

tive evidence” that the onset of EED resulted from a “triggering event.” At trial, Mr. Baze had to point to a “triggering event,” prompting a reaction that was so “enraged,” “inflamed,” or “disturbed” as to be uncontrollable, before he could present a defense under that theory. Mr. Baze may have been distraught at the ongoing feud with his wife’s family, but he could not point to a dramatic, isolated event in that conflict that could have caused him to lose temporary control of his sense of right and wrong, thereby qualifying him for mitigation under an EED theory. Therefore, limiting his ability to present evidence on this issue neither undermined the fundamental fairness of Mr. Baze’s trial nor deprived him of any “weighty interest,” and accordingly he could not establish any grounds for *habeas* relief on this question.

*Dissent*

The dissent argued that the Kentucky EED law measures whether the source of the defendant’s alleged EED “is reasonable under the circumstances as he believed them to be,” as held in *McClellan v. Commonwealth*, 715 S.W.2d (Ky. 1986). The dissent argued that although “we (or most people, for that matter) would have perceived certain events differently does not mean that Baze’s defense fails as a matter of law.” Taking that in consideration, Mr. Baze would qualify for an EED defense, and denying it would constitute a violation of his constitutional right to present a complete defense.

*Discussion*

An “extreme emotional disturbance” is a “*temporary* state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from the impelling force of the EED rather than from evil or malicious purposes.” Evidence of mere anger or hurt is not sufficient. To qualify for an EED instruction under Kentucky law, the defendant must show “some definitive, non-speculative evidence” that the onset of the EED was caused by a “triggering event” that must have a “sudden” onset that may extend over a length of time, and its effects must be “uninterrupted.”

Although the dissent argued that in an EED defense, it is the jury’s role to measure the defendant’s emotions as the defendant himself reasonably experienced them, the Constitution leaves judges “wide latitude” to exclude evidence that is only “marginally relevant,” and states have broad authority to promulgate rules that exclude evidence so long as they are

not “arbitrary” or “disproportionate to the purposes they are designed to serve.” Forensic examiners would be advised to examine the standard for extreme emotional disturbance for the jurisdictions in which they are working to provide relevant opinions that will assist triers-of-fact.

Sheila Wendler, MD  
Assistant Professor of Psychiatry  
John A. Burns School of Medicine  
University of Hawaii at Manoa  
Honolulu, HI

## Extreme Mental and Emotional Disturbance

### ***Failure to Call a Defense Expert Regarding a Mitigating Factor in a Capital Case Is Ruled Ineffective Assistance of Counsel***

In *State v. Chew*, 844 A.2d 487 (N.J. 2002), the New Jersey Supreme Court ruled that, in the sentencing phase of a capital case, defense counsel’s failure to conduct an adequate investigation before deciding not to call a defense psychologist to testify about mitigating factors, based on the belief that such testimony would be more harmful than helpful, constituted ineffective assistance of counsel. The court reversed the trial court’s denial of the petition for postconviction relief (PCR) and remanded the case for a new penalty-phase trial.

*Facts of the Case*

On January 13, 1993, police found the body of Theresa Bowman in the car of John Chew, which was parked in the rear of the Woodbridge Hilton Hotel parking lot. Ms. Bowman’s throat had been slashed; she was determined to have been dead for about 10 hours; and on her body was found a piece of paper with the name of “Joe Martin” and a phone number. Police interviewed a chef at the Hilton, Alejandro Mecalco, who recalled seeing a man who looked like “Kenny Rogers” struggling in the car on the night of January 12, 1993. Police met Mr. Chew, who looked nothing like Kenny Rogers, at his home, where he gave a statement. Mr. Chew said he had last seen Ms. Bowman on the evening of January 12, 1993, when they drove together to the home of his sister, Crystal Charette, and that Bowman had later departed alone

while he remained with his sister and her roommate, Helen Borden, until they drove him home two and a half hours later. Ms. Charette and Ms. Borden corroborated Mr. Chew's statement.

The next day, January 14, a detective visited Mr. Chew's home to request an interview, obtain blood samples, and search his car and house. Mr. Chew waived his rights in writing and agreed to the interview and search. He revealed that he had lived with Ms. Bowman from 1989 until her death. The police then went to the home of Ms. Charette and Ms. Borden, who gave taped statements exculpating the defendant.

On January 15, however, police received telephone tips implicating Mr. Chew. First, his life insurance agent reported that Mr. Chew had shown up at the agent's house on New Year's Eve (13 days before Ms. Bowman's death) to pay the December premium on a joint life insurance policy with Ms. Bowman. Mr. Chew paid in cash, saying that his check had bounced. Under the terms of the insurance, Mr. Chew was the beneficiary of the \$250,000 policy if Bowman died first. Mr. Chew told the agent that he did not want the policy to lapse.

Second, an associate of Mr. Chew's called to report that, on several occasions in 1991, Mr. Chew had offered him \$10,000 to kill Ms. Bowman so that he could collect the insurance proceeds. Third, Mr. Chew's son called police and reported Mr. Chew's plan to kill Ms. Bowman for the insurance proceeds. Ms. Bowman's paramour also reported to police that Ms. Bowman was planning to leave the defendant to move in with him on January 13, 1993, and that Mr. Chew would be receiving a settlement check on that date, of which she would receive \$10,000.

Police arrested Mr. Chew on January 23, 1993. Other investigators interviewed Ms. Charette, who now changed her story. She said that on the night of the murder, Mr. Chew had called and told her to meet him at the Hilton with a bag, bleach, and change of clothes. Mr. Chew had explained that Ms. Bowman wanted to remain there with friends, but that he wanted to return home. Ms. Charette and Ms. Borden arrived at the Hilton at 9:20 p.m. and approached Mr. Chew's car. Mr. Chew exited his car with blood on his clothing, removed and placed his outer clothes in a bag, and instructed Ms. Borden to pour bleach on the bag. He dumped the bag in a dumpster, and Ms. Charette drove him home. Later that night, Mr. Chew coached Ms. Charette on what

to tell police, and he threatened her. Ms. Borden confirmed Ms. Charette's account. Ms. Borden added that she thought she had heard a scream shortly before Mr. Chew exited the car.

When a detective confronted Mr. Chew with the statements of Ms. Charette and Ms. Borden, he agreed to give a taped statement in which he admitted being at the scene of the crime and having Ms. Charette and Ms. Borden drive him home. Later, Mr. Chew gave another statement with more details. He stated that he had accompanied Ms. Bowman to the Hilton to conduct a drug deal with a man named Joe. Mr. Chew stated that when he returned to the car, he found Ms. Bowman dead.

The police charged Mr. Chew with murder at around 4:00 p.m. He complained of back pain and received an unspecified medication. About two hours later he asked to speak with the detective. Mr. Chew recounted Ms. Bowman's drug deal with Joe. He said that after the transaction he entered the car and began to quarrel with Bowman, who told him they had "gotten ripped off" in the drug deal. Mr. Chew then stated that, after Bowman told him about her affair with her paramour, he "went off" on her.

At that point, the detective called in another detective. Additional *Miranda* warnings were administered, and Mr. Chew signed a waiver. He then repeated his prior statement about quarreling with Ms. Bowman after the failed drug deal. He claimed that Ms. Bowman had hit him a couple of times and scratched his face. He did not remember stabbing her. He then left his vehicle, removed and disposed of his bloodied clothes, and entered Ms. Charette's car. He claimed that he asked her to pick him up because he had planned to give Ms. Bowman part of the \$25,000 he expected to make from the drug deal, and then to separate from her. He acknowledged begging Ms. Charette and Ms. Borden not to tell the police what had happened, but restated that he did not remember stabbing Ms. Bowman.

Mr. Chew was tried and found guilty of purposeful or knowing murder by his own conduct and possession of a weapon for an unlawful purpose. At the penalty phase of trial, the jury found one aggravating factor: that Mr. Chew had murdered Ms. Bowman "in expectation of the receipt of pecuniary value." The jury further found that this one factor outweighed the 10 mitigating factors they had identified. The jury returned a death penalty verdict, and Mr. Chew was sentenced to death.

Mr. Chew appealed directly to the New Jersey Supreme Court, which affirmed his conviction and sentence, while preserving his request for a proportionality review. In that review, the court determined Mr. Chew had failed to show that his sentence was disproportionate. The United States Supreme Court denied his petition for *certiorari*.

Mr. Chew filed a petition for PCR in Superior Court, alleging he had been denied the effective assistance of counsel at both the guilt and penalty phases of his trial. He argued that trial counsel in the guilt phase were deficient for pursuing a denial defense instead of a passion/provocation manslaughter defense and for failing to request a general accomplice charge. In the penalty phase he asserted that trial counsel was deficient for failing to (1) use a defense psychologist as an expert in support of the mitigating factor that Mr. Chew was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution, (2) present evidence in support of this mitigating factor, (3) present evidence that he had no history of violent crimes, and (4) request a limiting instruction.

The PCR court concluded that while there may have been some deficiencies, counsel's decision to pursue a defense of denial rather than a defense of passion/provocation manslaughter was a strategic one. Second, the PCR court found no deficiency in failing to request a general accomplice charge. Third, the PCR court stated that whatever positive effects might have resulted from the psychologist's testifying as to the mitigating factor, the negative features of such testimony would have nullified these effects. Mr. Chew appealed the trial court's decision.

#### *Ruling and Reasoning*

The court began by setting forth the standard for evaluating ineffective assistance of counsel claims. As enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by New Jersey in *State v. Fritz*, 519 A.2d 336 (N.J. 1987), the test consists of two prongs. First, the reviewing court must determine whether defense counsel's performance fell below an objective standard of reasonableness, as judged on the facts of the particular case viewed as of the time of the attorney's conduct (the "deficiency prong"). Second, the court must ascertain whether there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different (the "prejudice prong"). The Court stated that in capital cases the deficiency prong applies to both phases, so that capital defendants are guaranteed competent counsel. The prejudice prong analysis applies in the guilt phase of a capital case, and a less demanding prejudice prong standard is used in the penalty phase. The capital defendant must show a reasonable probability that, but for the errors, the jury's penalty phase deliberations would have been affected substantially.

The court further stated that assessments of the reasonableness of counsel's assistance must contain a heavy measure of deference to counsel's judgments and that decisions to limit an investigation supported by reasonable professional judgments should not be considered ineffective assistance of counsel. However, strategy decisions made after less than complete investigation are subject to closer scrutiny. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes such investigations unnecessary, and a failure to do so will render a lawyer's performance deficient.

Mr. Chew argued that trial counsel's decision to pursue a denial defense was based on inadequate investigation and without consulting him. First, in investigating the case trial counsel had called the phone number found on the body of the deceased (Bowman) and found it to be disconnected. Trial counsel planned to use this evidence to support the defense theory that someone else murdered her. Second, trial counsel had planned to attack the admissibility of statements made to the police on January 23, 1993, based on Mr. Chew's assertion that he was taking medication. When blood test results came back negative for drugs and alcohol, counsel decided to argue that police wrongfully withheld Mr. Chew's medication. Defense counsel had failed to consult with another expert, to question the author of the blood test report, or to conduct an independent test of the defendant's blood. Mr. Chew asserted that because of the failure to investigate these two pieces of evidence, he was prejudiced at both the guilt and penalty phases of his trial, as there existed a reasonable probability that a passion/provocation manslaughter defense would have achieved a different result. He further argued that trial counsel's failure to undertake an investigation required the reviewing court to scrutinize counsel's conduct closely, which should result in a finding of ineffective assistance of counsel.

Next, Mr. Chew argued that trial counsel should have pursued a passion/provocation manslaughter defense because the jury might have believed that he and Ms. Bowman had argued after getting “ripped off” in the drug deal, and that he had reacted violently because she told him she was leaving to live with another man. In such a case, he would have been convicted of manslaughter and would not have been eligible for the death sentence. Alternatively, the passion/provocation defense would have carried over into the sentencing phase and dovetailed with a mitigation presentation of Mr. Chew’s remorse.

The court suggested that both of the defenses—denial and passion/provocation—carried benefits and drawbacks. Mr. Chew’s confession and other evidence of premeditation undercut the denial defense, while the testimony of the independent witness could have exonerated him. The passion/provocation defense was consistent with statements Mr. Chew had made to police and might have carried over into the penalty phase with mitigating evidence of Mr. Chew’s remorse. However, it also might have been rejected by the jury in both the guilt and penalty phases in light of the prosecution’s extensive evidence of premeditation (e.g., Mr. Chew’s alleged solicitations to have Bowman killed and his statements to his son about killing Bowman to obtain the insurance proceeds). The court suggested defense counsel had to choose between two weak defenses, and that it would not second-guess counsel’s strategy as to which was better.

Mr. Chew argued that trial counsel’s failure to obtain an accomplice liability instruction at the guilt phase constituted ineffective assistance of counsel. The court reviewed the evidence presented at trial and found that it did not support accomplice liability. Although there was some evidence that Mr. Chew may have solicited someone else to kill Ms. Bowman, there was no evidence presented that any person agreed to help, or helped, Mr. Chew to kill her. Because there was no rational basis for an accomplice liability instruction, the court ruled that the failure to request the charge was not prejudicial to the defendant.

Mr. Chew argued that defense counsel’s failure to call psychologist Dr. Gerald Cooke as a witness prejudiced him, because it kept from the jury important mitigating evidence that Mr. Chew was “under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecu-

tion” (p. 504). Specifically, Mr. Chew argued that counsel failed to conduct an adequate investigation in making its decision not to call Dr. Cooke, who would have testified in support of this mitigating factor.

Dr. Cooke had been retained by defense counsel to assess the defendant for the presence of any mitigating psychological factors. The prosecution had also retained a mental health expert, Dr. Daniel Greenfield. During the process of investigation, defense counsel had learned from Mr. Chew’s sister, Ms. Charette, that they had had an incestuous relationship. Mr. Chew also had had numerous arrests and convictions as a juvenile, and there were allegations that as a child he had harmed animals and molested a young neighbor. Defense counsel believed that Dr. Greenfield had been told by Ms. Charette of the incestuous relationship. Accordingly, defense counsel testified at the PCR hearing that she did not call Dr. Cooke as a witness at the penalty phase because, first, she did not want Dr. Greenfield to examine Mr. Chew. She was sure that he would expose Mr. Chew’s antisocial and criminal behavior and diagnose him as a sociopath. Second, defense counsel feared Dr. Greenfield knew of the incestuous relationship and would reveal that and other damaging information to the jury. She feared the jury might become more upset with this kind of behavior and become more prone to request the death sentence.

The court ruled that counsel’s strategic decision not to call Dr. Cooke as an expert witness was not based on a thorough investigation of all the facts and a consideration of all plausible options, as the *Strickland* decision requires. First, counsel never investigated whether Dr. Greenfield was aware of Ms. Charette’s claim about the incestuous relationship. Counsel never interviewed Dr. Greenfield nor requested a copy of any report he might have prepared. Second, counsel never discussed information about the incestuous relationship with Dr. Cooke to see whether it would have changed his opinion. The court noted that, at the PCR hearing Dr. Cooke, stated that this information would have strengthened his conclusion regarding the presence of the mitigating factor, and that the information about the cruelty to animals and molestation of a young neighbor demonstrated an “even greater depth of pathology” (p. 506) than he had realized. Accordingly, the court concluded that counsel’s failure to investigate thoroughly robbed the defendant of the strategic choice

of any presumption of competence and constituted ineffective assistance of counsel in the penalty phase.

Finally, the court considered the prejudice prong, to examine whether there was a reasonable probability that the introduction of the omitted information would have altered the jury's penalty-phase deliberations in such a way that confidence in the outcome would be undermined. The court considered whether there was a reasonable probability that Dr. Cooke's testimony in support of the extreme mental or emotional disturbance mitigating factor would have substantially affected the jury's deliberations in the penalty phase. The court noted that Dr. Cooke's testimony would have a potential downside. However, Dr. Cooke was satisfied that the additional evidence of incest, animal abuse, and sexual abuse would have further supported his opinion regarding the mitigating factor. Based on this projected testimony, the court found that one or more jurors may have found a mitigating factor of extreme mental or emotional disturbance and that at least one juror may have concluded that the aggravating factor did not outweigh the mitigating factors, thus sparing the defendant from the death sentence.

#### Dissent

Justice Verniero, joined by Justice LaVecchia and Chief Justice Poritz, filed an opinion concurring in part and dissenting in part. The dissent agreed with the majority's opinion concerning the guilt phase of the capital trial, but disagreed with the court's finding of ineffective assistance of counsel in the penalty phase. The dissent emphasized the "considerable burden" (*State v. DiFrisco*, 804 A.2d 507 (N.J. 2002)) borne by the defendant in demonstrating entitlement to relief when claiming ineffective assistance of counsel. The dissent applied the two-prong test assessing for ineffective assistance of counsel to the case and found that defense counsel's decision not to call the psychologist to testify as to a mental or emotional-disturbance mitigating factor was "not so wide of the mark to rise to the level of constitutional ineffectiveness" (pp. 507–8). The dissent viewed the decision as a tactical one that was consistent with defendant's denial defense and avoided focus on the horrific manner of the killing.

Further, the dissent argued that the second prong of the test was not met: even if counsel's assistance was deficient, the errors did not substantially affect the jury's deliberations. The jury had concluded that 10 mitigating factors were outweighed by the one aggravating factor that defendant had killed his victim for pecuniary gain. There was no reason to think establishing an 11th mitigating factor would have made any difference. Moreover, had defense counsel established that factor, the state would have responded with powerful rebuttal evidence that would have been very damaging to the defense. Testimony about the defendant's psychiatric condition would have been rebutted with evidence that he was simply antisocial—evidence that would include his bad acts as a child (such as setting his grandmother's house on fire) and as an adult (such as his incestuous sexual relationship with his sister). In further support of its position, the dissent cited to previous cases rejecting ineffective-assistance claims on similar grounds.

#### Discussion

In this case, the New Jersey Supreme Court closely scrutinized the basis for defense counsel's strategic decision not to call a mental health expert to testify about a mitigating psychological factor. The court required counsel's conclusions regarding why such testimony would not be advisable to be based on adequately investigated information. Mere fears or possibilities were deemed insufficient in light of the importance of the issue in a capital case. The dissent objected to the majority's finding of ineffective assistance of counsel for "counsel's failure to call one additional witness for the purpose of establishing one additional mitigating factor" (p. 509). However, the outcome of this case suggests a potential reluctance to deny PCR in a death penalty case if there is any doubt and illustrates the importance of mental health testimony to establish mitigating factors in such cases.

Todd S. Elwyn, JD, MD  
 Fellow in Forensic Psychiatry  
 John A. Burns School of Medicine  
 University of Hawaii at Manoa  
 Honolulu, HI