

# Criminal Justice Outcomes of Suicide by Cop Survivors

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The concept of suicide by cop (SbC) is of interest to psychiatrists, law enforcement professionals, lawyers, and citizens. It is a form of provoked homicide arising from a wish to die. Those who attempt SbC experience more mental illness, substance use, and recent trauma than the general population. This article examines those who attempt SbC and survive the encounters. SbC survivors who threaten or harm police or others may be charged with crimes such as weapons possession, aggravated assault, murder or attempted murder of an officer. The formulation of a provocative act, however, frustrates attempts at defenses based on mental state, resulting in few requests for expert testimony. Few data exist on how these individuals fare in court. Appellate cases in which defendants attempted to introduce evidence of SbC illustrate great variability in adjudication. Psychiatric defenses, such as diminished capacity and insanity, are usually inapplicable or unsuccessful because intent and knowledge of wrongfulness are implied in the provocative act. Diversion of SbC defendants into mental health courts is rare because of firearms use against police. The author argues that criminal justice ignores SbC survivors' mental health and recommends application of therapeutic jurisprudence to give full expression of SbC dynamics.

**J Am Acad Psychiatry Law 51:390–400, 2023. DOI:10.29158/JAAPL.220116-22**

**Key words:** suicide by cop; police-assisted suicide; therapeutic jurisprudence; mental health court; criminal responsibility

Homicide and suicide have been linked psychodynamically and criminologically.<sup>1</sup> Mass shooters, for example, often take their own lives. In victim-precipitated homicide (VPH), the decedent caused the killing, often with stated intent to die. Studied since the 1950s,<sup>2</sup> VPH may involve domestic and social situations and police–citizen interactions.<sup>2,3</sup> Suicide by cop (SbC) is the best-known subset of VPH, whereby an individual attempts or achieves suicide by inducing police to use lethal force. SbC survivors face criminal charges when their provocative behavior includes attempted or completed homicides, assaults, or weapons offenses. Suicidality raises questions of criminal responsibility (insanity), actual intent (*mens rea* defenses), and mitigation.

Since the mid-1990s, legislators, judges, and mental health advocates have considered alternatives to strict

criminal justice for persons with serious mental illness and substance use disorders.<sup>4,5</sup> One alternative is the use of problem-solving courts, which include mental health, drug, and veterans' courts.<sup>6,7</sup> Although problem-solving courts are typically reserved for nonviolent offenses,<sup>8</sup> there are mental health courts for felonies in some jurisdictions.<sup>9</sup> Problem-solving courts promise better treatment for citizens, relief within overcrowded jails and prisons, and a therapeutic process. The movement is a partial solution to citizens caught in cycles of transinstitutionalization.<sup>10,11</sup> Given the prevalence of serious mental illness among SbC attempters and survivors, it is worthwhile to examine the possibility of applying alternative resolutions.

This article reviews the contours of SbC within the criminal justice system, using appellate decisions and other literature review to illustrate outcomes. It concludes that defenses invoking mental states for survivors (insanity and diminished capacity) are rarely applicable in SbC cases. Therapeutic jurisprudence (TJ),<sup>12</sup> as applied in veterans' and problem-solving proceedings, may be a more constructive approach. The author argues that formats employing TJ represent a better resolution to criminal charges against

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Published online June 2, 2023.

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Disclosures of financial or other potential conflicts of interest: None.

SbC survivors by inviting psychiatric testimony and permitting a fuller narrative for defendants.

### SbC as a Phenomenon

The term “suicide by cop,” or “suicide by proxy,”<sup>13</sup> has entered public discourse, media, and scholarship. It has appeared, for example, in television shows such as ABC News *20/20* (October 16, 1998), *NCIS* (e.g., Season 16, Episode 6, 2018), and *Law & Order* (Season 3, Episode 2, 2001), and the song “Don’t Take Me Alive” by Steely Dan (from *The Royal Scam*, ABC records, 1976). It has also appeared in coroners’ reports as suicide, rather than homicide, as a manner of death.<sup>14,15</sup>

SbC terminology is variable, with terms such as “police-assisted suicide,” “police-associated deaths,” “hetero-suicide,” “legal intervention deaths,” and “law-enforcement-assisted suicide.”<sup>16–19</sup> This article retains the term SbC to refer to an individual’s behavior resulting in police using lethal force.<sup>19</sup> The text refers to individuals who survive attempted SbC as survivors rather than perpetrators, emphasizing their psychopathology instead of criminality.

### Epidemiology and Classification

SbC research concerns psychiatry, criminal and civil law, criminology, law enforcement, and crisis intervention methodology.<sup>17</sup> The research has been salient due to increased scrutiny of police-community relations. The *Washington Post*, for example, has compiled about a thousand instances of police-related deaths annually since 2015.<sup>20</sup> Its numbers likely have been underestimated based on reliance on the National Vital Statistics System (NVSS). A reanalysis showed underreporting of these fatalities among non-White citizens; about 30,000 versus about 17,000 in the NVSS sample from 1980 to 2018.<sup>21</sup> Persons with mental illness are overrepresented among decedents in police-related fatalities, including SbCs.<sup>22,23</sup> These statistics do not capture nonlethal incidents.

Lack of uniform definition and reporting procedures limits availability of accurate data. SbC cases, for example, are usually called homicides, not suicides.<sup>19</sup> The reporting of SbC fatalities influences public perception of safety and strength of police-community relationships.<sup>16,19</sup> Citizens understandably question why persons with mental illness are killed. The documentation of SbC as a form of suicide, however, has been criticized as *post hoc*

justification for unscrupulous or inept police work, or an attempt to shift the blame from police to victim.<sup>16,24</sup> This is important, as increased scrutiny of police behavior focuses on thresholds for lethal force and immunity of police and municipalities.<sup>25</sup>

The overall prevalence of SbC is unknown but considered rare.<sup>26,27</sup> Publicity surrounding it may lead to false assumptions about its frequency. Although the results of attempts are often deadly, there is little information on how often officers de-escalated the situation without physical injury to citizens. Studying officer-involved shootings in the United States, Patton and Fremouw<sup>19</sup> concluded that at least 10 percent were SbC, with higher rates in hostage and barricade situations. Common features of SbC attempts include male sex, ages 20 to 40, psychiatric and arrest history, intoxication, and recent life trauma.<sup>19</sup> Mohandie and colleagues<sup>18</sup> examined original police records of 707 officer-involved shootings from 1998 to 2006 and determined that about one-third were SbC. Among those, 95 percent were male, and 80 percent had weapons, mostly firearms. Suicide notes were left in 14 percent of the cases, four mentioning SbC. In other instances, a wide range of clinical and descriptive indicia, including survivor statements, aided classification. A smaller study ( $N = 46$ )<sup>28</sup> found that 17 percent of SbC attempters had replica firearms, which would aid defendant officers in civil cases (e.g., “We didn’t know it was a toy”) but cut against a psychiatric defense among SbC survivors (e.g., “I knew they would shoot me if I held up something that looked like a real gun”). A more recent study examined 419 SbC cases from Los Angeles in which police used nonlethal force on citizens.<sup>29</sup> The typical SbC profile was male, average age 38, and likely to have a mental disorder. Eighty-nine percent verbalized suicidal intent.

SbC can be subtyped in several different ways. Mohandie and Meloy<sup>17</sup> sorted SbC into two, nonexclusive categories based on motivation: “instrumental” (avoidance of incarceration) or “expressive” (venting rage or hopelessness). They found that all SbC instances, in addition to being psychodynamically complex and varied, contain a “meta-goal” of suicide, homicide-suicide, or “cry for help.” Keram and Farrell noted that “[c]ourts will be cautious in admitting evidence of the precipitator’s motive, plan, or intent” (Ref. 13, p 597), potentially prejudicing survivors’ criminal proceedings. Dewey and colleagues<sup>27</sup> determined that three groups of nonexclusive factors existed among 68 subjects: mental illness (depression with suicidal features, severe

substance use), criminality (facing arrest or imprisonment), and domestic problems (violence and stressors). A rare variation of SbC is when death-row prisoners attempt to hasten their executions.<sup>30</sup> When abandoning appeals is not sufficient,<sup>31</sup> they may attack corrections officers, hoping to be killed.<sup>32</sup> Additional typologies were reviewed by Jordan and colleagues.<sup>29</sup> Although these schemas are useful in the study of depression and in suicide prevention, their utility in criminal courts usually is relegated to sentencing.

### Relevance to Forensic Psychiatry Practice

SbC's intersection with mental illness is important for forensic psychiatrists. Across SbC studies, 40 to 63 percent of individuals met criteria for at least one mental disorder, predominantly chronic depression, bipolar disorder, or schizophrenia.<sup>27</sup> In addition, 33 to 65 percent of individuals who completed SbC had a history of substance use disorders and more than 50 percent of individuals were intoxicated during the index incident. Survival of SbC attempts may vary with the degree of support from mental health professionals, perceived lethality of the threat to officers, officers' training and individual characteristics, and nonlethal incapacitation of the citizen. Legal questions for expert witnesses range from criminal responsibility of the SbC survivor to the fitness for duty of officers traumatized by these incidents. The question of reasonableness of officers' force would be a question for the jury aided by experts in police practices.

Despite the research literature noted, little is known about SbC survivors.<sup>16,23</sup> This is reflected in the rarity of requests for forensic psychiatric services, in the author's experience, and in the dearth of legal decisions to guide jurisprudence. Intuitively, suicidal citizens with severe mental illness should not be held as blameworthy as those with obvious antisocial objectives, though their actions may be similarly unlawful. The laws permitting defendants to present evidence of mental disorder to negate *mens rea* or to mount an affirmative defense of legal insanity<sup>33</sup> apply poorly to SbC cases. Mental illness rarely negates criminal intent, even when severe,<sup>34,35</sup> because attempted SbC implies awareness that the behavior (pointing a gun or otherwise threatening violence) is provocative. Similarly, insanity is difficult to establish when a wrongful act was formulated to cause one's death, even with an irrational basis. Statutes typically look only at the cognitive process behind the provocative act but may include a volitional

test of the individual's impulse control,<sup>33</sup> not regarding the nuanced dynamics of suicide.

### Methods

To review how courts have adjudicated criminally charged survivors of SbC, the author conducted a search of state and federal appellate decisions and literature using Nexis Uni, Google Scholar, Westlaw, and MEDLINE/PubMed; all dates were searched. Search terms included combinations of the following: suicide by cop; suicide by police; law enforcement assisted suicide; victim-precipitated suicide; officer-involved suicide; and TJ. In addition, the author reviewed decisions and articles on admissibility of SbC evidence (via all sources), news reports involving SbC (via Nexis Uni), and articles/law reviews dealing with jurisprudence relevant to SbC (via all sources). The results will begin with the admissibility of SbC as evidence and then turn to appellate decisions and other sources that illustrate variations of criminal justice for SbC survivors.

### Results

There were approximately 50 appellate decisions between 2002 and 2022 in which SbC was mentioned. Several appellants raised questions of ineffective assistance of counsel in not arguing mental health factors; only one prevailed.<sup>36</sup> In several instances, there were concerns over jury instructions and or admissibility of diminished capacity defenses. In a Mississippi case, the appellant questioned barring psychiatric testimony on SbC; this conviction was reversed.<sup>37</sup> Of the remainder, the author selected those that illuminate areas of admissibility of SbC expert testimony and criminal dispositions. These selected cases are described in the sections below.

#### Admissibility of Expert Evidence in SbC

Despite the status of SbC as a behavioral phenomenon, there are residual questions about its admissibility via psychiatric expert testimony. SbC is neither a cause of death nor a diagnosis that would support a defense of insanity in relation to provocation of police. The act of inducing reactive violence may undercut a cognitive definition of insanity (knowledge of wrongfulness) while not eliminating an insanity determination in jurisdictions that include volitional impairment.<sup>33</sup> Similarly, the manifest intent of SbC frustrates a defense of diminished capacity (negating

specific intent). Yet, for forensic psychiatrists, it is intuitively reasonable that state of mind be considered in the calculus of survivors' culpability, often relegating our role to aid mitigation in sentencing.

Courts are beginning to show interest in SbC. About 20 years ago, a U.K. case ruled for the first time that the killing of a citizen by an officer was suicide.<sup>38</sup> Addressing an inquest jury on the matter of police liability for homicide, the coroner told jurors to bear in mind "suicide by cop." There was immediate protest from advocates for families of decedents, calling the ruling "perverse and dangerous" and suggesting a precedent for police to deflect attention from themselves.<sup>38</sup>

A 2006 Florida appellate case<sup>39</sup> overturned a conviction for second-degree (felony) murder of Mr. Wagner, whose crime partner, Mr. Pucci, was shot and killed by an officer following armed robbery of a store. Because Mr. Pucci's death was during their flight from police, Mr. Wagner was also charged with murder (homicide during a felony). The trial court rejected the defense's proffer of expert testimony on SbC; there was no jury instruction on it and Mr. Wagner was found guilty. One focus of the appellate case was whether Mr. Wagner could have shielded himself from the homicide charge by asserting that Mr. Pucci provoked the officer's actions. The appellate court ruled that Florida defendants have a right to present evidence and that a jury instruction was required. The court overturned the murder conviction and Mr. Wagner was sentenced to 15 years' incarceration on the remaining charges.<sup>40</sup>

Support for the admissibility of SbC testimony comes principally from civil cases. In *Boyd v. City & County of San Francisco*,<sup>41</sup> the U.S. Court of Appeals for the Ninth Circuit held that the district court's review of mental health expert testimony on SbC met the *Daubert*<sup>42</sup> standard for scientific testimony. The testimony was admissible under Federal Rule of Evidence 702, in that it was relevant, scientifically sound, helpful to the fact finder, and not prejudicial.<sup>43</sup> Police shot and killed Mr. Boyd, a man with mental illness who attempted two separate kidnappings at gunpoint. His estate sued the City and County of San Francisco for wrongful death, claiming Mr. Boyd had been trying to surrender and that the police officers used excessive force. The defense presented expert witness testimony by a forensic psychiatrist who opined that Mr. Boyd, attempting SbC, had drawn police fire. The expert's well researched and reasoned

opinion permitted the syndromal description of SbC to withstand evidentiary scrutiny. The ruling has the potential to support arguments in civil actions for deprivation of rights under 42 U.S.C. § 1983.<sup>44</sup>

The general applicability of the *Boyd* precedent is unknown both in civil rights cases against police and municipalities and in criminal cases against SbC survivors. In the criminal matters that follow, some survivor-defendants had an opportunity to argue for reduced culpability at trial, whereas others were denied, leading to appeals and postconviction relief petitions.

### **Insanity Defense**

The insanity approach to SbC is not new. The English case of James Hadfield, decided in 1800, is an example of a man with brain injury and insane (psychotic) delusions.<sup>45</sup> Mr. Hadfield, a military veteran, shot at (or near) King George III to induce his own death for regicide. His underlying belief was that his being killed by others would create a thousand years of utopia. He survived and was acquitted by reason of insanity. In an early iteration of TJ, he was committed for psychiatric treatment. Despite this historical precedent, more recently, criminal courts have tended to reject defense arguments based on SbC, either outright or reserving them for sentencing.<sup>46-48</sup>

One SbC survivor successfully used an insanity defense, and this clinical case was reported by Bresler and colleagues 20 years ago.<sup>26</sup> Like Mr. Hadfield, the defendant, Mr. P., sustained traumatic brain injury (car versus pedestrian), followed by significant changes in functional domains and volitional and cognitive deficits: "[he was] extremely impulsive, poorly planned, and organically disinhibited" (Ref. 26, p 4). After an angry exchange with his wife, he fled home with firearms. The police, alerted by his wife, pursued him into the woods. Mr. P. engaged them in verbal and shooting exchanges before capture. The authors concluded, "In situations such as this one in which it appears that the motivational and cognitive deficits are inseparable, a very liberal interpretation of the M'Naughten insanity standard is required for one to qualify for the defense" (Ref. 26, p 4). The authors did not indicate how the defense was fashioned, whether it was contested, or what the ultimate disposition was.

*United States v. Israel*<sup>49</sup> illustrates the difficulty harmonizing SbC, a cognitive test for insanity, and mitigation. In 2014, Kamau Alan Israel robbed a bank in Texas and engaged police in a high-speed chase. He had a history of schizophrenia with breakthrough



psychotic episodes despite taking medications. After crashing, he tried carjacking another vehicle at gun-point but later complied with police commands to drop his weapon. Mr. Israel was arrested and charged with bank robbery. Afterward, he began referencing an alter ego named “Damon,” and suggested that his actions were motivated by suicide. He robbed the bank hoping for SbC or being jailed, which he believed would allow him to escape from Damon. Mr. Israel was found competent to plead guilty to bank robbery and received the maximum sentence of 240 months in prison. The U.S. Court of Appeals for the Fifth Circuit denied him relief, citing that he did not take responsibility for trying to steal a car, even though he admitted to the bank robbery.

In 2017, Mr. Israel filed suit in U.S. District Court claiming counsel’s ineffectiveness in not providing an insanity defense and failing to present mitigating mental health evidence at sentencing. The district court rejected Mr. Israel’s appeal, citing that it was “disjointed” and that there was no evidence of mental disability missed by trial counsel.<sup>50</sup> Mr. Israel returned to the Fifth Circuit Court of Appeals, which had affirmed the sentence. The court said that an insanity defense would not likely have succeeded, as he attempted to evade capture by wearing a disguise and fleeing police and that he knew his actions would provoke police response; counsel was not ineffective.<sup>51</sup>

### Diminished Capacity

*Nebraska v. Churchich*<sup>52,53</sup> underscores the problem of attacking intent as a defense tactic. In August 2012, Raymond L. Churchich, a man with bipolar disorder and polysubstance abuse, was in a standoff with Bellevue, Nebraska police. Barricaded in his parents’ basement with a shotgun, he fired shots through a window in the officers’ direction. Mr. Churchich text-messaged his parents and friends, indicating he wanted to die. He messaged a friend, “I’m leaving planet earth by a gauge to the heart,” and to his father, “The cops r here and its either them or me” (Ref. 52, p 2, spelling and punctuation in original). He also cursed police in words painted on his body. A SWAT team deployed pepper rounds into the residence, forcing Mr. Churchich outside.

Mr. Churchich pled not guilty to assaults and firearms charges. He was released on bond and assigned to Pretrial Services. The requirements included completion of an inpatient substance use program, 12-

step program follow-up, counseling, and wearing both continuous alcohol-monitoring and location-monitoring devices. He returned to court two months later, after leaving the program, and was ordered to undergo evaluations of competency and sanity. Mr. Churchich was found competent to stand trial and counsel reserved the question of sanity for trial. In mid-2013, a plea agreement was reached, dropping four lesser felony charges in exchange for no-contest pleas on the others. He was not required, however, to give a factual basis for his plea because it was no contest. Sentencing was consecutive which, in the aggregate, could result in 27–60 years’ imprisonment.

Mr. Churchich filed an appeal citing, among other things, ineffective assistance of counsel for failing to withdraw the pleas after a psychological report suggested he could not form intent. The report became available after the plea hearing but before sentencing. The entirety of the appeal was denied in the 2014 decision.<sup>52</sup> Mr. Churchich then appealed for postconviction relief to the same state court of appeals in 2018, this time *pro se*. He reiterated that trial counsel was ineffective, thus prejudicing the outcome. The opinion revealed details about reports by a psychologist and a psychiatrist.<sup>53</sup> The appellate court, however, concluded that Mr. Churchich acted intentionally, citing his text messages and the writings on his body; it affirmed the convictions and sentences.

In *California v. Park*,<sup>54</sup> a defendant failed to challenge *mens rea* (diminished actuality) because of the general-intent nature of the charges. In 2014, David Park was laid off from his job as a school custodian. Despondent, he sent his daughter away from their trailer home and binged on alcohol. He later texted his friend that he planned to get drunk enough to “get enough guts” to kill himself. His friend requested a police welfare check. When the police arrived, Mr. Park refused to come outside and shouted through the door, “I don’t believe in suicide, so I guess I’m just going to have to have you guys do it for me” (Ref. 54, p 5). Mr. Park then fired multiple rounds through the trailer’s walls, initiating a six-hour stand-off. He was charged with four counts of assault on a police officer with a firearm. Mr. Park was initially found incompetent to stand trial and committed to Patton State Hospital, where psychotropic medications were forcibly administered. Prior to trial, the court agreed with the prosecutor to exclude evidence that Mr. Park had mental illness, since the evidence was relevant only to motive and not to his charges,

which were general intent crimes not amenable to a diminished capacity analysis.

At trial, Mr. Park testified that he did not intentionally fire at police but instead shot at the floor of his trailer and at the bathtub to “let people know that I was serious [about suicide] and I really wanted to do this and they needed to go away” (Ref. 54, p 26). The jury found him guilty, and Mr. Park was sentenced to an aggregate term of about 33 years. Mr. Park appealed, arguing that the court violated his right to present a defense by excluding evidence of mental illness. The appellate court reiterated that assault with a firearm on an officer is a general intent offense. It only required proof that Mr. Park acted willfully and that he was aware of facts that would “lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone” (Ref. 54, p 34). Intent could not be negated by evidence of a defendant’s mental illness or voluntary intoxication.

In *State of Washington v. Anya Montgomery*,<sup>55</sup> there was confusion in the trial court about the use of diminished capacity and insanity defenses. Ms. Montgomery, convicted of attempted first-degree murder of her adoptive parents, was sentenced to 20 years’ imprisonment. Appealing, she alleged that the prosecutor misled the jury by misstating the law. The records revealed diagnoses of reactive attachment and posttraumatic stress disorders in childhood. When Ms. Montgomery was 12, her adoptive parents relinquished parental rights. Eleven years later, she revealed homicidal ideas against them; the incident occurred shortly thereafter. Under interrogation, Ms. Montgomery claimed the victims had sexually abused her, that she had returned to kill them, and that she was trying to induce SbC (not elaborated in the decision).

Confusion came when Ms. Montgomery proffered psychiatric testimony on diminished capacity. The witness stated that rather than intending to kill the victims, she was acting out a fantasy in which she went from victim to superhero. The expert, on cross-examination, acknowledged that Ms. Montgomery told the police of her intent to kill. Then the following exchange took place between prosecutor and witness:

Q: . . . I mean, she understood that what she was going over there to do was considered to be illegal, but your opinion is that she didn’t intend to actually assault or attempt to kill anybody. Correct?

A: That’s correct. There are two different psycho legal [sic] issues. I’m not saying she was not guilty by reason of

insanity. I’m saying she lacked capacity to form intent. Those are two different issues with different standards.

Q: All right. That’s not what I asked, and now that you’ve brought up the issue of insanity, you are not opining that she was insane at the time legally. Correct?

A: That’s correct.

Q: Okay. But the point being, again, that her awareness that her—what she was doing was illegal is not consistent with not intending to do anything illegal; i.e., kill the [victims]. Correct?

A: That’s not correct. (Ref. 55, p 2–3; Google Scholar pagination).

The prosecutor later argued that the expert’s opinion was internally inconsistent. The appellate court ruled that the jury was told to follow the court’s charge and that ambiguity surrounding the expert’s testimony would not have affected the outcome. The conviction was affirmed.

### **Problem-Solving Court**

The *New York Times*<sup>56</sup> reported on the following SbC attempt by a veteran who avoided attempted murder charges. Staff Sgt. Brad Eifert had been deployed to Iraq and in 2006 worked as an Army recruiter in Michigan. Troubled by PTSD symptoms, he self-medicated with alcohol and made two suicide attempts in 2010. In August 2010, two coworkers planned to take him for psychiatric evaluation. Mr. Eifert escaped to his home, where he grabbed three guns and fired them into the woods. He later dropped them and ran toward waiting police officers shouting, “Shoot me! Shoot me! Shoot me!” The officers subdued him with a Taser and arrested him.

Mr. Eifert faced five counts of assault with intent to murder the officers, each carrying a potential life sentence. Judge Jordan of Ingham County District Court, who had started a veterans’ court in East Lansing, diverted the case to such a venue. This court was not usually open to defendants charged with firearms or violence crimes. The prosecutor reasoned that Mr. Eifert’s emotional difficulties warranted leniency and the police officers agreed to withdraw charges of assault with intent to murder. Mr. Eifert pled guilty to a single charge of carrying a weapon with unlawful intent within the veterans’ court program. By adhering to mental health and substance use treatment and supervision, the charge would be dismissed or reduced to a misdemeanor.

### **Mitigation**

In *Washington v. Burton*,<sup>57</sup> Craig Burton, a military man with firearms training, tried to avoid criminal

consequences after surviving SbC. After his honorable discharge, he became depressed in 2015 and received paroxetine. Meanwhile, his wife was divorcing him, and he was overwhelmed. At the time of the incident, he felt suicidal, was drinking beer, and had a loaded handgun. His mother-in-law called police; 11 officers came. Three of them feared Mr. Burton would shoot them because he fired shots into the trees saying, “Do it.” Mr. Burton came out with the gun but did not point it. When an officer ordered him to drop the gun and he refused, the officer shot him once in the abdomen. On the way to the hospital, “Burton told Officer Wells that he wished police officers had killed him and he was glad he injured no one” (Ref. 57, p 7).

Mr. Burton’s charges included three counts of first-degree assault with intent to inflict great bodily harm; each carried a firearms enhancement. He opted for a bench trial and did not file for diminished capacity. At trial, Mr. Burton testified that his sole purpose was suicide. A psychiatrist testified, not about SbC, but that the suicidal ideation was linked to paroxetine effects.

The trial judge, impressed that Mr. Burton never intended to shoot the officers, only to frighten them, noted that his provocation was intentional. Mr. Burton asked for special consideration in sentencing, “which applies when the defendant suffers from an impaired capacity to appreciate the wrongfulness of his conduct or to conform his conduct to lawful requirements” (Ref. 57, p 14). He was sentenced to about 10 years, largely for firearms offenses. The trial judge’s frustration over sentencing guidelines was palpable: “I’m confident I don’t have any reasonable basis that’s been offered to mitigate below the standard range. I just don’t have that in front of me” (Ref. 76, p 15). Mr. Burton appealed the sentence. The appellate court disagreed with the trial judge over discretion and remanded Mr. Burton’s case for resentencing; there is no published opinion on that aspect of the case. The appellate decision admitted regret over its perceived impotence, suggesting only a reduction in penalty.

## Discussion

Individuals experiencing psychosis, suicidal depression, or unbearable life crises may turn to desperate acts such as SbC. There is momentum within communities for enhanced recognition and nonlethal interventions, for example, police training and embedded mental health professionals in crisis

intervention teams (CITs). The deployment of CITs may be a practicable solution to these SbC situations.<sup>58</sup> The CIT model employs law enforcement and mental health professionals working in tandem to respond to behavioral emergencies. Assuming that more SbC attempters are acknowledged as such and that de-escalation prevails over lethal force, there will be a larger population of survivors needing forensic services. The question for defense attorneys and expert witnesses is how to situate the individual defendant’s narrative within available statutes and legal traditions. The answer is that it is a poor fit, borne out in this small sampling.

## Limitations on Data Interpretation

This review has been limited to appellate cases and cannot represent the degree to which criminal defendants attempt to use evidence of SbC in their defense. The cases used and discussed are included for educational purposes, not to analyze the full range of trials that are concluded and not appealed. Thus, it was not determined whether SbC was actually mitigating or aggravating at the trial level. It is likely, in the author’s view, that instances in which police officers are killed or injured would be prosecuted aggressively, not triaged either to standard psychiatric defenses or to problem-solving formats. If true, it would explain the rarity of appellate cases requiring participation by expert witnesses at trial. Another limitation in case-finding is the invisibility of veterans’ and problem-solving proceedings when searching appellate decisions.

## Admissibility of SbC Evidence

A medical determination by an expert witness of SbC behavior has no direct bearing on the disposition of defendants. It only opens a door to a narrative, but that narrative must have a context and a legal basis. If the charges are serious, it would typically exclude defendants from problem-solving courts and therefore from TJ. That is, in the cases described, standard psychiatric testimony, for insanity or diminished capacity defenses, may clash with legal procedures, as in *Israel*, *Churchich*, and *Park*. As in Mr. Burton’s case, legislative support for alternate adjudication may also be unavailable. Meanwhile, problem-solving venues have extended to domestic violence and sex offenses,<sup>59</sup> suggesting the possibility of the same for SbC. And, as seen in Mr. Eifert’s case, veterans’ courts may be less constrained in case selection. It is the author’s view that citizens with mental illness should receive the benefit of a full hearing on culpability. Even so, courts

**Table 1** Options for Defendants with Mental Illness Surviving Suicide by Cop

Option	Likely outcome and barriers	Case citations, references
Insanity	Most states have an insanity defense with the standard of proof a cognitive test, whether the defendant knew the act was wrong. Barrier to success is that the act of provoking an officer was done knowing it is wrong, thereby increasing chance of provoked homicide. It is unlikely to succeed unless defendant is delusional regarding the nature of the act. There may be resistance from victims and their families.	<i>R. v. Hadfield</i> , <sup>45</sup> <i>Mr. P.</i> , <sup>26</sup> <i>U.S. v. Israel</i> , <sup>49–51</sup>
Diminished capacity	Most jurisdictions (not federal) permit evidence of mental illness to negate a high element of intent (e.g., knowing and purposeful). The act of intentionally provoking police into killing undercuts this argument. Additionally, the argument generally is inapplicable to general intent offenses. Thus, a <i>mens rea</i> approach is unlikely to succeed.	<i>Nebraska v. Churchich</i> , <sup>52,53</sup> <i>California v. Park</i> , <sup>54</sup> <i>Washington v. Montgomery</i> <sup>55</sup>
Mitigation	Evidence of mental illness as a dynamic in provoking police is often useful at sentencing. It is best employed when the defendant pleads guilty.	<i>Washington v. Burton</i> <sup>57</sup>
Diversion (veterans)	Problem-solving courts for veterans may employ diversion programs for a wider variety of crimes. Defendants with service-connected trauma-related disorders are best suited for this tactic.	Case of Sgt. Brad Eifert <sup>56</sup>
Diversion (civilians)	Problem-solving courts in nonveteran contexts often exclude major crimes and those involving firearms or mandatory sentences. Suitable candidates usually have serious mental illness or substance use and are willing to enter a guilty plea.	USDOJ Bureau of Justice Assistance, America's Law Enforcement and Mental Health Project. 42 US Code 3711 (2000) <sup>4,5</sup>
Introducing reasonable doubt (failure of proof)	Defendants can argue that the purpose of threatening police was to cause their own death. When formal defenses of insanity and diminished capacity are not invoked, it may be possible to proffer evidence on the existence of mental illness via Federal Rule of Evidence 401 or similar state statute.	FRE 401–403 <sup>60</sup> (theoretical)
Therapeutic jurisprudence	Ideally, the court would be receptive to incorporating mental illness into a formulation of a defendant's provocative behavior. Potential outcomes can include diversion to the mental health system and reduction in the charges to accommodate problem-solving court parameters.	Using the methodology of appellate decisions, there were no cases reported. Successful applications of TJ could exist in isolated cases or within mental health court environments.

will weigh mitigating evidence against the severity of harm done to police officers or other citizens during the SbC episode. This analysis can be accomplished in mental health or veterans' courts as alternatives to standard mitigation formats. Table 1 summarizes potential adjudication approaches.

### **Insanity and Diminished Capacity**

A psychotic SbC survivor is unlikely to be found not guilty by reason of insanity. Aside from the jurisdictions with a volitional test,<sup>33</sup> the standard for insanity rests on a suspension of knowing one's act is wrong. The SbC attempt itself telegraphs knowledge of wrongfulness in provoking a police response.

The *Israel* cases illustrate several key points: the difficulty in mounting an insanity or *mens rea* defense in the face of a seemingly organized and goal-directed sequence; the persuasive effect of behavioral indicia on culpability (wearing a disguise, eluding, and trying to steal a car); the weak effect of

claiming flight from an evil alter ego; and the adverse effect of claiming the goal of SbC, which itself requires intent. The *Churchich* and *Montgomery* cases also illustrate the incongruence of making a *mens rea* claim against a complex sequence of manifestly intentional behaviors. The defendants' documented mental illness was immaterial.

Criminal law recognizes that mental illness may lessen the culpability and the severity of punishment for lawbreakers. An individual challenging *mens rea* may be found responsible for a lesser crime (partial responsibility).<sup>61</sup> Complicating matters, the *mens rea* approach is often framed as the defendant's capacity to form intent, rather than whether intent was in fact formed at the time of the charged crimes.<sup>61</sup> SbC survivors face courts that limit psychiatric evidence if a defendant is charged with a general intent crime. Accordingly, mental state becomes nullified legally, even though relevant to the defendant's narrative. This was illustrated in Mr. Park's case,<sup>54</sup> where he



was prohibited from introducing evidence of his mental illness. The court treated criminal intent in the standard way, indifferent to the mental state of the defendant at the time in question. Mr. Park wanted the jury to appreciate his SbC mentality and his defense counsel knew in advance that a *mens rea* approach could not be employed against general intent charges. Although he testified that his intent was other than criminal, there was no testimony on SbC whereby the trial judge could have instructed jurors to regard it alongside other evidence the government relied on to prove its case beyond a reasonable doubt.

A defendant such as Mr. Burton retains the option to argue, without expert testimony, that the intent expressed was not criminal; rather, a product of suicidality, thus introducing reasonable doubt as to intent (failure of proof, at least on the most serious charges). An alternative pathway, in the author's view, could include expert testimony on SbC, which is relevant to state of mind without invoking a formal mental health defense. Using Federal Rule of Evidence 401<sup>60</sup> or similar state law could provide the jury with information needed to understand Mr. Park's dynamics. The relevance test under Rule 401 is whether the proposed evidence "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action" (Ref. 60, p 9). Irrelevant evidence is barred under Rule 402 and confusing or prejudicial evidence is barred under Rule 403 (Ref. 60, p 9). The review of appellate decisions revealed one instance where trial counsel unsuccessfully argued reasonable doubt by suggesting an SbC dynamic; the conviction was upheld.<sup>62</sup>

### **Pretrial Diversion and Specialized Criminal Courts**

In typical diversion models, eligible defendants apply to the prosecutor's office for admission into pretrial programs.<sup>63</sup> Eligibility may vary with prior criminal history, offense severity, substance use and mental health history, victim approval, restitution amount imposed, and arresting officer approval. Upon acceptance, the defendant enters into an agreement with the prosecutor or court to abide by terms such as completing a rehabilitative or therapeutic program or performing community service. If all terms are followed during the diversionary period, charges typically are dismissed. Whether program eligibility extends to those charged with felonies, as is often the case in SbC survivors, varies among jurisdictions.<sup>9,64</sup>

It appears that veterans' court may be a viable model for alternate disposition of criminal matters.

In Mr. Eifert's case, being an ex-soldier conferred advantages, as it did for Mr. Hadfield. Without this diversion, he likely would have been at the mercy of standard prosecution and its consequences. Mr. Eifert received a TJ approach, which included cooperation from prosecution and police stakeholders. Civilians facing serious charges from SbC incidents may be disadvantaged, since civilian courts would be unlikely to employ TJ.<sup>65</sup> There are other concerns, for example, in a civilian problem-solving court: the defendant may waive procedural rights and be subject to continued stigma of mental illness.<sup>6</sup> By using TJ, the citizen could be removed from criminal-court supervision and placed within a mental health domain. It has been observed recently in this journal that problem-solving courts, by retaining authority within the prison-industrial complex,<sup>66,67</sup> may fall short of achieving the goal of restoring authority to the mental health system via civil commitment.<sup>68</sup> There is work to be done to harmonize the goals of TJ with fair adjudication of all defendants.

Police-citizen interactions, complicated by mental illness and ambiguous circumstances, can lead to polarized views wherein officers and citizens can both be stigmatized. Alternative dispositions such as drug courts, mental health courts, veterans' courts, and reentry courts have proliferated.<sup>6,69</sup> McLeod<sup>69</sup> categorized the reformist models in specialized criminal courts into TJ, judicial monitoring, order maintenance, and decarceration. The TJ model of reform may be the most comprehensive in relation to SbC, avoiding singular approaches to punishment and crime prevention.<sup>70</sup>

The application of TJ is an attempt to bridge legal and psychosocial problems.<sup>71</sup> TJ is at once a philosophy, an attitude, a practice, and a lens through which to perceive justice and effect it without harming vulnerable individuals. Its application permits expression of views while the parties remain mindful of each other's humanity. While retaining adherence to due process concerns, the practice of TJ involves participation of judges and counsel, admission of evidence, self-determination, human rights, and other components of criminal proceedings.<sup>72,73</sup> In the author's view, it is an appropriate process in SbC cases. Continued surveillance of case law will be required to substantiate this claim.

### **Conclusion**

The frontier of the adjudication of SbC survivors is to establish venues for full expression of the defendant's behavior and the officers' response. It would be

wrong to ignore the impact of SbC incidents on officers as well. Instead, showing sympathy for suicidal citizens must be balanced with respect for challenges faced by responders. Although TJ is recommended, it is unlikely that attempted or completed homicide charges can be commuted in the current legal climate. Similarly, transferring adjudication from courts to mental health authorities would require a sliding scale of offense severity. The present study is limited by the lack of case law examples specific to SbC.

America is now well into what Pinals and Felthous<sup>74</sup> have called “second-generation” scholarship on justice reform for persons with mental illness. Sentencing hearings are not the ideal intercept point for citizens with mental illness. In the CIT model, where mental health professionals respond to crises alongside law enforcement, there is more opportunity for triage and decriminalization; evidence of these effects is accumulating.<sup>75</sup> There is a potential role for psychiatric expert witnesses in explaining suicidal behavior to courts or mental health systems that will listen, and in fashioning alternatives to standard punishment models for survivors of SbC. Forensic professionals can establish leadership by modeling standards for “diversion evaluations” with embedded risk assessments.<sup>76</sup> Such evaluations would facilitate use of TJ and ease transitions between criminal and civil oversight, thus lessening the burden of defendants pleading guilty to crimes as a threshold to diversion.<sup>76</sup>

### Acknowledgments

The author thanks Yi Wang, MD, for her input on an early draft and Michael L. Perlin, Esq. for assistance with legal research and review of a draft of this article.

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