

ill will neither help the rehabilitation process nor protect the public. Sentencing belongs to the criminal court, but commitment based on dangerousness from mental illness should remain a civil and psychiatric matter.

## Compulsory Psychiatric Testing

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### **Compulsory Psychiatric Testing Does Not Violate a Defendant's Rights Against Self-Incrimination When a Not Guilty Plea Is Entered Secondary to Posttraumatic Stress Disorder**

In *Mitchell v. State*, 192 P.3d 721 (Nev. 2008), the Nevada Supreme Court reviewed the appeal of a judgment of conviction in a bench trial for second-degree murder with the use of a deadly weapon. The appeal was based primarily on the argument that the district court violated the appellant's Fifth and Fourteenth Amendment rights against self-incrimination when it ordered him to undergo a compulsory psychiatric examination after he claimed that he justifiably fired in self-defense because of hyperarousal symptoms brought on by posttraumatic stress disorder (PTSD).

#### *Facts of the Case*

In 2005, the State of Nevada charged Donald Mitchell with second-degree murder with the use of a deadly weapon for discharging a firearm numerous times and killing Edward Charles at a pool party in Las Vegas on July 24 of that year. Shortly after his arrival at the pool party, Mr. Mitchell, who was intoxicated, became involved in a heated discussion with the victim. Mr. Mitchell left the party for a few minutes and returned with a pistol. Mr. Mitchell and Mr. Charles again exchanged words, and thereafter,

shots were fired. Mr. Mitchell repeatedly fired his pistol, and Mr. Charles was killed.

Before the trial commenced, the defense requested a psychiatric examination, and Mr. Mitchell was evaluated by Dr. Thomas Bittker and Dr. Louis Mortillaro. Both experts diagnosed posttraumatic stress disorder, including symptoms of hyperarousal. Mr. Mitchell pleaded not guilty, claiming that he fired in self-defense, as his hyperarousal symptoms caused him to overestimate the threat of attack and inhibited his ability to form the requisite *mens rea* to be guilty of murder. He waived his right to a jury trial, and the case proceeded as a bench trial.

The state asked the district court to order that Mr. Mitchell be examined by an independent psychiatric expert. Over defense objections, the district court granted the state's motion. After reviewing the results from two days of examination, independent expert Dr. David Schmidt concluded that Mr. Mitchell malingered during the psychiatric examination so that he would appear excessively pathological.

In 2005, the district court ruled that Mr. Mitchell murdered Mr. Charles with malice aforethought, did not shoot in self-defense, and thus was guilty of second-degree murder with the use of a deadly weapon. He was sentenced to life imprisonment with parole eligibility after 10 years for the second-degree murder conviction and received an equal and consecutive sentence for use of a deadly weapon. He appealed the case and asserted numerous procedural errors. Arguably, the most pertinent points were that the district court violated his Fifth and Fourteenth Amendment rights when it ordered him to undergo a compulsory psychiatric examination by an independent psychiatrist and, furthermore, allowed that expert to testify about the results of the examination at trial.

#### *Ruling and Reasoning*

The Nevada Supreme Court affirmed the ruling of the district court of second-degree murder with the use of a deadly weapon. The court concluded that because Mr. Mitchell placed his mental state directly at issue, the district court did not violate his Fifth Amendment rights when it ordered him to undergo an independent psychiatric examination to evaluate his claim that symptoms of PTSD led to his actions in the death of Mr. Charles. Further, the supreme court decided that the district court did not err in allowing the state to cross-examine the defense re-

garding the defendant's prior bad acts such as school violence, even though, according to *Nester v. State*, 334 P.2d 524, 526 (Nev. 1959), "proof of a distinct independent offense is inadmissible" during a criminal trial.

In its ruling, the supreme court cited another Nevada Supreme Court case, *Estes v. State*, 146 P.3d 1114 (Nev. 2006), in which the court ruled that the state may introduce the results of a court-ordered psychiatric evaluation as long as the evidence is used only to rebut a defendant's insanity claims and does not relate to his or her culpability for the charges. However, the court noted that it had yet to consider whether the district court may order a defendant to undergo a psychiatric examination when a defendant claims his or her actions were justifiable because of symptoms of posttraumatic stress disorder. In addition to rulings in its own jurisdiction, the court reached its conclusions in the current appeal by using the reasoning of courts that had ruled on the question of compulsory examinations in other contexts such as battered-spouse syndrome.

For example, in the battered-spouse case *State v. Manning*, 598 N.E.2d 25 (Ohio Ct. App. 1991), the Ohio Court of Appeals noted that a compelled psychiatric examination was proper when the defendant placed her mental state directly at issue. In another battered-spouse case, *State v. Hickson*, 630 So.2d 172 (Fla. 1993), the Florida Supreme Court concluded that if the defendant chose to introduce defense expert testimony about her state of mind, then she must also submit to a psychiatric evaluation by state experts.

Regarding the defendant's prior bad acts, the supreme court affirmed the district court's decision to allow the state to introduce them during cross-examination for several reasons. First, the information was contained in the evaluations that the defendant requested, not in the court-ordered evaluations. Second, the state's cross-examination regarding these acts related to information contained in the defendant's background file, rather than to conversations the defense experts had with the defendant. Third, Mr. Mitchell himself had introduced the evaluations in support of his defense. Finally, the supreme court, citing Nev. Rev. Stat. Ann. § 48.045(1)(a) (2005), ruled that "if a defendant offers evidence concerning his good character, then the state may offer evidence of his bad character" (*Mitchell*, p 728).

#### Discussion

The Fifth Amendment bars the government from introducing compelled statements into evidence at trial. However, in this case, the Nevada Supreme Court affirmed the ruling of the lower court and held that because the defendant placed his mental state directly at issue, his Fifth Amendment rights were not violated when the court ruled that he must undergo compulsory psychiatric testing after he pleaded not guilty due to hyperarousal symptoms of PTSD. This case was the first to examine whether a self-defense plea related to PTSD could result in compulsory psychiatric testing.

It makes sense that the court would order a psychiatric evaluation in response to Mr. Mitchell's PTSD defense. However, even though it may have appeared logical, the court had to support it with legal precedent. The court utilized precedent set in other cases in which *mens rea* was at issue, such as battered-spouse syndrome self-defense and insanity pleas. While similar, it could easily be argued that PTSD is quite different from battered-spouse syndrome, which focuses on what has been done to the victim over time and is often related to the charges that are brought against the victim. In contrast, PTSD may focus more on psychiatric changes brought on by another incident that may not have any relation at all to the offense at hand. In this case, the court was forced to make a leap of judgment, and it decided that the two self-defense pleas were similar enough that they should be treated as such in regard to compulsory psychiatric testing. This is an issue with which courts will be faced as more pleas related to self-defense due to PTSD are brought forth.

The ruling that the court can order psychiatric testing when a defendant claims that he acted reasonably in self-defense due to PTSD may open the door for others entering self-defense pleas or otherwise citing mitigating factors to be subject to such court-ordered evaluations. In other words, might prosecutors request that judges order psychiatric examinations when defendants claim that they overreacted to a situation based on personal beliefs, racial or ethnic backgrounds, or mental conditions such as depression or intoxication?

This case raises another concern that is important for forensic psychiatry, regarding how material obtained during the process of evaluating a defendant can be introduced at trial. In *Estes* (p 1121), the Nevada Supreme Court determined that "a defendant is

generally entitled to protection from admission of un-Mirandized incriminating statements made to health care professionals in the context of a court-ordered evaluation or examination.” In Mr. Mitchell’s case, the court did not deny that he was entitled to protection from introduction of un-Mirandized statements made during his independent psychiatric evaluation; however, this protection was not extended to material informing defense psychiatric evaluations. Further, the state’s expert was permitted to testify about evaluation results suggesting that Mr. Mitchell was malingering his PTSD symptoms, since these results were introduced to rebut the defendant’s PTSD defense. This ruling highlights the need for experts to be aware of the background information that they put in their reports and how such information may be used during trial.

This case called on the court to contemplate how pleas of not guilty due to PTSD will be handled within the legal system in the future. To our knowledge, Nevada is the first state to deal with such a plea, and the court decided that PTSD should be treated in a manner similar to not guilty defenses based on other mental conditions such as insanity and battered-spouse syndrome. This case may have future legal and social implications, as an increasing number of combat veterans return home from Operations Iraqi Freedom and Enduring Freedom. It will be interesting to see how other courts resolve this issue and whether they agree with the Nevada Supreme Court’s ruling that not guilty pleas that claim PTSD symptomatology are subject to the same psychiatric testing requirements as other mental disorders.

## Mute but Competent?

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### Mutism Does Not Preclude a Finding of Competent to Stand Trial or Trigger a *Frendak* Inquiry

In *Howard v. United States*, 954 A.2d 415 (D.C. Cir. 2008), the District of Columbia Court of Ap-

peals considered whether the trial court erred in deeming a mute defendant competent to stand trial, in failing to explore the insanity defense, and in failing to suppress two show-up identifications. We will primarily focus on the first two issues related to forensic psychiatry.

#### *Facts of the Case*

In August 2003, while posing as a gas station window washer, Melvin Howard sprayed Susan Saffer in the face with window cleaner. He displayed a gun, and then forced her to give him her car keys. A police car chase immediately ensued. Mr. Howard crashed the car, fled on foot, and was apprehended while hiding behind a trash can. The police then conducted two show-up identifications with Ms. Saffer and her friend, who had also witnessed the events.

Upon his arrest, Mr. Howard became mute and nonresponsive. In November 2003, during a mental health evaluation ordered by the trial court, Mr. Howard did not respond to any of the inquiries. Therefore, a competency examination was ordered. Mr. Howard remained unresponsive to both verbal and written communications. He was admitted to St. Elizabeths Hospital in April 2004 for a court-ordered “full” competency evaluation.

At St. Elizabeths Hospital, Dr. Michael Sweda, clinical psychologist, gave Mr. Howard a diagnosis of schizophrenia, catatonic type, and personality disorder, not otherwise specified with antisocial features. At admission and during several subsequent evaluations, Mr. Howard was deemed incompetent to stand trial.

Mr. Howard began receiving psychotropic medication, and, in February 2005, he “suddenly” began speaking. That April, Dr. Sweda submitted a report that deemed him competent to stand trial, competent to waive the insanity defense, and criminally responsible for the offense. He was found competent to stand trial in several examinations leading up to the trial. Hospital reports showed that, although Mr. Howard was mute and nonresponsive during the preliminary hearings and at the time of the trial, he had been freely communicative with doctors and staff at the hospital. Dr. Sweda and a psychiatrist at St. Elizabeths Hospital concluded that Mr. Howard’s muteness was volitional.

In July 2005, Mr. Howard once again became mute, and the hospital’s finding of competent to stand trial was challenged. During the August 2005