

## Mental Health Evidence in Death Penalty Mitigation

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### **Strategic Avoidance of Full Mental Health History Not Seen as Ineffective Assistance of Counsel**

In *United States v. Mitchell*, 790 F.3d 881 (9th Cir. 2015), the Ninth Circuit Court of Appeals addressed whether trial counsel conducted a reasonable investigation into the defendant's mental health, upbringing, and drug abuse history and examined counsel's strategic decisions on what to present as evidence in a capital trial.

#### *Facts of the Case*

Lezmond C. Mitchell was convicted in federal court on two counts of first-degree murder, carjacking resulting in death, and multiple counts of robbery. The crimes were committed on a Navajo reservation in Arizona. Although the Navajo Nation opposes the death penalty and has opted out of capital punishment for crimes committed on Navajo territory, the charge of carjacking resulting in death falls under federal jurisdiction based on the Major Crimes Act (18 U.S.C. § 1153 (2000)) and is not subject to tribal jurisdiction. Mr. Mitchell, then 20 years old, acted with an accomplice, 16-year-old Johnny Orsinger, in the carjacking on October 28, 2001. In the course of the crime, the defendants killed a 63-year-old woman and her 9-year-old granddaughter. The woman was stabbed 33 times, and the girl had her throat slit twice and had large rocks dropped on her head. The two defendants later returned to hide the evidence and dismember and hide the bodies. Three days later, Mr. Mitchell and two other accomplices used the stolen vehicle to rob the Red Rock Trading Post (also on Navajo land) at gunpoint.

Mr. Mitchell was sentenced to life imprisonment for the two murder convictions, long consecutive prison sentences for the robbery and related counts, and death for carjacking resulting in death. He brought a motion to appeal alleging that he received ineffective assistance from his defense lawyers. The primary claim raised for the guilt phase was that counsel failed to assert an intoxication defense. The primary points raised for the penalty phase were inadequate investigation of his mental health, history of substance abuse, and troubled upbringing and the choice not to present evidence of these factors.

#### *Ruling and Reasoning*

The appellate panel held in a two-to-one decision that counsel was not negligent in investigating whether Mr. Mitchell was intoxicated at the time of the offense. The majority pointed out that he denied having been intoxicated. Defense counsel had searched for evidence to contradict the allegation at the scene of the crime, but had found nothing. Furthermore, Mr. Mitchell led authorities to the crime scene after apprehension, demonstrating that he was not so intoxicated that he lacked the ability to recall the events. As for the penalty phase, the majority ruled that there was a constitutionally adequate investigation of possible mitigation. The defense lawyers had Mr. Mitchell examined by a psychologist, Dr. Susan Parrish, early in the case, and by a team of doctors led by psychiatrist Dr. Barry Morenz at the University of Arizona Medical School. He was also examined by a neuropsychologist, Dr. Anne Henning, and a neurologist, Dr. Ronnie Bergen. Mr. Mitchell had undergone brain imaging, blood work, and an electroencephalogram. Both Dr. Parrish and Dr. Morenz diagnosed antisocial personality disorder. Dr. Morenz also included depressive disorder not otherwise specified, cognitive disorder not otherwise specified, polysubstance abuse, history of head injuries, and a "mild deficit" in executive functioning likely related to emotional factors, not brain trauma. Vera Ockenfels, an experienced mitigation specialist, was hired by the defense team and produced a 42-page, single spaced "social history" of Mr. Mitchell's life.

According to the holding, defense counsel made a strategic decision to forego presenting evidence of Mr. Mitchell's drug use, mental health, and physical abuse, because counsel did not want to expose damaging evidence or portray him as a sociopath. Coun-

sel did not want to call Dr. Morenz to testify because it would require submitting his report to the prosecution, which could have exposed damaging facts that would have a “negative and adverse effect” on the jury. The document included Mr. Mitchell’s history of cruelty to animals, gang involvement, violence, and facts regarding the crime that he revealed as motives for the killings.

Instead, the defense chose to present Mr. Mitchell’s redeeming qualities that made his life worthy of saving. Counsel presented evidence that Mr. Mitchell felt unloved and rejected by his mother and his struggle with his mixed Navajo and Anglo heritage. Counsel presented his positive qualities of being a good student, a member of the student counsel, a speaker at his high school graduation, and a good athlete. Counsel called nine witnesses to support these assertions. They argued that if Mr. Mitchell’s life were spared and he were sentenced to life without parole, he would adapt to prison and could have a positive impact on other inmates because of his history of responding well to structure, despite a lack of family support.

#### *Dissent*

Judge Reinhardt dissented. He opined that counsel’s “good guy” defense was unreasonable in light of the horrific nature of the crime and that Mr. Mitchell was deprived of his Sixth Amendment right to effective counsel. The jury was never given the opportunity to understand what made Mr. Mitchell the person he became before sentencing him to death.

The dissent pointed out that the Navajo nation values life and views rehabilitation as a means of addressing criminal behavior, as opposed to sentencing someone to death, since most major crimes committed on the reservation tend to be precipitated by the abuse of alcohol. Ms. Ockenfels, counsel’s experienced mitigation specialist, informed counsel that Mr. Mitchell began using drugs at age 11 and recommended further investigation into his addiction and that a forensic psychologist be hired to explain how Mr. Mitchell’s upbringing caused him to turn to drugs and alcohol, but counsel chose not to pursue either of these suggestions. Counsel could have attributed Mr. Mitchell’s drug and alcohol addiction, particularly considering its chronicity, to his self-medicating the trauma he endured and the mental illnesses that were later diagnosed. Further investigation would have revealed that Mr. Mitchell’s poly-

substance and alcohol use drastically escalated in the months preceding the crimes, leading, for example, to his staying up for three nights in a row. It would have also exposed his family history of alcoholism.

The defense focused on presenting Mr. Mitchell as a good person, instead of focusing on his drug and alcohol addiction, harsh upbringing, and the resulting emotional and mental conditions that followed. Further investigation into Mr. Mitchell’s upbringing would have revealed that his mother and grandmother were physically abusive to him. Mr. Mitchell’s mother and grandmother were also well aware that his grandfather had molested little girls. Despite this knowledge, they sent Mr. Mitchell to live with him for extended periods. His grandparents and his uncle also told him that he was a product of rape and that his grandfather was his real father. Mr. Mitchell’s mother expressed uncertainty as to whether Mr. Mitchell himself may have been molested by his grandfather. The dissent pointed out that American Bar Association guidelines require an extensive investigation into personal and family history in death penalty cases, but this history was discovered only after his conviction and revealed that his home life was far more violent and dysfunctional than had been reported.

#### *Discussion*

In this ruling, the Ninth Circuit Court of Appeals held that the exploration of potential mitigating factors by counsel was constitutionally adequate. The majority noted that the defense used several experts to conduct evaluations of the defendant and investigated possible contributing organic causes of mental defect.

The dissent pointed out how crucial it is that the jury in a capital case understand what led up to the crime and that all factors be addressed. The dissent argued that a more reasonable strategy would have presented the traumas that Mr. Mitchell endured and painted a picture to the jury that described his mental state preceding the crime. Presenting Mr. Mitchell as a victim of abuse and neglect who made subsequent poor decisions attributable to a lack of positive role modeling could have swayed at least one juror, which would have been sufficient for him to avoid the death sentence.

Defense counsel has discretion in terms of the defense strategy it pursues, including whether to call witnesses who may reveal damaging information

when testifying. According to the majority, choosing not to take that risk did not rise to the level of ineffective assistance of counsel in this case.

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## Insanity Defense and Credibility of the Defendant

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### United States Court of Appeals Affirms the District Court's Decision to Deny Appointment of Additional Experts to Assist in Development of an Insanity Defense

In *United States v. Nelson*, 609 Fed. Appx. 559 (11th Cir. 2015), the Eleventh Circuit Court of Appeals reviewed evidence on appeal to determine whether a defendant's Fourteenth Amendment due process right to a fair trial was violated by the district court's decision to deny his motion for appointment of additional experts to assist in development of an insanity defense for a conviction of armed bank robbery and using, carting, and brandishing a firearm during a crime of violence.

#### Facts of the Case

Andrew Nelson was indicted by a grand jury for one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) (2012), and one count of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(C) (1) (A)(ii) (2012). Mr. Nelson submitted an affidavit of indigency and an attorney was appointed to represent him.

Mr. Nelson pleaded not guilty and informed the court of his intention to pursue an insanity defense. His motion for a psychiatric or psychological evaluation was granted, and a forensic psychologist, Dr. Kari Schlessinger, evaluated him for nine hours and submitted a lengthy report on competency and criminal responsibility. Findings from Dr. Tin Chin who conducted a 45-minute routine psychiatric evaluation of Mr. Nelson were also submitted.

In Dr. Schlessinger's report, Mr. Nelson's diagnosis was post-traumatic stress disorder (PTSD) based on his reported symptoms from a past sexual assault. Further diagnosis included a personality disorder with schizoid and narcissistic traits. The report noted that Mr. Nelson may have exaggerated his symptoms based on psychological tests and that he embellished his job skills, had an inflated sense of self-importance, lacked empathy, and came off as haughty during the interviews. Dr. Schlessinger concluded that Mr. Nelson was competent to stand trial and that, although he had PTSD, he was not impaired enough to be unable to appreciate the wrongfulness of his conduct and thus was sane at the time of his offenses. Dr. Chin diagnosed bipolar disorder and prescribed risperidone. He further concluded that Mr. Nelson's behavior was due to an episode of impulsivity that had followed a period of dysphoric mood.

Subsequent to Dr. Schlessinger's submitting her reports, Mr. Nelson moved pursuant to 18 U.S.C. § 3006A(e) for appointment of independent psychiatric or psychological experts and additional legal counsel, to assist in the development and presentation of an insanity defense.

After the pretrial § 3006A(e) hearings, the district court denied Mr. Nelson's motion for appointment of an independent mental health expert, investigator, and additional counsel because he had not shown that these services were necessary for adequate representation. The court found that Mr. Nelson's insanity defense was "implausible" as evidenced by Dr. Schlessinger's reports, inconsistencies in his VA records, recent financial expenditures that were not suggestive of depression and PTSD, and inconsistencies in his testimony (in particular, his alleged proficiency in Arabic and Mandarin, which was tested by court-appointed language experts as a means of determining his credibility).

The first trial ended in a mistrial due to the jury's inability to reach a verdict. During a second jury trial, Dr. Chin testified that Mr. Nelson had manic-depressive disorder and that Mr. Nelson had committed the bank robbery during a manic bipolar episode. Dr. Schlessinger was called to testify as a rebuttal witness. Mr. Nelson was found guilty on all counts of the indictment. He appealed, stating that the court had wrongfully denied his § 3006A9(e) motion.