

## **Death Penalty Mitigation when the Defendant Proclaims Innocence and Insists on Testifying Post-conviction**

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Can mitigation be effectively communicated to jurors during the death-penalty sentencing phase even when the neuropsychiatrically impaired, but nonetheless legally competent defendant proclaims innocence after having been convicted and even though he insists on testifying at the trial's penalty phase?

Mitigating Circumstance:

In terrifying murders, even under optimal conditions, presenting effective death-penalty mitigation evidence is often difficult where there are minority defendants, non-minority victims, and non-minority finders of fact. Mitigation presentations are further complicated when the minority defendant continues to proclaim his or her innocence even after a jury verdict of guilty. The task becomes even more daunting when the neuropsychiatrically impaired but nonetheless legally competent defendant also insists on proclaiming his innocence during mitigation before the same jury that convicted him at trial.

The more horrifying the murder, especially when it involves multiple innocent victims, the more any evidence of preexisting mental illness, even where well documented, typically will be met with skepticism. Prosecutors contribute to that skepticism when they misleadingly portray such preexisting mental illnesses as being adventitious, i.e., accidentally correlated with, but incidental to the circumstances resulting in the commission of the crime, and therefore not worthy of consideration as mitigating. Dr. Harold Bursztajn, co-Director of Harvard Medical School's Program in Psychiatry and the Law, was the forensic expert in neuropsychiatry during the penalty phase of one such capital case.

In *State of Washington v. Cruz* (January, 2002), Kevin Cruz was charged with two counts of aggravated first-degree murder and two counts of attempted murder for shooting four men on November 3, 1999, at the Northlake Shipyard in the Freemont district of Seattle. The prosecution alleged that Kevin walked into the shipyard office and opened fire, hitting all four men in the office. He then dumped the murder weapon in some nearby bushes and fled the scene. Several weeks later, a bike rider discovered the gun. Police traced the gun to Kevin. Subsequently, witnesses to the crime identified him as having committed the shootings.

Prior to the shootings in 1998, Kevin had been employed at the Northlake Shipyard for approximately 5 months. At trial, the prosecution attempted to portray

Kevin as having a grudge against the shipyard for terminating some benefits he was to receive from a minor on-the-job injury.

Kevin was 30 years old at the time of the shootings. He lived a truly tragic life. He had suffered years of physical and psychological abuse at the hands of his stepfather. Family members corroborated that as a child Kevin had been regularly and at times savagely beaten by his stepfather.

Kevin began to exhibit signs of mental illness approximately a decade before the shootings. Over the next several years he informed acquaintances that he was being followed, that people were listening to him, and that he had auditory hallucinations and believed he could speak to dead people. At the time he was arrested for the shootings, the walls of his bedroom were lined with aluminum foil. At the time of the killings he was suffering a variety of neurocognitive symptoms and impairments of judgment consistent with one of the schizophrenic disorders, paranoid schizophrenia. These impairments compounded the grievances he felt and constricted his ability to resolve the distress he was experiencing in a rational manner.

Washington uses a bifurcated trial process in death-penalty cases. Because of the evidence surrounding Kevin's guilt, the defense team viewed a conviction as largely inevitable. In view of Kevin's protestations of innocence and refusal to consider the development of a "not guilty by reason of insanity" defense, the defense team was especially concerned that jurors would reject mitigation evidence by reasoning that "first the defense said he didn't do it; now they say he did but he was mentally ill." To combat possible damage to defense credibility with the jury, the defense used the guilt phase of Kevin's trial to argue innocence as their client insisted, while simultaneously preparing jurors to accept the mental-health mitigation evidence that they planned to present when the penalty phase arrived.

In the penalty phase, the mental-health expert retained by the prosecution presented the opinion that whatever mental illness may have existed prior to the crimes, its presence was merely adventitious to their commission. The prosecution was able to use its retained expert's opinion to argue vigorously that, given the nature of the crimes of which Kevin had been convicted, he deserved the death penalty irrespective of any facts or expert opinions presented by the defense regarding the influence of a preexisting mental illness.

In this highly negatively charged emotional climate in favor of imposing the death penalty, the defense presented mitigation evidence from Kevin's mother, brother, sister, two neighbors, the head of the Washington State Corrections system, and a psychologist (to interpret some standardized tests). In concluding their mitigation presentation, the defense offered Dr. Bursztajn. His forensic neuropsychiatric expert opinion was based on the results of his comprehensive neuropsychiatric evaluation of the defendant. Dr. Bursztajn concluded that at the time of the killings Kevin Cruz was suffering from neurocognitive impairments resulting from a protracted course of untreated paranoid

schizophrenia. These impairments had persisted throughout the course of the trial, including the penalty phase.

Although Dr. Bursztajn's conclusions were fairly complex medically, his testimony illustrates the importance of ensuring that the defense in capital prosecutions utilize not just qualified mental-health experts, but experts who can present complex evidence of mental illness in an objective manner that jurors can easily understand. Dr. Bursztajn translated his neuropsychiatric analyses into commonsense terms that placed many of Kevin's actions in the context of mental illness. For example, during his presentation, Dr. Bursztajn drew an analogy with *A Beautiful Mind*, a movie enjoying great popularity at the time of the trial.

After Dr. Bursztajn testified, Kevin, as was his right under Washington law, faced the jury. Because Dr. Bursztajn's testimony had set the stage, the jury could easily understand the significance in psychiatric terms of Kevin's own, often rambling, testimony. After a five-month trial, the jury deliberated for approximately four hours before deciding to spare Kevin's life.

Standards for capital-punishment counsel throughout the country have rightfully come under increased scrutiny in the past few years. Defense counsel in capital cases are expected to "leave no stone unturned" in their efforts to save lives. —As the Cruz case illustrates, a comprehensive forensic neuropsychiatric evaluation and examination can be vital even when a defendant refuses to cooperate with a complete mental-state defense, continues to proclaim innocence post-conviction, and insists on testifying he is innocent. Although a mentally ill defendant's conduct at trial can make penalty-phase presentations difficult, finders of fact must be effectively presented with the results of forensic neuropsychiatric evaluations in order to consider fully and fairly all available mitigation evidence.

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