Date: May 22, 1997

From: General Counsel (022)

subj: Definition of Insanity in 38 C.F.R. § 3.354(a) -XXXXXXX, XXXX X. XX XXX XX

To: Acting Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

- a. What is the meaning of the term "constitutionally psychopathic" as used in 38 C.F.R. § 3.354(a)?
- b. Does the definition of insanity in 38 C.F.R. § 3.354(a) exclude behavior which is due to a personality disorder or a substance-abuse disorder, except where a psychosis is also present?
- c. What are the intended parameters of the types of behavior which are defined as insanity in 38 C.F.R. § 3.354(a)?
 - (1) Does the definition of insanity include behavior involving a minor episode, or episodes, of disorderly conduct or eccentricity, if the behavior is due to a disease?
 - (2) How significantly must an individual's behavior deviate from his or her "normal method of behavior" for the person to be considered insane under 38 C.F.R. § 3.354(a)? Is this a purely subjective standard?
 - (3) What is the meaning of the phrase "interferes with the peace of society," and to what extent must an individual "interfere" with society's peace to meet the definition of insane?
 - (4) What is the meaning of the phrase "become antisocial" as used in 38 C.F.R. § 3.354(a)?
 - (5) Are the "accepted standards of the community to which by birth and education he belongs," as referred to in 38 C.F.R. § 3.354(a), necessarily identical with the "social customs of the community in which he resides?" If not, must an indi-

vidual both deviate from the standards of his community of "birth and education" as well as be unable to adapt in order to further adjust "to the

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social customs of the community in which he resides," in order to meet the regulatory definition of insanity? What evidence, if any, would be necessary to establish either or both such community standards?

COMMENTS:

- These issues arise in the context of a remand from the Court of Veterans Appeals (CVA) to the Board of Veterans' Appeals (BVA) in the case of Cropper v. Brown, 6 Vet. App. 450 (1994). During service, the appellant received four nonjudicial punishments resulting from marijuana use, absence without leave, drunk and disorderly conduct, and failure to go to the appointed place of duty. As a result, the appellant was discharged with an other-than-honorable discharge "'by reason of misconduct'" showing a pattern of "'frequent involvement of a discreditable nature with civil or military authorities." Id. at 451. The appellant applied for veterans' benefits, but the claim was denied. On appeal, the BVA concluded that the appellant's discharge precluded entitlement to veterans' benefits. The BVA also concluded that the evidence did not demonstrate that the appellant was insane at the time of commission of the offenses resulting in discharge. The CVA vacated the BVA's conclusion on the issue of insanity and remanded the case for consideration of a report of a post-service psychiatric examination.
- 2. In order to qualify for veterans' benefits, a former servicemember must demonstrate that he or she is a "veteran" within the meaning of the veterans' benefit statutes. A "veteran" is defined by 38 U.S.C. § 101(2) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." A discharge from service under other-than-honorable conditions, issued because of willful and persistent misconduct, will be considered to have been issued under dishonorable conditions, 38 C.F.R. § 3.12(d)(4), and bars entitlement to veterans' benefits. However, entitlement is not barred if it is established that, at the time of the commission of the offense leading

to a person's discharge, the person was insane. 38 U.S.C. § 5303(b); 38 C.F.R. § 3.12(b). A definition of insanity is provided at 38 C.F.R. § 3.354(a), and that definition is specifically made applicable to determinations pursuant to 38 U.S.C. § 5303(b). 38 C.F.R. § 3.354(b).

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3. The first question in the opinion request pertains to the meaning of the term "constitutionally psychopathic" in 38 C.F.R. § 3.354(a). The definition of an insane person in section 3.354(a) does not include an individual who is constitutionally psychopathic. According to Robert J. Campbell, M.D., Psychiatric Dictionary 154, 586 (6th ed. 1989), the term "psychopathic constitution" is synonymous with "psychopathic personality," which is currently defined as "any behavioral dysfunction that is primary (idiopathic or nonorganic) and manifests itself in abnormally aggressive or seriously irresponsible conduct." The term "psychopathic personality" "has generally been understood to refer to a consistent, lifelong pattern of behavior conflicting with social norms." Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 134 & n.6 (1967) (Douglas, J., dissenting); see also United States v. Flores-Rodriguez, 237 F.2d 405, 411 n.6 (2d Cir. 1956). Dorland's Illustrated Medical Dictionary, 371, 1383 (28th ed. 1994), defines "constitu-tional" as "affecting the whole constitution of the body; not local," and "psychopathic" as "pertaining to antisocial behavior or antisocial personality disorder." Based upon these definitions, we conclude that the term "constitu-tionally psychopathic" in 38 C.F.R. § 354(a) refers to a condition which may be described as an antisocial personality disorder. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), at 645, states that "[t]he essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." See also The American Psychiatric Press Textbook of Psychiatry 712 (Hales, Robert E., M.D. et al. eds., 2d ed. 1994) (noting that the central characteristic of antisocial personality disorder is "a long-standing pattern of socially irresponsible behaviors that reflects a disregard for the rights of others").

- 4. The opinion request also inquires as to whether the definition of insanity in 38 C.F.R. § 3.354(a) excludes behavior resulting from a personality disorder or substanceabuse disorder. The CVA has stated that, in order to constitute insanity for purposes of section 3.354(a), behavior must be "due to a disease." Zang v. Brown, 8 Vet. App. 246, 253 (1995). In Winn v. Brown, 8 Vet. App. 510, 516 (1996), appeal dismissed, 110 F.3d 56 (Fed. Cir. 1997), the CVA held that 38 C.F.R. § 3.303(c), which states that a personality disorder is not a disease or injury for purposes of VA disability compensation, is a valid exercise of the authority granted to the Secretary of Veterans Affairs pursuant to
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- 38 U.S.C. § 501. Because a personality disorder is not a disease for VA compensation purposes, behavior which is attributable to a personality disorder does not satisfy the definition of insanity in section 3.354(a).
- 5. With regard to substance-abuse disorders, we note initially that a determination as to whether a particular condition may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles. VAOPGCPREC 82-90 (O.G.C. Prec. 82-90). However, assuming for purposes of discussion that a substance-abuse disorder may be considered a disease for compensation purposes, we note that DSM-IV, at 182, states that "[t]he essential feature of Substance Abuse is a maladaptive pattern of substance use manifested by recurrent and significant adverse consequences related to the repeated use of substances." Recurrent substance abuse may result in a failure to fulfill work, school, or home obligations, including repeated absences or poor performance, or legal problems such as arrests for substance-related disorderly conduct. As discussed below, the term insanity refers to a condition involving conduct which deviates severely from the social norm or interferes grossly with the capacity to meet the ordinary demands of life. The conduct described in DSM-IV which is generally attributable to a substance-abuse disorder does not exemplify the gross nature of conduct which is generally considered to fall within the scope of the term insanity. We therefore conclude that behavior which is attributable to a substance-abuse disorder does not constitute insane behavior under section 3.354(a).

6. The opinion request inquires regarding the parameters of the types of behavior which constitute insanity under 38 C.F.R. § 3.354(a). The opinion request asks whether a minor episode, or episodes, of disorderly conduct or mere eccentricity, if due to a disease, may be considered insane behavior under section 3.354(a). The question of insanity arises in numerous legal proceedings, and its meaning may vary according to the jurisdiction and the object or purpose of the proceeding. However, in all contexts, the term indicates a condition involving conduct which deviates severely from the social norm. Black's Law Dictionary, at 794, states that "[t]he term is more or less synonymous with

. . . psychosis," which itself has been defined as "a mental disorder characterized by gross impairment in reality testing" or, in a more general sense, as a mental disorder in which "mental functioning is sufficiently impaired as to interfere grossly with the . . . capacity to meet the ordinary

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demands of life." Dorland's Illustrated Medical Dictionary at 1383. According to Webster's Third New International Dictionary 1168 (1981), "insanity" is a severe mental disorder, encompassing "such unsoundness of mind or lack of understanding as prevents one from having the mental capacity required by law to enter into a particular relationship, status, or transaction or as excuses one from criminal or civil responsibility." ¹ Section 3.354(a), which implements 38 U.S.C. § 5303(b) by providing a definition of insanity applicable to determinations under that statute, must be interpreted in light of the commonly accepted meaning of the term, in order to be consistent with the meaning which we may assume Congress intended in enacting that statute. See, e.g., Pioneer Investment Servs. Co. v.

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reason, from disease of mind or mental deficiency, that he or she did not know the nature and consequence of the act or . . [i]f known, that the claimant did not perceive the act as wrong."

dure Manual M21-1 (VBA Manual), Part IV, para. 11.10d.(2)(a) and (b), states that when the claimant or beneficiary caused the death of the veteran or another beneficiary and death benefits are at issue, the test for determining whether the killing may be excused by reason of insanity is whether "at the time of the commission of the act, the party accused was laboring under such a defect of

Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993) (it is presumed that Congress intends the words in its enactments to carry their ordinary, contemporary, common meanings).

7. The regulatory history of section 3.354(a) indicates that the Department of Veterans Affairs' (VA) predecessors have, consistent with the commonly accepted meaning of the term, considered insanity to involve a severe form of mental disability. The term "insanity" was apparently first defined for purposes of determining entitlement to veterans' benefits in General Order No. 348 (April 20, 1926), issued by the United States Veterans' Bureau, which stated that, to support a finding of insanity, the rating body must base its conclusions upon a diagnosis of psychosis, which was characterized as "a persistent morbid condition of the mind characterized by a derangement of one or more of the mental faculties to the extent that the individual is unable to understand the nature, full import and consequences of his acts, and is thereby rendered incapable of managing himself or his affairs." General Order No. 348 was canceled by General

Order No. 348-A (July 21, 1926), which stated that "a person will be deemed to be insane when he is mentally incapable of attending to his affairs." General Order No. 348-A was

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canceled by General Order No. 348-C. General Order No. 348-C (Oct. 26, 1927) contained a definition of an "insane person or lunatic" very similar to the definition of insanity in current 38 C.F.R. § 3.354(a). However, General Order No. 348-C qualified the criterion relating to prolonged deviation from normal behavior with the proviso that the person must, as a result of such deviation, be "incapable of managing his own affairs or transacting ordinary business," a concept akin to the level of incompetency generally supporting appointment of a quardian. See Black's Law Dictionary 795 (6th ed. 1990). The definition of an "insane person" in General Order No. 348-C also included a person "who is dangerous to himself, to others, or to property," a concept similar to that employed in civil commitment proceedings in many jurisdictions. See Black's Law Dictionary at 795. ²

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The terms of General Order No. 348-C pertaining to the definition of "insane person" were subsequently promulgated

8. Applying the current regulation in Struck v. Brown, 9 Vet. App. 145, 152 (1996), the CVA stated that a doctor's statements that "'a main exacerbation of [the appellant's] illness occurred during his military service,'" during which time he developed the signs and symptoms of schizophrenia, and that the appellant's current "'chronic and disabling schizophrenia was triggered by the stress-related military service,'" indicated that the appellant "may have been insane" when he absented himself without leave. ³ The CVA's

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discussion of the evidence in *Struck* is consistent with the above-referenced authorities, which indicate that a minor episode or episodes of disorderly conduct or mere eccentricity would not constitute insane behavior for purposes of

38 C.F.R. § 3.354(a).

9. The opinion request also asks how significantly an individual's behavior must deviate from his or her "normal method of behavior" in order to meet the regulatory definition of insanity. The determination as to whether a particular behavior constitutes insanity for purposes of section 3.354(a) is a question of fact to be resolved by the

as part of R&PR 6735(a) (Sept. 19, 1929), and later as R&PR 1174 (Jan. 25, 1936). The latter regulation was described in its heading as the definition of both insanity and incompetency. Paragraph 4.h. of Instruction No. 1, Title 38 USC Chs. 1, 11, 13, 15, 35, 37, 51, 53, 61, 71, Public Law 85-857 (May 29, 1959), moved the material regarding inability to manage one's affairs and transact business, in somewhat modified form, to what is now 38 C.F.R.

§ 3.353(a), which pertains to determinations of incompetency, and deleted the references to dangerousness.

The CVA's conclusion in *Cropper*, 6 Vet. App. at 453-54, "that the insanity must be such that it legally excuses the acts of misconduct" and that "there must be a causal connection between the insanity and the misconduct" in order to demonstrate that a discharge under dishonorable conditions does not bar veterans' benefits, is "no longer operative" because it was based on provisions in the VBA Manual M21-1 which have been superseded. Struck, 9 Vet. App. at 153-54.

factfinder based on consideration of the circumstances of the particular case. See Stringham v. Brown, 8 Vet. App. 445, 448 (1995); Zang, 8 Vet. App. at 254. We believe that case-by-case adjudication is particularly appropriate for assessing the extent by which an individual's behavior must deviate from his or her normal behavior because the behavior which may constitute insanity in section 3.354(a) may be so "varying in nature as to be impossible of capture within the boundaries of a general rule." Sewell Coal Co. v. Federal Mine Safety & Health Review Comm'n, 686 F.2d 1066, 1070 (4th Cir. 1982); accord Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 909 (5th Cir. 1983); see also Hunter v. Director, Office of Workers' Compensation Programs, 803 F.2d 800, 803 (4th Cir. 1986) (where regulations did not define the term "chronic disease of the lung," it was not unreasonable to require claimants to establish the chronic nature of their lung cancer on a caseby-case basis). However, the issue of the extent to which an individual's behavior deviates from his or her normal method of behavior should be evaluated in light of the principles discussed above governing the gross nature of conduct which is generally considered to fall within the scope of the term "insanity."

10. The next question pertains to the meaning of the phrase "interferes with the peace of society." The regulatory history provides no authoritative guidance regarding the meaning of this phrase. However, the word "peace" has been described as "'that state and sense of safety which is necessary to the comfort and happiness of every citizen, and which government is instituted to secure.'" State v. Van Allen, 102 A.2d 526, 527 (Conn. 1954) (quoting Malley v. Lane, 115 A. 674, 676 (Conn. 1921). The phrase "peace of society" has been used in the context of legal principles which provide order to society. See Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314, 325 (1853) (discussing neces

sity of stare decisis in cases affecting retroactively the

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courts' jurisdiction); Landsdale v. Smith, 106 U.S. 391, 394 (1882) (preservation of peace of society by doctrine of laches); Rozell v. Rozell, 8 N.Y.S.2d 901, 903 (N.Y. App. Div.), aff'd, 22 N.E.2d 254 (N.Y. 1939) (inability of minor child to claim damages for personal injuries inflicted by parents). Thus, the phrase "interferes with the peace of society" in 38 C.F.R. § 3.354(a) may be read as referring

to behavior which disrupts the legal order of society. See also "breach of the peace," which is a generic term including "all violations of public peace, order, or decorum," and which may consist of acts of public turbulence or indecorum, invasion of the security and protection which the laws affords, violation of a law enacted to preserve peace and good order, and acts which tend to excite violent resentment or create public tumult, or provoke, excite, or incite others to break the peace. 11 C.J.S. Breach of the Peace §§ 2, 4 (1995).

- 11. With regard to the extent to which an individual must interfere with the peace of society in order to be considered insane, we believe that this is a question which may be resolved through adjudication on a case-by-case basis. Hunter, 803 F.2d at 803. However, we note that the interference with the peace of society, to be considered evidence of insanity within the meaning of 38 C.F.R. § 3.354(a), must be due to disease. Zang, 8 Vet. App. at 253. Further, the extent of the interference necessary to establish insanity must be evaluated in light of the above-referenced discussion of the gross nature of the conduct normally associated with that term.
- 12. The request for opinion next inquires as to the meaning of the phrase "become antisocial" as used in 38 C.F.R. § 3.354(a). The term "antisocial" is defined by Dorland's Illustrated Medical Dictionary, at 100, as "behavior that violates the rights of others or is criminal." According to Webster's Ninth New Collegiate Dictionary 93 (1990), "anti-social" refers to behavior which is "hostile or harmful to organized society," especially behavior which "deviat[es] sharply from the social norm." Examples of antisocial behavior provided in DSM-IV, at 649-50, include: (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; (3) impulsivity or failure to plan ahead; (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; (5) reckless disregard for safety of self or others; (6) consistent <Page 9>

irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; and (7) lack of remorse, as indicated by being in-

different to or rationalizing having hurt, mistreated, or stolen from another.

- The term "become" has been defined as meaning "to come into existence" or "to undergo change or development." Webster's Ninth New Collegiate Dictionary at 139. Use of this term indicates that the regulation was intended to refer to a course of conduct representing a departure from an individual's normal pattern of behavior. Thus, the reference to "become antisocial" would not encompass behavior attributable to a personality disorder, which involves "a lifelong pattern of action or behavior," 38 C.F.R. § 3.303(c), and which is recognized as a disorder having its onset in childhood or adolescence and persisting in a stable form over time. DSM-IV at 632. In view of the foregoing, we conclude that the phrase "become antisocial" as used in 38 C.F.R. § 3.354(a) refers to the development of behavior which is hostile or harmful to others in a manner which deviates sharply from the social norm and which is not attributable to a personality disorder.
- 14. The final issue raised by the request for opinion concerns the reference in 38 C.F.R. § 3.354(a) to such departure "from the accepted standards of the community to which by birth and education [a person] belongs" so as to render the person unable to adapt "to the social customs of the community in which he resides." The opinion request asks whether "the accepted standards of the community to which by birth and education [a person] belongs" are identical in meaning to "the social customs of the community in which he resides." Each part of a regulation must be construed so that effect is given, if possible, to every word and clause, so that no part will be inoperative or superfluous. 2A Norman J. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992); Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995); Sekula v. Federal Deposit Ins. Corp., 39 F.3d 448, 454-55 (3d Cir. 1994). In order to give effect to the two phrases at issue, they must be considered to refer to different standards for evaluating an individual's behavior. Under any other interpretation, one of the two phrases would be rendered superfluous and would collapse into one step what is clearly meant to be a two-step process under section 3.354(a). See Sekula, 39 F.3d at 455. Accordingly in order to be considered insane under the departure-fromaccepted-standards criteria of section 3.354(a), a person must both deviate from the

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accepted standards of the community to which he or she belongs by birth and education and be unable to adjust to the

social customs of the community in which he or she resides.

- With regard to the phrase "the accepted standards of the community to which by birth and education [a person] belongs," the word "birth" refers to a "state resulting from being born . . . at a particular time or place or into a particular kinship." Webster's Third New International Dictionary 221 (1981). In light of this definition, the phrase in question appears to refer to an individual's ethnic and cultural background and to the level of education completed by the individual. Regarding the evidence which would be necessary to establish this standard, we note that DSM-IV includes information specifically related to cultural considerations to assist in application of psychiatric diagnostic criteria, including a discussion of cultural variations in the clinical presentation of disorders, an outline for cultural formulation designed to assist in evaluating and reporting the impact of the individual's cultural context, and a glossary of culture-bound syndromes. See DSM-IV at xxiv. The cultural formulation involves systematic description of an individual's cultural and social reference group. Id. at 843.
- The second standard, "the social customs of the community in which [a person] resides," does not take into account the background of any particular person but rather embodies the common understanding in a community concerning social norms. This standard requires assessment of whether an individual is able to conform his or her behavior to the conduct required of an average person in a particular community. See generally Estate of Burgess v. Peterson, 537 N.W.2d 115, 119-20 (Wis. Ct. App.), review denied, 540 N.W.2d 202 (1995); Estate of Mild v. Scheuer, 136 A.2d 875, 882 (N.J. 1957) (conduct measured by an ordinary-person standard, without reference to an individual's intellect and education). We note that one source of evidence of the social customs of the community in which an individual resides is the laws and judicial decisions of the particular jurisdiction, such as those dealing with what constitutes a breach of the peace. In view of the foregoing, the reference to "the accepted standards of the community to which by birth and education" an individual belongs requires consideration of evidence of the cultural and ethnic traits

and degree of education possessed by a particular individual, while the reference to "the social customs of the community"

in which an individual resides, requires consideration of

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evidence of an "average person" standard derived from the contemporary values of the community at large.

HELD:

- a. The term "constitutionally psychopathic" in 38 C.F.R. § 3.354(a) refers to a condition which may be described as an antisocial personality disorder.
- b. Behavior which is attributable to a personality disorder does not satisfy the definition of insanity in section 3.354(a). Assuming that a particular substance-abuse disorder is a disease for disability compensation purposes, behavior which is generally attributable to such disorders does not exemplify the severe deviation from the social norm or the gross nature of conduct which is generally considered to fall with the scope of the term insanity and therefore does not constitute insane behavior under section 3.354(a).
- c.(1) Behavior involving a minor episode or episodes of disorderly conduct or eccentricity does not fall within the definition of insanity in section 3.354(a).
- c.(2) Determination of the extent to which an individual's behavior must deviate from his or her normal method of behavior for purposes of section 3.354(a) may best be resolved by adjudicative personnel on a case-by-case basis in light of the authorities defining the scope of the term insanity.
- c.(3) The phrase "interferes with the peace of society" in 38 C.F.R. § 3.354(a) refers to behavior which disrupts the legal order of society. Determination of the extent to which an individual must interfere with the peace of society so as to be considered insane for purposes of section 3.354(a) may be resolved by adjudicative personnel on a case-by-case basis in light of the authorities defining the scope of the term insanity.

- c.(4) The term "become antisocial" in 38 C.F.R. § 3.354(a) refers to the development of behavior which is hostile or harmful to others in a manner which deviates sharply from the social norm and which is not attributable to a personality disorder.
- c.(5) Reference in 38 C.F.R. § 3.354(a) to "accepted standards of the community to which by birth and education" an individual belongs requires consideration of an individual's ethnic and cultural background and level of education. The

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regulatory reference to "social customs of the community" in which an individual resides requires assessment of an individual's conduct with regard to the contemporary values and customs of the community at large.

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