for that disturbance.

Some states permit mental disorder to contribute to both prongs of the EED standard, no matter how severe the mental illness appears to be.<sup>11</sup> For example, in New York “[a] defendant cannot establish an extreme emotional disturbance defense without evidence that [they] suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control” (*People v. Roche*, 2002, p. 1138). Crucially, a “mental infirmity” need not be a psychiatric disorder, and forensic mental health testimony is not necessary to establish EED (*People v. McKenzie*, 2012). Instead, mental infirmity “refers more broadly to any reasonably explicable emotional disturbance so extreme as to result in a profound loss of self-control” and may be inferred from the defendant’s

behavior. Although the mental infirmity must “not ris[e] to the level of insanity” (*People v. Roche*, 2002, p. 1138), this condition appears merely to acknowledge the reality that, if a defendant is insane, they should be acquitted (Blue, 1990; N.Y. Crim, 2016) (not including this element).<sup>12</sup>

Even when mental disorder rising to the level of insanity cannot support an EED defense, “lesser mental infirmities” may still be considered. For instance, an Oregon appellate court in *State v. Zielinski* (2017) treated “lesser mental infirmity” such as anxiety disorder as a “personal characteristic” (like gender, sexual orientation, pregnancy, and physical disability) that should factor into an “actor’s situation” in the reasonableness prong of the EED test (pp. 977–980). It reasoned that lesser mental disorders “may be the focus of clinical attention[.]. . . can involve acute symptoms and. . . [are] susceptible to psychological and medical treatment” so more closely resemble physical disability than “nonclinical personality traits” like ill temperament or stubbornness (p. 978). However, *Zielinski* (2017) prohibited consideration of any mental illness that “intertwined” with the actor’s “personality characteristics” such as a personality disorder (pp. 977–978). Other *Shelton* states may permit personality disorders to support an EED claim, however (*State v. Dumlao*, 1986; *Linnen v. Poole*, 2001, noting New York courts have “not fixed with precision the contours of what constitutes a ‘mental infirmity’”).

Jurisdictions that require an external provoking event to establish EED vary as to whether they factor mental disorder into the reasonableness of the defendant’s excuse for their disturbance. Kentucky and Delaware consider such evidence probative to the reasonableness assessment (*Fields v. Commonwealth*, 2001; *State v. Magner*, 1997). However, a few states appear to prohibit consideration of mental disorder in EED cases altogether. The Arkansas Supreme Court made clear that mental disorder should not factor into the assessment of an event’s provoking nature (*Kail v. State*, 2000), the actor’s “situation,” or the “circumstances” the actor believed to exist at the time of the offense (*Bankston v. State*, 2005). Similarly, Utah’s EED statute appears largely, if not completely, to exclude consideration of a defendant’s mental disorder (SMMI, 2020).

## 4.2 | Intoxication and substance abuse

States diverge in their treatment of intoxication and substance abuse in relation to EED. Some states, such as Delaware and New York, hold such evidence inadmissible (Extreme Emotional Distress, 2020; *People v. Knights*, 1985). Other states permit evidence of intoxication or substance abuse to support an EED defense, although such evidence alone typically will not suffice to establish EED. For example, the Montana Supreme Court in *State v. Miller* (1998) relied on the defendant’s high level of intoxication, which “impaired his judgment and reasoning,” when upholding his conviction of mitigated murder (p. 728). The court stressed, however, that the conviction was only justified “because there existed other mitigating circumstances besides Appellant’s intoxication and fear of being assaulted” (p. 728). North Dakota and Hawaii treat mental conditions caused by substance abuse in a similar manner (“acute alcohol intoxication, a psychosis with drug intoxication,” *State v. Trieb*, 1982; substance-induced psychosis, *State v. Young*, 2000).

## 4.3 | Loss of self-control

Loss of self-control is a common, and often predominant, requirement of EED standards (Buchhandler-Raphael, 2020; *State v. Matias*, 1992). Psychiatric evidence may be used to establish this crucial element (*People v. Harris*, 2000).<sup>13</sup> Importantly, evidence of a violent killing will not suffice to establish EED if other evidence suggests the defendant maintained self-control at the time of the killing. For example, the New York Court of Appeals in *People v. Roche* (2002) found evidence that Roche had stabbed his girlfriend 12 to 14 times in a violent struggle insufficient to warrant an EED charge given conduct indicating possession of self-control, including telling neighbors that the victim committed suicide, changing his socks, and gathering items in a duffle bag to prevent discovery (p. 1139; see also *State v.*

Jusino (2016); *State v. Buckley*, 1976). EED cases often turn on the presence and credibility of evidence indicating a loss of self-control, whether in the form of psychiatric testimony or from the defendant's statements and conduct.

## 5 | CONSIDERATIONS FOR FORENSIC EVALUATORS

Considering the complex legal backdrop, there is much a mental health expert must consider when approached to evaluate a defendant pursuing an EED defense. Importantly, experts must be familiar with the legal standard in their jurisdiction, as the scope of their role will be impacted by the extent to which the court considers mental health evidence relevant to momentary stressors. In states that have adopted the MPC's reasonableness standard, evaluators may be asked to opine on "the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time [of the homicide], however inaccurate that perception may have been" (*People v. Casassa*, 1980, p.1316). In addition, evaluators would be expected to discuss the origin of and contributing factors to the EED as well as the causal link between the EED and the criminal act in question. However, in some jurisdictions, mental health experts may only be asked to evaluate an EED defendant if the emotional disturbance is suspected to arise from some type of mental condition or abnormality that is "beyond the ken" of the average layperson (Goldstein et al., 2013, p. 448).

Given the similarities among legal standards—and to reduce the degree of subjectivity often present in EED evaluations—evaluators typically should describe how the defendant's decision-making, lack of self-control, intensity of feeling, impaired reasoning ability, and/or mental health symptoms may have affected their behavior or judgment with consideration given to the relevancy assigned to each factor by the evaluator's jurisdiction. Considering the difficulty of making sense of sometimes multiple, co-occurring, and interacting variables on a defendant's mental state at the time of the offense, mental health experts are uniquely equipped to provide the trier of fact with information necessary for a well-informed decision regarding EED. The following sections present important considerations for evaluators as they prepare for, undertake, and write reports for EED cases: the research backdrop and historical context of EED evaluations and the evaluative process itself, including consideration of mental illness, substance use, and self-control.

### 5.1 | Research on EED evaluations

Importantly, research regarding the role of the mental health evaluator in EED cases is scant and dated. The first decision model was offered by Goldstein (1989) in the wake of several New York EED cases and emphasized four stages for evaluators to consider: 1) provocation, whether "simmering" over time or immediate; 2) sudden, intense, extreme, and uncontrollable emotion; 3) loss of intellectual or emotional control; and 4) a sudden, extreme outburst of violence. The general thrust of this model was echoed by Hall (1990) and revisited in a later work by Hall et al. (2001). Hall's model focused on the defendant's capacity for self-control, with abilities ranging from "disorganized to highly competent" (Hall, 1990, p. 39), while emphasizing the link between extreme emotion, loss of self-control, and the criminal act. In addition, Hall highlighted the importance of basing one's conclusions on the defendant's history and behavior, rather than attempting to assess a defendant's cognitive and emotional state alone (a difficult task that many legal scholars believe is impossible; see Slobogin, 2006).

In 2001, Hall and colleagues expounded on this model by encouraging evaluators to analyze capacity for self-control before and after—not only during—the offenses. This updated model also proposed evaluators use the following funneling approach in their analysis: 1) the presence of a significant environmental stressor; 2) a significant, negative change in the defendant's cognitive and emotional processes; and 3) a loss of self-control (Hall et al., 2001). Later research highlighted the need to weigh the influence of emotion regulation skills, personality, and other mental health factors on capacity for self-control, while noting the challenge of determining when loss of self-control is intrinsic to

mental illness, particularly when a defendant has a diagnosed (or suspected) mental disorder (Drogin & Marin, 2008). The components of these decision models reflect commonalities in the legal standards discussed above.

## 5.2 | Evaluative process

After consideration of historical models for EED evaluations, evaluators should prepare for the mental health and personality pathologies that may be present in EED defendants. To this end, mental health experts should provide clear and detailed information concerning exactly what elicited the defendant's emotional response, whether that was the victim's actions, those of some other party, external events or life stressors, or a combination. Evaluators should also discuss whether the perceived provocation was distant in time from the defendant's actions (i.e., whether the EED was the result of a gradual build-up or "simmering"), and the extent to which perceived provocation was fueled by mental illness, trauma, maladaptive personality traits, intoxication, or some other psychologically relevant construct. Broad consideration of any relevant mental health symptom may be useful to the extent that the symptom in question influences "extreme emotions" and a resultant behavioral change.<sup>14</sup> A detailed timeline of events should exist in forensic reports and provide information about the prolonged effects of trauma, substance abuse, etc., over time.

When preparing for an EED assessment, forensic evaluators might consider starting with a line of inquiry typically associated with criminal responsibility evaluations. Melton et al. (2017, p. 246) provides a useful outline recommending that practitioners address: relevant psychosocial and historical factors; cognitive, emotional, and behavioral states preceding, during, and after an alleged offense; and hypotheses in a reliable manner by utilizing multiple sources of data. This information could be garnered and expanded upon as needed via a standard psychosocial interview focused on the defendant's history, particularly as it relates to emotional and behavioral control. During the interview, the evaluator should ask the defendant to describe in detail the events leading to their arrest, while noting any changes in their thinking, emotions, and behavior. Psychological testing could be useful to assess for more stable conditions likely to affect emotional stability (e.g., personality traits, intelligence, cognitive impairment). Tests of feigning may assist in determining the extent to which defendants are being honest regarding their symptoms at the time of the evaluation.

When crafting a final opinion, evaluators must provide the trier of fact with the most accurate information about a defendant's mental and emotional state while being mindful of the need to leave legal issues to the factfinder. This stance has led some to conclude that any evaluations of mental state at the time of the offense should convey "the fullest, richest, most textured description possible of the defendant's mental and emotional state" (Morse, 1984, pp. 51–52; see also; Slobogin, 2006). Moreover, the evaluator must also provide the factfinder with any information that may assist in the determination of factors relevant to EED: the existence and source of any emotional or mental disturbance, its nature, and any contributing factors; how the defendant may have experienced this disturbance (e.g., how they saw the world, their feelings/perceptions, and any impacts on reasoning and/or self-control); whether this disturbance should be considered "extreme" given the individual's baseline; any relation between the disturbance and a plausible triggering circumstance; and evidence of the causal connection between the EED and the homicidal act. To assist evaluators in crafting their language to meet a court's needs, we consider each of these factors below, with recommendations for both evaluation and report-writing provided.

### 5.2.1 | Evidence of mental illness or disorder

As previously noted, in considering the potential clinical picture of a defendant who may assert an EED defense, it is important to learn how the jurisdiction approaches evidence pertaining to mental illness and, therefore, what clinical presentations may qualify for EED. All EED definitions require a departure from normal ("reasonable") emotional

response secondary to an overwhelmingly stressful situation, resulting in intense feelings such as rage and a consequent loss of self-control. Thus, a clinician should focus on the presentation and pattern of symptoms and stress any evidence indicating a loss of self-control, rather than focus on specific diagnoses, as a court could rule that certain diagnoses rise to the level of insanity or are “personal characteristics” and thus are not appropriate for a defense of EED.

Among the wide array of mental health diagnoses that present with difficulties in self-control, the fifth edition of the Diagnostic and Statistical Manual of Manual Disorders (DSM-5), describes disruptive, impulse-control, and conduct disorders as unique because they “[manifest] in behaviors that violate the rights of others (e.g., aggression, destruction of property), and/or. . . bring the individual into significant conflict with societal norms or authority figures” (American Psychiatric Association, 2013, p. 461). Thus, by the very nature of their diagnostic descriptors, interactions with the legal system appear all but expected. Externalized anger and aggression are also common features among trauma and stressor-related disorders. While not a dispositive sign of such pathology, individuals with posttraumatic stress disorder (PTSD) can evidence dysfunction with autonomic arousal and reactive expressions of hostility, baseline negative emotionality, and tendencies to erroneously appraise innocuous situations as something emergent and harmful (American Psychiatric Association, 2013). Indeed, some researchers have concluded the commission of violent acts by those with trauma exposure is primarily driven by hyperarousal (Barrett et al., 2011). Many problematic personality traits commonly seen in personality disorders may also contribute to acts of violence under the right circumstances. For example, distrust, suspiciousness, and tendencies to ruminate on and interpret situations and interactions as hostile or threatening may result in increased hostility toward and from others (Carroll, 2009). Additional impulsive and potentially aggressive acts may also stem from emotional dyscontrol (Bertsch et al., 2018; Newhill et al., 2012).

### 5.2.2 | Substance abuse

Substance use is another important factor to consider when assessing a potentially emotion-fueled act. A clear relationship exists between risk of violence and substance use disorders, especially when coupled with a co-occurring mental illness (Schifano et al., 2020; Van Dorn et al., 2012). Substance intoxication also tends to have an additive effect with the symptoms of preexisting mental health conditions. In particular, research demonstrates that alcohol and cannabis exacerbate the hyperarousal symptoms of PTSD (Barrett et al., 2011), increasing an already present risk for violence perpetration. Similarly, in a sample of those with intermittent explosive disorder (IED) in Coccaro et al.'s (2016) study, IED preceded substance use disorders in 80% of their sample and also increased the risk for impulsive and volatile interpersonal acts toward others. In those with borderline personality disorder, criminal assault charges were partially related to comorbid substance use (Sansone et al., 2014). The research suggests the cumulative effects of substance use may lead someone who already has a predisposition toward intense emotions and/or impulsivity to react even more explosively. Thus, even in jurisdictions prohibiting evidence related to substance use, it may be important for an evaluator to note and perhaps highlight the role of substance use in EED cases, particularly if the defendant shows symptoms of comorbid mental illness.

### 5.2.3 | Self-control

At the core of EED evaluations is an analysis of the defendant's ability to choose and exercise control over their behavior (Hall, 1990). Self-control relies upon the cognitive abilities of our executive functioning system in regulating our attention, behavior, thoughts, and emotions (i.e., inhibitory control) for overriding a strong internal predisposition (e.g., unwanted thoughts or memories) or external lure (e.g., temptation), and instead allowing us to engage in more appropriate behavior (DeLisi et al., 2017; Diamond, 2013).

To illustrate executive functions activated in service of self-control, consider an actor with a long history of verbal and physical abuse from a partner. Perhaps the actor has felt the urge to respond to verbal abuse with disagreement, yet recognizes from past experience that such an act may beget threats or acts of physical harm. If the actor notices their partner is irritable and making passive-aggressive comments, they might rely upon self-awareness to recognize the dilemma (i.e., whether to engage or walk away), inhibition to restrain the urge to respond and escalate the situation (e.g., express disagreement or give interpersonal feedback that the partner is unlikely to appreciate), selective attention to direct their focus away from the temptation (e.g., contact a friend for support), working memory to elicit positive self-talk, and problem-solving to cope with the urge to engage (e.g., call a hotline for intimate partner violence). Deficits in any one of these areas might contribute to interesting considerations in EED cases, particularly if a defendant exhibits difficulties across a number of emotional and behavioral domains.

Forensic evaluators may come across a variety of clinical presentations where an individual presents with deficits or lapses in executive functioning. These may include organic or acquired impairments (e.g., neurodevelopmental disorder, neurocognitive disorder), psychosis, mood disorder, and/or a personality disorder, to name a few. In such situations, the task of the evaluator is to differentiate between evaluatees whose impulsivity is both internalized and frequent (e.g., antisocial personality disorder, BPD) and those whose otherwise non-injurious tendencies were overborne by external circumstances (Drogin & Marin, 2008). In other words, evaluators are asked to examine an individual's problem-solving style, with attention to executive functions that underlie self-regulation, and assess whether their response to the stressor in the alleged offense was characteristic of them (due to normative or pathological personality tendencies) or aberrant. This requires a firm foundation in psychological assessment and conceptualization for understanding the evaluatee's patterns of thinking, feeling, and behavior when interacting with their environment, and also consideration of contextual influences on their reaction at the time of the alleged offense. Returning to our earlier discussion of EED decision models, Hall et al.'s (2001) model offers a particular benefit here, as he and his colleagues recommend consideration of the impact of situational and intrapsychic factors on self-control and choice of behaviors.

With respect to the issue of self-control, the following inquiries proposed by Hall (1990) may be useful to consider in formulating questions and/or conceptualization of the person. First, compare the individual's degree of self-control at the time of the alleged offense with their own normal behavior. Second, evaluate them against normative data (e.g., of executive functioning abilities and/or developmentally expected levels) from groups of which the defendant is a member. Third, analyze any past instances of violence by the evaluatee for degree of self-control in such situations (e.g., a low level of self-regulation may be suggested by the similarity of defendant's actions in other instances). Fourth, elicit whether the evaluatee had a clear rationale for their behaviors, as an absence of such might indicate a loss of self-control. Intact executive functioning is incompatible with loss of self-control due to extreme emotion, and evaluators should look for signs where either or both capacities may be compromised (see Table 2 for factors identified by Hall et al., 2001).

Additionally, psychological research has identified factors that may aggravate failures in impulse control or executive functioning. For example, the deleterious effects of stress (Arnsten, 1998; Liston et al., 2009; Oaten & Cheng, 2005), loneliness (Baumeister et al., 2002; Cacioppo & Patrick, 2008; Campbell et al., 2006; Tun et al., 2013), and lack of physical health (Hillman et al., 2008) have been found to contribute to negative changes in the prefrontal cortex (i.e., the part of the brain responsible for executive functioning), and to result in poor reasoning and problem-solving abilities, forgetfulness, and impaired ability to exercise discipline and self-control. Thus, with respect to EED evaluations, mental health experts must pay attention to the emotional, social, and physical needs of an individual in understanding their cognitive performance and ability to exercise self-control.

TABLE 2 Signs of Intact and compromised executive functioning and/or self-control

Compromised	Intact
● Disorganized behaviors	● Preparation for the violence to follow
● Non-goal-directed hyperactivity (e.g., scattered, random, non-functional movements)	● Rehearsal of the violent act
● Startle reactions	● Deceiving the victim to take advantage of them (e.g., giving false information to gain an advantage, concealing a weapon)
● Immediate responses	● Orchestration of multi-task schemes
● Uncontrolled crying	● Acts that show cognitive flexibility in responses (e.g., use of both a knife and firearm during homicide)
● Resistance to influence when under threat	● Ability to show a "change in principle" (e.g., switching from killing to theft)
● Mental confusion	● Behaviors that are incompatible with stress (e.g., eating or drinking during a violent act)
● Disorientation	● Testing the victim (e.g., changing behavior to see the victim's reaction)
● Amnesia	● Ability to delay responses or resist distractions
● Lack of Deception (e.g., openly telling the victims of an intent to attack)	● Ability to monitor what they have already done before resuming violence
● Continued violence that goes past the immediate threat and point where it is functional (e.g., the defendant kicked the victim repeatedly after death)	● Ability to regulate the tempo, intensity, and duration of behaviors (e.g., wake the victim from unconsciousness to elicit pain)
● Development of PTSD related to the instant offense	● Stopping violence after achieving the intended outcome
	● Destruction of evidence during or after the violent act

Note: The following information was taken from Hall et al., 2001, as noted in the reference section.

## 6 | CASE STUDIES

The following case studies illustrate the complex and myriad ways defendants may present during EED evaluations and how EED determinations may turn on legal differences between jurisdictions.

### 6.1 | Case study 1: Mr. Palmer

Mr. Palmer is a 42-year-old African-American man with a lengthy history of bipolar disorder. Mr. Palmer responded positively to antipsychotic and mood-stabilizing medications and owned a successful contracting business. Aside from obstructive sleep apnea, which he managed using a continuous positive airway pressure (CPAP) machine, Mr. Palmer did not have major health concerns. However, he would occasionally stop taking his medications due to a belief they were unnecessary. In such instances, he would appear normal, albeit with periods of irritability and worsened sleep, for several months. Over time these symptoms would worsen until Mr. Palmer would hardly sleep, get into verbal and physical altercations with others, speak rapidly and illogically, and engage in bizarre, agitated behavior.

One fall, Mr. Palmer developed a viral infection that prevented him from using his CPAP. The consequent sleep disturbance resulted in psychological decline, such that Mr. Palmer reported feeling irritable, disoriented, and paranoid. One day, his girlfriend contacted his parents out of concern after Mr. Palmer initiated an argument and appeared irrationally angry, demanding she leave his home and never return. Mr. Palmer's girlfriend reported that Mr. Palmer's apartment appeared ransacked and in shambles, with several holes punched in the wall by Mr. Palmer in

the belief there were monitoring devices implanted there. Later that night, police arrived at Mr. Palmer's home after reports of a man yelling and throwing rocks at passing cars. Mr. Palmer appeared incensed, screaming unintelligibly and threatening harm if they came closer. With no obvious trigger, he charged one officer, shoving her to the ground and punching her repeatedly in the face. He was Tasered multiple times, finally relinquishing his hold on the officer when several other officers separated them. Mr. Palmer was sedated by emergency responders and began wailing seconds later, expressing remorse for his actions. The officer sustained a serious head injury which proved fatal, and Mr. Palmer was charged with murder.

At his arraignment, Mr. Palmer was tearful, rambled incoherently, and seemed not to understand the circumstances leading to his arrest. The judge referred him for a competency evaluation. Mr. Palmer was found incompetent to proceed and received antipsychotic and mood-stabilizing medications, which quickly improved his functioning. After being found competent to proceed, Mr. Palmer's legal team considered an insanity defense and sought an expert evaluation for this issue. However, given that Mr. Palmer's case was in a jurisdiction with a Not Guilty by Reason of Insanity standard limited to incapacity to appreciate wrongfulness, this option was not deemed viable given the lack of clear evidence suggesting delusional influence over his thinking and behavior. Instead, he asserted an EED defense, alleging an inability to control his emotional responses at the time of the crime due to uncontrolled mania.

During the interview, Mr. Palmer remembered little from the night of his arrest but recalled believing he was being watched. He remembered throwing patio furniture over his fence into his neighbor's yard but could not explain why. When asked about the holes in his walls, Mr. Palmer shrugged, vaguely recalling his belief that cameras had been installed there by some unknown entity. He also remembered feeling unreasonably angry about police being on his property but did not think he lashed out at them due to paranoia. Body camera footage from his arrest supported the assertion that Mr. Palmer was overcome by emotions and impulsivity borne of mania but showed no evidence of illogical thinking. Aside from his girlfriend's testimony, no evidence suggested Mr. Palmer was detached from reality.

### 6.1.1 | Legal analysis

If required for his EED defense, Mr. Palmer would have difficulty satisfying traditional HOP requirements as there was no unlawful act by the deceased or other provoking event external to the accused. In states not requiring a provoking event, however, Mr. Palmer may be able to satisfy the subjective prong of his EED defense. The body camera footage suggests that Mr. Palmer was overcome by emotions and impulsivity due to mania which, combined with witnesses' accounts of his behavior, would help establish his overwhelming emotion and loss of self-control.

Mr. Palmer's EED defense would fail, however, in states that do not permit consideration of mental illness, since his emotional response can only be considered reasonable in light of his severe mental disorder. In states that recognize mental disorders, his bipolar disorder may help establish one or both prongs of his EED defense (as in New York). The prosecution may argue that Mr. Palmer's frequent refusal to take medication exacerbates his mental illness, analogizing that to voluntary intoxication in which he should not be entitled to mitigation (depending on the jurisdiction). However, as his sleep apnea seems to be the primary cause of his mental health decline in this case, the prosecution's argument will likely fail unless evidence shows he purposefully did not take his pills around the time of the offense and should have been aware of the resulting decline and consequent harm he inflicted.

If the jurisdiction includes a volitional prong in its insanity standard, Mr. Palmer may also want to pursue an insanity defense for his inability, due to serious mental illness, to conform his conduct to the requirements of the law at the time of the killing. If the jurisdiction also disqualifies defendants with a mental disorder rising to the level of insanity from pursuing an EED defense, then Mr. Palmer could be forced to abandon his EED claim (as in Connecticut). Regardless, Mr. Palmer would likely only prevail on an EED defense in states with broad EED formulations.



## 6.2 | Case study 2: Mr. Landon

Mr. Landon is a 23-year-old Caucasian man with a history of emotional and behavioral difficulties. From birth, his mother described him as “a difficult child,” noting he seemed quick to anger at even the slightest setbacks. In primary school, his teachers described him as bright and engaged with his schooling but observed significant opposition toward adults, misbehavior toward other children, and difficulty focusing in class. In high school, his intelligence was measured in the “very superior” range. However, his behavioral difficulties increased, such that he was frequently admonished for taunting his peers, being disrespectful to his instructors, and skipping school to use alcohol and marijuana. Mr. Landon eventually dropped out of school in the tenth grade. Afterwards, he failed to maintain employment, citing difficulty getting along with others. He earned his GED at age 17 before pursuing a career in the marijuana industry.

After moving to a state with recreational marijuana sales, Mr. Landon began using marijuana and alcohol excessively, isolating himself from others. His friends and family reported that Mr. Landon began expressing strange and seemingly delusional ideas about war with other nations, alternate realities, and being a reincarnated god. However, they noted Mr. Landon was also so frequently intoxicated that they could not ascertain the extent to which these symptoms were related to drug or alcohol use. When Mr. Landon was 22 years old, the police were called to his apartment during a domestic dispute, during which Mr. Landon threatened to kill the officers if they attempted to enter his home. Mr. Landon was also in increasing conflict with several family members, who stated he frequently became so angry and dysregulated that he made extremely violent threats about which he later felt remorseful (e.g., telling his stepmother he would slit her throat after she made a joke about his alcohol use, then tearfully apologizing only minutes later). He began to see a psychiatrist for treatment of extremely variable mood, anxiety, substance use, difficulty connecting to others, and the strange beliefs noted above. He was prescribed mood-stabilizing, antipsychotic, antidepressant, and sedative medications, which he took as directed. During meetings with his psychiatrist, Mr. Landon reported decreasing mood disturbance but also violent nightmares.

Days after his last appointment with his psychiatrist, Mr. Landon was involved in a traffic accident when another driver accidentally veered into his lane, striking his vehicle and causing minor damage. Mr. Landon exited his car and exchanged heated words with the other motorist before returning to his vehicle. However, after observing the other driver taking a picture of his license plate, Mr. Landon removed a firearm from his glove compartment, shot the other driver, and fired several rounds at other witnesses who escaped without injury. After clearing his magazine, Mr. Landon returned to his car, hid his firearm, left the scene, and proceeded to work as scheduled. He worked for several hours as if nothing was amiss and was pulled over by police on his way home, later being charged with first degree murder.

During his interviews, Mr. Landon described his childhood similar to that noted above, adding that he always felt disconnected from and superior to others due to his intellect. He recognized he was often in trouble in his youth for defiance toward adults but attributed this behavior to others misunderstanding him. He acknowledged his explosive temper and history of aggressive statements, but asserted he was not a violent person and that his actions on the day of his arrest were associated with severe dissociation. More specifically, Mr. Landon stated he became so upset after being struck by the other driver that he “blacked out” and that his arm seemed to act of its own accord as if he were playing a first-person shooter game. Mr. Landon completed several psychological tests during his evaluation, including those assessing personality, response style, and dissociation. Across all measures, his report was indicative of severe difficulties with emotion regulation, substance abuse, disconnection from reality, and aggressive behavior, but also an attempt to appear more psychologically impaired than he was. Additionally, his test results highlighted that his reported symptoms were highly improbable and even more pronounced than what might be expected from an inpatient psychiatric population.

Many statements Mr. Landon made regarding his thinking and behavior were incongruent with witness statements and video footage of him at work, where he was observed working calmly, safely, and effectively with highly technical mechanical equipment only minutes after the killing. Indeed, witnesses of the shooting remarked that Mr.

Landon appeared emotionless at the time. At no point did anyone note an apparent disconnect from reality or even disorientation, casting doubt on Mr. Landon's report of severe dissociation during the shooting.

### 6.2.1 | Legal analysis

If required, Mr. Landon may struggle to satisfy traditional HOP elements such as provocation and cooling time requirements. For instance, in states with a strict requirement of adequate provocation, such as Arkansas (physical fighting, threats, or brandishing a weapon) or New Hampshire (unlawful action by victim), the car accident alone would likely not qualify, although it may be enough to constitute a triggering event in a less stringent jurisdiction. Likewise, the amount of time that passed between the car accident and the homicide might be considered sufficient for emotion to cool in an ordinary person, though juries in states that allow for a gradual build-up of mental trauma (New York, Connecticut) may find the cooling time requirement satisfied. Further, some states such as Kentucky may hold the event sufficiently "uninterrupted" to qualify for an EED defense. Alternatively, Mr. Landon could argue that the taking of the picture was the provoking event. However, while this argument could satisfy a strict cooling time requirement, it is even less likely than the car accident to qualify as adequate provocation.

Mr. Landon's long history of explosiveness will detract from his EED defense as some jurisdictions may view the homicide as an escalation of his preexisting anger issues. Most jurisdictions would not consider the event to be an "unusual emotional experience or circumstance" that meets the threshold of "extreme" (*State v. Crespo*, 1998).

Mr. Landon's struggle with dissociation, anxiety, and emotion regulation may support an EED finding in a jurisdiction that allows mental illness to support an EED defense. A jury may be wary of this argument, however, as Mr. Landon attempted to exaggerate his symptoms. Given his high intellect, he may appear as if he is trying to manipulate the system to receive a mitigated sentence. However, his diagnosis and treatment history support his assertion of mental illness. Some states may prohibit consideration of any personality disorder (*State v. Zielienski*, 2017). An additional point of consideration for the finder of fact is whether dissociation, by nature being an internal state, can truly be perceived by others, and if so, what the outward cues of dissociation to the degree reported by Mr. Landon might be.

Mr. Landon's calculated post-crime conduct of hiding the gun and shooting at witnesses to prevent them from testifying strongly indicates a maintenance of self-control (although shooting at witnesses could be argued as a loss of self-control due to anger). Further, although it is possible his calm return to work just hours after the homicide could constitute a "cool down," it is also possible that jurors might perceive this as a lack of an emotional breakdown altogether. In addition, the fact that no witnesses thought he appeared disconnected from reality or disoriented undermines any argument of "derealization." Mr. Landon's history of substance abuse could support his assertion of a history of mental illness and social stressors, should the jurisdiction recognize such arguments.

### 6.3 | Case study 3: Mr. Corazon

Mr. Corazon is a 55-year-old Mexican man who immigrated to the United States at age 30. The need to work long hours on his family's farm in Mexico prevented Mr. Corazon from attending school, and he ultimately withdrew after attaining minimal education. Mr. Corazon was married for several years and had five children with his first wife, with this marriage ending in divorce after his wife left him for another man. He began dating but found it difficult to trust other women, until he met Ms. Tenille. Mr. Corazon described his relationship with Ms. Tenille as chaotic, noting that she was "aggressive" and seemed to enjoy hurting him. When he sought treatment for depression stemming from these relationship difficulties, psychological testing placed Mr. Corazon's intellectual functioning in the "low average to extremely low" range. However, the psychologist completing this testing highlighted the influence of possible

cultural, linguistic, and educational factors that may have skewed the results. Aside from this possibility of lower intellectual functioning, Mr. Corazon's records indicated no mental impairment prior to his arrest.

After several months of increasing conflict, Ms. Tenille reportedly told Mr. Corazon she planned to leave him for another and taunted him for being "less than a man." Although her words made him angry, Mr. Corazon also felt sad and did not want Ms. Tenille to leave. After she retired to the bedroom, he retrieved a crowbar from his toolbox, struck her in the head, and stabbed her several times. He then slit his own wrists, hoping to die while lying next to her. After 2 hours of "waiting to die," Mr. Corazon inexplicably left their apartment, and police found him hiding in the apartment complex's laundry room with severe lacerations to his wrists that required immediate medical treatment. After Ms. Tenille's death, he was charged with first degree murder.

During his interview, Mr. Corazon explained that Ms. Tenille frequently humiliated him in front of others, mocking his sexual functioning to her coworkers. He indicated she seemed distant and more irritable than usual in the month before her death, which led him to attempt to appease her by providing gifts and being more affectionate. One night, Ms. Tenille admitted to having an affair, and when Mr. Corazon asked why, Ms. Tenille laughed and replied, "Because he has bigger balls than you." Mr. Corazon indicated he became so angry that he "saw nothing," and, in the next few seconds, stormed to the garage, grabbed the crowbar, and struck Ms. Tenille in the head. He described partial amnesia for the following events, saying that when he regained full consciousness and saw what he had done, he felt so depressed that he cut his wrists in an attempted suicide. He reported leaving home because he did not know what to do and was "dazed," and explained he hid in the laundry room because he was afraid.

During his interview, Mr. Corazon evidenced some difficulty with his memory and showed symptoms of mild cognitive impairment potentially related to mild intellectual disability or mild neurocognitive disorder. However, these deficits did not significantly affect his ability to relate his history, maintain satisfactory employment, or meet his basic needs around the time of the offenses. Thus, these symptoms did not seem to have affected his ability to make rational decisions nor indicate Mr. Corazon was necessarily less able to regulate his emotions. Additionally, it is notable that Mr. Corazon had once dealt with an unfaithful partner without significant difficulty and had no prior history of significant aggression or criminal behavior. Nonetheless, the available records and witness statements corroborated that Mr. Corazon had appeared depressed around the time of Ms. Tenille's death, with one witness remarking she often heard Ms. Tenille yelling at him through their apartment walls and had heard such yelling within an hour of her death. Furthermore, witnesses and those who knew Mr. Corazon described him as a typically mild-mannered man, and many said they would not be surprised if he finally "snapped" after years of living with Ms. Tenille.

### 6.3.1 | Legal analysis

Mr. Corazon will likely have difficulty presenting a qualifying triggering event of provocation in most states that require one. In states that allow words to qualify as provocation (Delaware, Kentucky, Oregon), he may be successful in asserting that the confession of infidelity caused his breakdown. If the state allows for a cumulative series of events to build his mental trauma (such as New York), he may fare better due to the constant abuse and humiliation he endured through the relationship.

Mr. Corazon's immediate reaction to the news of infidelity and insult, coupled with his partial amnesia and his dazed and suicidal post-crime conduct, supports his assertion of a loss of self-control. Further, Mr. Corazon has not exhibited violent behavior in the past, despite having previously experienced infidelity. Thus, he could likely satisfy the "extreme" aspect of the EED defense even under Connecticut's strict definition (see *State v. Elliott*, 1979), as his actions display a significant degree of intensity away from his norm.

Mr. Corazon's difficulty with memory and symptoms of mild cognitive impairment (potentially related to mild intellectual disability or mild neurocognitive disorder) will likely not play a significant role in his EED defense. Given the mild nature of the impairments, they likely did not affect his ability to make rational decisions or regulate emotions. Therefore, the impairments do not seem causally related to the homicide and will not have a dispositive impact in the

case, although they will likely still be considered in states that apply a subjective approach to analyzing the reasonableness of the explanation for the disturbance.

## 7 | CONCLUSION

As Table 1 demonstrates, EED standards vary widely between states, and various differences may prove dispositive within a given jurisdiction. Forensic evaluators must keep abreast of the relevant statutory definition of EED and requirements developed in case law. Perhaps most crucial to evaluators' assessments will be whether a state requires a provoking event to cause an emotional disturbance, or, alternatively, whether emotional effects stemming from a mental disorder may suffice. Evaluators should also determine the jurisdiction's stance on the use of mental disorder to inform the reasonableness assessment, and whether the jurisdiction differentiates between disorders that could support an insanity defense, lesser mental infirmities, and personality disorders.

As noted above, EED has been the subject of very little recent empirical research. Future work should consider the evolving landscape of EED cases, with particular attention to defendant and situational characteristics in successful EED defenses. Researchers may also choose to evaluate whether changing perspectives regarding assessment and treatment of mental illness may affect legal dispositions in EED cases. Finally, in light of recommendations made by other scholars and by the authors of the current paper pertaining to EED and mental health evaluations, it may be useful to more closely examine the role of forensic evaluators across jurisdictions in order to refine best practices in these challenging, yet fascinating, cases.

## CONFLICT OF INTEREST

The authors of this manuscript have no disclosures or conflicts of interest to report.

## ENDNOTES

- <sup>1</sup> In permitting sensitivity to the genders of the offender and victim, EED could potentially move beyond the gendered lens of the "reasonable person" used in the common law heat-of-passion defense (Miller, 2010). Yet EED, like its forebearer provocation, has been subject to searing critique by feminist scholars for its deeply gendered perspective and toleration of violence against women (Nourse, 1997; Ramsey, 2010; Dressler 2001). Indeed, Nourse's study of EED cases involving intimate homicide from 1980 to 1995 found that EED reform permitted manslaughter instructions "in cases where the defendant claims passion because the victim left, moved the furniture out, planned a divorce, or sought a protective order" without evidence of infidelity—claims that were rejected at common law (Nourse, 1997, pp. 1332-33, 1349). A 2002 study of the 28 cases where EED was used in New York County from 1988 to 97, however, found that—while the EED defense permits a jury to weigh mitigation in these circumstances—EED cases where the victim was a former wife or girlfriend are unlikely to result in a manslaughter verdict (Kirschner et al., 2004). It is also possible that the EED defense, in eliminating the cooling time requirement, better protects victims of domestic violence who kill their aggressors than the heat-of-passion defense (Horder, 2005; Kirschner et al., 2004, p. 129).
- <sup>2</sup> As with provocation, scholars have wrestled with the legitimacy of EED as a partial excuse. For instance, Buchhandler-Raphael (2020) argues that loss of self-control is a flawed concept hinging on the "same problematic theory that underlies the insanity defense's volitional impairment test" (p. 1843). Namely, in both doctrines, there is a lack of "psychological or psychiatric basis for accurately demarcating the line between genuine impairment in capacity to exercise control and simple failure to do so" (p. 1943). Morse (2009) and Bonnie (1983) have raised additional criticisms about control-based tests. On the other hand, scholars have pointed to the unique attributes of the EED defense to distinguish it as a distinct, legitimate defense despite the similar use of the loss of self-control notion (Dressler 1988; Weber, 1981). Ultimately, however, the purpose of this paper is not to resolve those difficult disputes nor defend the existence of the EED defense. Rather, this article seeks to explore the current doctrinal manifestations of the mitigating defense and provide guidance to forensic mental health professionals on how to navigate the complex waters of the doctrine.
- <sup>3</sup> Arkansas (Manslaughter, 2020a), Connecticut (Murder, 2020), Delaware (Extreme Emotional Distress, 2020), Hawaii (Manslaughter, 2020b), Kentucky (Manslaughter in the First Degree, 2020; Murder, 2020), Montana (Mitigated Deliberate Homicide, 2019), New Hampshire (Manslaughter, 2020c), New York (Murder in the Second Degree, 2019), North Dakota (Murder, 2020), Oregon (Extreme Emotional Disturbance, 2020), Utah (Special mitigation for mental illness or

- provocation reducing the level of criminal homicide offense [SMMI], 2020). Two American territories—Guam and American Samoa—also have adopted EED provisions (Guam (Manslaughter Defined and Classified, 2018), American Samoa (Manslaughter, 1987).
- 4 The U.S. Constitution permits states to place the burden of establishing the elements of an EED partial defense on defendants (*Patterson v. New York*, 1977; *contra Mullaney v. Wilbur*, 1975).
  - 5 The Hawaii Supreme Court in *State v. Seguritan* (1998) excised the “extremely” modifier of “unusual and overwhelming stress,” finding that Hawaii’s EED statute focused on the defendant’s *reaction* to the stress rather than the degree of its unusual and overwhelming nature (p. 129).
  - 6 Consider *State v. Miller* (1998) where the Montana Supreme Court found that evidence of prior nonviolent arguments between the victim and the defendant indicated the defendant *was* under EED due to the abnormality of his violent eruption (p. 727).
  - 7 For a more detailed exploration of contemporary differences among states’ EED standards, particularly the extent to which they resemble the common law HOP defense and permit consideration of mental disorder, see Johnston & Leahey (in press).
  - 8 These states include Utah, New Hampshire, and Arkansas.
  - 9 However, some EED jurisdictions may follow the common law in treating as adequate provocation threats of violence and/or informational words informing of conduct that, if seen, would constitute adequate provocation (MPC Commentaries, pp. 57–58).
  - 10 Though not without some controversy. See Singer (1986) and Kahan and Nussbaum (1996) for criticism of the frequency of psychiatric evidence in EED cases.
  - 11 In *People v. Sepe* (2013), mental disorder contributed to both prongs of the EED standard. There, the New York appellate court held a jury verdict rejecting the defendant’s EED verdict was against the weight of the evidence and emphasized—in its assessment of both prongs of the defense—the defendant’s “significant mental trauma,” “lengthy psychiatric history” of treatment for depression and anxiety, deteriorating mental state in the months preceding the homicide, and “seriously weakened psychiatric state” at the moment of the killing (pp. 284–285).
  - 12 One state, Connecticut, permits mental disorder to support an EED defense but requires a defendant to establish their disturbance did not stem from a mental condition equating to insanity. Judges have complained that this element is misleading, confusing, and distracting for the jury (Connecticut Criminal Jury Instructions, 2020; Blue, 1990).
  - 13 For a discussion of how forensic psychiatrists should assess the loss of self-control in Hawaii, see Hall et al. (2001).
  - 14 Some may question whether the mental health condition in question should be a defined, structured disorder as codified in the DSM-5, or whether syndrome evidence or that of “conditions for further study” may be admissible in EED cases. Though a review of the merit of DSM-5 classifications over other methods of identifying mental disorder is beyond the scope of the current paper, we uphold that despite its limitations (see Pickersgill, 2014, for example). The DSM-5 is widely considered authoritative given its use of review groups consisting of hundreds of international experts, decades of peer-reviewed research, and consideration of multicultural differences. Although the evidence for its reliability is mixed (e.g., Chmielewski et al., 2015) it has demonstrated incremental validity over prior DSM editions (Stinchfield et al., 2016). Ultimately, the admissibility of testimony regarding mental disorder, whether or not the DSM-5 is used, is an issue for the finder of fact.

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