

# Death Sentence and Ineffective Assistance of Counsel: Two Supreme Court Justices Dissent

Each year between 7,000 and 8,000 new cases are filed in the U.S. Supreme Court. Full review is granted in about 80 of those cases and denials of review are simply, cursory “Review Denied”.

The Justices are not obliged to explain why a case is reviewed and why it is not. Individual Justices, however, alone or joined by other Justices, may dissent from a denial (four votes are needed for acceptance).

In **Elmore v. Holbrook**, 137 S.Ct. 3 (2016), Justices Sotomayor and Ginsburg dissented from the denial of review in a case where the defendant claimed that his court-appointed counsel provided ineffective assistance at the capital sentencing phase of his trial.

This was the first capital case for Elmore’s court appointed lawyer and he elected to give the jury a one-hour penalty phase argument about the defendant’s remorse. Elmore was in the military and served in Vietnam repairing Agent Orange pumps. The jury did not hear from experts who concluded that Elmore was cognitively impaired and lacked impulse control.

The 7-page dissent underscores the significance of expert lawyering and expert witnessing in that most solemn of trial agendas: will this defendant live and die in prison or die at the hands of the state. The dissent weaves its concerns around counsel’s (now conceded) lapse in judgment and the absolute need for counsel to investigate and then explain this man to a jury with his life in their hands.

The lawyer’s job is to adopt a mitigation strategy and that includes exploring the alternatives and then fully investigating the option selected. The dissenting Justices here seriously fault counsel for not educating the jury to Elmore’s possible brain damage.

In the Justices’ own words:

“Elmore was born in 1951 in central Oregon, where he lived until his teens. He was exposed to powerful neurotoxins from a young age. Elmore’s house in Oregon was located next to an airport from which crop dusters regularly sprayed pesticides. Decades after Elmore moved away, the state environmental agency took soil samples that showed toxin levels over 4,500 times the maximum amounts allowed by state law. Later, Elmore worked on

cars and oil pipelines where he regularly melted lead batteries and handled solvents without gloves. And when Elmore left home at age 17 to serve in the Vietnam War, he was tasked with repairing Agent Orange pumps without protective equipment.

“Experts who testified at Elmore’s postconviction hearing agreed that this exposure placed him at serious risk of brain damage. They conducted neuropsychological tests that revealed mild to moderate cognitive impairments, including a marked inability to control his emotions and impulses. Elmore tested in the bottom one percent on tests measuring that

“Elmore’s death sentence arises out of a murder that he committed in 1995. The crime was horrific. Elmore raped and murdered his stepdaughter, first strangling her with a belt, then driving a sharp object through her ear, and finally bludgeoning her with a hammer. **In re Elmore**, 162 Wash.2d 236, 244, 172 P.3d 335, 340 (2007). Elmore was apparently motivated by fear that the victim would tell the authorities that he had previously sexually abused her. After several days of misdirecting the authorities, Elmore turned himself in and confessed. In the wake of the murder, Elmore expressed extreme remorse. A jailhouse minister who

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characteristic. The experts concluded that damage to Elmore’s frontal lobe had made him impulsive and susceptible to emotion. And they agreed that the murder Elmore later committed was linked to Elmore’s cognitive deficits—for instance, by making him unable to ‘put on the brakes’ when emotional.

“Elmore was discharged from the Army under honorable conditions in 1972, but found it hard to return to civilian life. He moved around the United States, taking jobs in hotels, gas stations, farms, and oil fields. Elmore was arrested three times—once for stealing checks, once for stealing furniture, and once for stealing appliances from a motel. Officers at one prison reported that Elmore was nonviolent and, if anything, was the victim of other inmates’ threats. After his second conviction, Elmore was incarcerated for two years in Washington state prison, where he was repeatedly raped by another inmate. Until the murder for which he was ultimately sentenced to death, and despite his emotional challenges, Elmore was never convicted of a violent crime.

visited Elmore in prison later attested that, the day after he arrived, he ‘was huddled into a ball at the back of the room, shaking uncontrollably.’ Elmore, he said, ‘was unlike any prisoner I had counseled before. He was wracked with anguish and dripping with remorse.’ A correctional officer at the prison later testified that Elmore appeared ‘in a state of disbelief about what he had done’ and was ‘an emotional wreck.’”

The lawyer’s mitigation case lasted only an hour and the theme was remorse, not impairment. The attorney conceded he was advised to retain a neuropsychiatrist but did not. He should have gone into the details of an organic brain disorder but did not.

Counsel did retain three mental health professionals, not otherwise described, but they did not reach into the brain disorder issue, lacking the qualifications to do so.

The dissent believes a jury might well have avoided imposing a sentence of death had Elmore’s brain damage been introduced, explained and related to this horrific crime.

Remember, none of this is about excusing the crime. It is only to mitigate the sentence. ■



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