

Discussion

In *Sell*, the United States Supreme Court held that the four requirements for the involuntary medication of defendants when administered for the sole purpose of restoration of trial capacity are not to be balanced; instead, each of the requirements must be independently met.

The first requirement is that an important government interest be at stake. In *Sell*, the United States Supreme Court held that courts must consider each case's facts in evaluating the government's interest because special circumstances may lessen its importance. Although the Supreme Court of Oregon acknowledged the trial court's finding that Mr. Lopes had been charged with a serious crime, the question remained as to whether the presence of special circumstances lessened the state's interest. As the trial records were deemed insufficient, the Supreme Court of Oregon held that the trial court did not adequately demonstrate that "the state's continuing interest in restoring relator's competence and potentially convicting him are so important that they justify relator's involuntary medication" (*Lopes*, p 528).

Although the first factor of *Sell* was not met, thus requiring the trial court to vacate its *Sell* order, the Oregon Supreme Court went on to address the remaining *Sell* factors. The second factor is that "the administration of medication is substantially likely to render [Mr. Lopes] competent to stand trial and that such medication is substantially unlikely to have side effects that will interfere significantly with [Mr. Lopes'] ability to assist counsel" (*Lopes*, p 528). The trial court did not indicate whether the evidence presented met the clear-and-convincing standard of proof that is borne by the state in *Sell* hearings. Further review of the hearing record showed that Mr. Lopes' diagnosis had been delusional disorder, persecutory type. The treating psychiatrist testified there was a "30 to 40 percent" rate of successful treatment of that disorder with antipsychotic medication, and opined that the medications were "worth trying." However, the *Sell* standard was not met because the state failed to present clear and convincing evidence that involuntary medication was "substantially likely" to restore fitness (*Lopes*, p 530).

This *Sell* requirement underscores the great difference between the stringent proof of a medication's efficacy demanded by *Sell* and the more relaxed standard of efficacy that is allowed in clinical practice when initiating a course of medication. The clinical approach of trying alternative medications with careful observation for possible efficacy may be justifica-

tion for a trial of medication, but it is not sufficient to meet *Sell's* legal standard for involuntary medication. Thus, it is critical that the mental health professional who is called to testify in support of forced administration of a medication be prepared to offer drug efficacy testimony that meets the clear-and-convincing standard of proof demanded by *Sell*.

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Choosing Not to Pursue a Mental Health Defense in a Capital Case

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Reliance Upon "Remorse" Rather Than a Mental Health Defense Is Held to be a Reasonable Defense Strategy

Clark Elmore pleaded guilty and was sentenced to death for the rape and murder of his stepdaughter. In subsequent appeals, he argued many claims, including ineffective assistance of counsel. His claims were fully litigated through the Washington state court system and were dismissed on direct appeal. Mr. Elmore then filed a collateral petition citing failure of his counsel to present a mental health defense in mitigation. The Washington Supreme Court ruled against that claim, upholding the capital sentence. Mr. Elmore then filed a *habeas* petition in U.S. district court, again claiming ineffective counsel for failure to explore more fully mitigating evidence regarding possible mental illness, brain damage, or both. The U.S. District Court for the Western District of Washington denied the petition. Mr. Elmore appealed to the Ninth Circuit Court of Appeals, again arguing that counsel's failure to explore a mental health/brain damage defense constituted ineffective assistance of counsel (*Elmore v. Sinclair*, 781 F.3d 1160 (9th Cir. 2015)).

Facts of the Case

On April 17, 1995, Clark Elmore brutally raped and murdered his 14-year-old stepdaughter after an

argument about his past sexual abuse of her. He concealed her body in a secluded area. When she was reported missing, he feigned concern before fleeing to another state. He eventually surrendered and gave a tape-recorded confession. He was charged with aggravated first-degree murder, initially refusing an attorney and attempting to plead guilty. The plea was refused, and a public defender, Jon Komorowski, who had no capital case experience, was appointed.

Attorney Komorowski believed Mr. Elmore to be mentally competent and assisted in preparing his guilty plea. Research by an assembled defense team that included two focus groups and a mock trial, suggested that a sentencing mitigation strategy based solely on remorse and personal responsibility was best and that presentation of mental illness or brain damage as mitigating factors might undermine that defense. In determining this strategy, Mr. Elmore was evaluated by two mental health experts, both of whom found him capable of complex and logical thinking, noting that he “appreciated the seriousness of his crime and tried to cover it up” (*Elmore*, p 1165). Mr. Elmore’s plea was accepted, and the sentencing jury, having heard his “remorse” mitigation claim, unanimously recommended the death penalty.

Mr. Elmore litigated appeals through the state court system, raising numerous claims, including ineffective assistance of counsel for not pursuing potentially mitigating mental health claims. His conviction and sentence were affirmed by the Washington Supreme Court. He then filed a personal restraint petition in the same court, including the claim that counsel erred in not presenting evidence of his diminished mental capacity. The Washington Supreme Court then remanded the case to the superior court for an evidentiary hearing regarding that claim.

At the hearing, Mr. Komorowski provided detailed testimony regarding his choice of defense strategy and several mental health experts testified. In defending his remorse strategy, Attorney Komorowski noted concern about introducing “dueling mental health experts” (*Elmore*, p 1167) and thereby opening the door for the prosecution to introduce evidence of Mr. Elmore’s sexual abuse of the victim and others. The experts testified whether Mr. Elmore’s mental impairments may have adversely impacted his capacity to understand the crime committed or to control his behavior. Their opinions conflicted; the two defense psychologists maintained that the crime

was committed under “an extreme emotional disturbance” which might have “reduced ability to control himself” or “impaired his ability to comply with the law.” The prosecution psychologist opined that at the time of crime, Mr. Elmore was “calm, calculating, able to conform conduct to requirements of law and . . . took rather significant measures during crime to cover it up,” and could be accurately characterized as “a thinking and calculating individual.” (*Elmore*, p 1167).

After reviewing the findings of the hearing, the state supreme court denied all of his claims and upheld the conviction and sentence (*In re Elmore*, 172 P.3d 335 (Wash. 2007)). He then filed a federal *habeas* petition, which was denied by the district court, leading to the appeal to the Ninth Circuit.

Ruling and Reasoning

The circuit court’s analysis was guided by two sign posts: one a statutory mandate, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, and the other the U.S. Supreme Court’s construction of the Sixth Amendment right to counsel, which the Court set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The statutory authority of federal courts to grant *habeas corpus* relief for persons in state custody is 28 U.S.C. § 2254 (2006), as amended by the AEDPA of 1996. To grant relief, a federal court must determine whether the state court’s decision was “unreasonable” or opposite the conclusion reached by the U.S. Supreme Court on a question of law. A violation of the Sixth Amendment right to counsel is found when *Strickland’s* two-pronged standard is met, namely demonstrating that counsel’s performance “fell below an objective standard of reasonableness” and that the alleged deficient performance “prejudiced the defense,” to the extent that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*Elmore* pp 1169–70, quoting *Strickland*, p 694). In addition, federal relief under the AEDPA requires a showing that the state adjudication was objectively unreasonable in denying the ineffective counsel claim, thus, federal courts are “doubly deferential” to state court judgments (*Elmore*, p 1168).

In its reasoning, the circuit court did specifically consider the soundness of trial counsel’s decision to use a remorse strategy, as opposed to a psychological or brain disease strategy. The court concluded that given counsel’s

concerns about bolstering the remorse strategy, his decision to avoid a mental health defense was a reasonable one. In addition, the circuit court held that the state supreme court was not objectively unreasonable in dismissing claims of ineffective counsel, agreeing that counsel's pursuit of a "remorse defense" was a "reasonable strategic decision" (*Elmore*, p 1171).

Concurring (in part), Judge Hurwitz agreed with the majority opinion upholding Mr. Elmore's conviction and death sentence. His concurrence acknowledges, as did the majority opinion, the strictures placed on the federal courts by the AEDA and *Strickland*; the substantial deference afforded to final state court decisions; and the substantial deference *Strickland* affords trial counsel's strategy choices.

Discussion

The *Elmore* decision illustrates concerns related to the expanding role of mental health and behavior science evidence in trial counsels' strategies. The concurring opinion emphasized that use of expert testimony is especially relevant to sentencing in capital cases. Neuroscience has grown in importance as is illustrated by recent Supreme Court decisions barring the death penalty for persons who have an intellectual disability and those who commit murder when less than 18 years of age (*Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005)). In *Elmore*, the majority and concurring opinions clearly attend to questions of mental illness and brain damage and affirm the obligation that defense counsel has to fully conduct an investigation of these two possible areas of defense. Indeed, the majority opinion gently chided the state supreme court (and by implication, trial lawyers), saying that it "at times conflated the mental health and brain damage defenses" (*Elmore*, p 1171). The concurrence went further, noting past cases illustrating counsels' obligation in a capital case to thoroughly investigate mental health claims (*Wiggins v. Smith*, 539 U.S. 510 (2003)).

Elmore illustrates some of the challenges intrinsic to the expanding role of behavior science and mental health experts in capital cases. The defense counsel's expressed concern with introducing dueling experts to the court could be justified based on the predictable wide-ranging and contradictory views of the testifying experts participating in the case. Expert testimony regarding the extent to which heightened emotional arousal or extreme emotional disturbance translate to a meaningful lack of capacity to direct

and control one's behavior suggests the subjective nature of such opinions; objective judgments are beyond our current state of knowledge. *Elmore* also demonstrates that, even as behavior science expert testimony is increasingly recognized as playing an important role in such cases, reliance on it remains only one of several types of trial strategies that counsel can look to in seeking sentencing mitigation.

Finally, the case illustrates the importance of the laws and Supreme Court precedents that limit the scope of federal court review of state court decisions. To obtain a finding of ineffective counsel, Mr. Elmore had to prove both prongs of the *Strickland* test and to do so against the deferential lens of the AEDPA's mandate that state court opinions be given the benefit of the doubt. This obstacle proved to be insurmountable.

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Claims of Incompetency in Death Penalty Proceedings

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Defendant Found Competent to Be Executed and a Stay of Execution Overturned After State Court's Application of Federal Law Is Deemed Reasonable

Andre Cole was sentenced to death in Missouri. He filed a petition for a writ of *habeas corpus* in the Missouri Supreme Court claiming that he was incompetent to be executed. The court denied the petition and motion for stay of execution, and Mr. Cole appealed to the federal district court. The U.S. District Court for the Eastern District of Missouri concluded that the Missouri Supreme Court incorrectly and unreasonably applied federal law and granted the motion for a stay of execution. In *Cole v. Roper*, 783 F.3d 707 (8th Cir. 2015), the Eighth Circuit reversed the district court's ruling. The issue before the Eighth Circuit was whether the state supreme court had made an incorrect and unreasonable application of federal law when reviewing Mr. Cole's incompetency claim.