

*Ruling and Reasoning*

The court of appeals held that the district court was not erroneous in denying Mr. Nelson’s § 3006A(e) motion. The court cited *United States v. Rinchack*, 820 F.2d 1557 (11th Cir. 1987), in which the appeals court ruled that “to demonstrate a need for expert services, a defendant must establish that he (1) cannot afford the services, and (2) the services are necessary to an adequate defense” (*Rinchack*, p 1563). They indicated that there was ample evidence, including Dr. Schlessinger’s findings, Mr. Nelson’s VA records, and Mr. Nelson’s own testimony, to support the district court’s findings that Mr. Nelson’s insanity defense was incredible.

The appeals court further stated that Mr. Nelson failed to show prejudice in the district court’s denial of additional expert services. The court cited *United States v. Feliciano*, 761 F.3d 1202 (11th Cir. 2014), stating that “a defendant cannot properly demonstrate prejudice solely on the basis that the denial of expert services prevented him from having expert evidence in the form he believed to most persuasive” (*Feliciano*, pp 1208–1209). They claimed that Mr. Nelson benefited from an expert’s favorable assistance in Dr. Chin’s testimony at trial and thus failed to show prejudice.

Finally, the appeals court concluded that the district court did not violate Mr. Nelson’s Fourteenth Amendment due process right to a fair trial by denying his § 3006A(e) motion. The appeals court cited *Moose v. Kemp*, 809 F.2d 702 (11th Cir. 1987), stating that the government “need not provide indigent defendants *all* the assistance their wealthier counterparts might buy; rather, fundamental fairness requires that the [government] not deny them an adequate opportunity to present their claims fairly within the adversary system” (*Moose*, p 709, emphasis in original). Moreover, a defendant “must show a reasonable probability that an expert would assist his defense and that the denial thereof would result in a fundamentally unfair trial” (*Moose*, p 709). Because Mr. Nelson failed to demonstrate the necessity of additional expert assistance, along with the implausibility of the defense, his due process right to a fair trial was not violated.

*Discussion*

In this ruling, the appeals court highlights the importance of plausibility of an insanity defense. If there is insufficient evidence that points toward a

plausible insanity defense, an indigent defendant can be denied the benefit of additional expert testimony.

In this case, the appeals court considered Dr. Chin’s favorable assistance enough to preclude Mr. Nelson from claiming prejudice. Dr. Schlessinger’s nine-hour evaluation and lengthy report held much more weight in swaying the court’s opinion, compared with Dr. Chin’s 45-minute routine psychiatric evaluation. Dr. Schlessinger’s report and testimony were so persuasive, that they not only assisted the trier of fact in deeming Mr. Nelson sane, they also left the court with the view that the insanity defense was improbable. This further emphasizes the impact on the court’s opinion of a thorough evaluation performed by an expert.

Finally, inconsistencies in Mr. Nelson’s testimony and VA medical records were also a major contributor to his eventual denial of additional assistance, because his credibility came into question. The circuit court took specific note of the district court’s assessment of Mr. Nelson’s lack of credibility in its conclusions.

Disclosures of financial or other potential conflicts of interest: None.

## Ineffective Assistance of Counsel Standards in Death Penalty Cases

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### Circuit Court of Appeals Reviews the Application of Mental Health Factors in Death Penalty Mitigation

In *Doe v. Ayers*, 782 F.3d 425 (9th Cir. 2015), the Ninth Circuit Court of Appeals reviewed evidence on appeal to determine whether the district court had correctly applied numerous legal standards when adjudicating John Doe (an alias used because of the sensitive nature of details in the case; initials were used for other individuals) of murder and two counts of home burglary, as well as special

circumstances charges of felony-murder-burglary and felony-murder-rape.

*Facts of the Case*

In 1984, a house in California inhabited by K.H., M.H., their young children, their live-in babysitter L.R., and her daughter was burglarized, and several items were stolen. Mr. Doe was arrested in connection with the burglary, but was released. Soon afterward, the home was burglarized again. L.R. was found murdered, having been beaten, stabbed, and strangled and bound half-naked to the bed in the master bedroom, with a sex toy placed suggestively nearby. Again, some items were stolen. Mr. Doe was arrested and charged with the counts described above. The court assigned J.B. as counsel. J.B. had never worked on a criminal case in which the death penalty was at issue. He hired D.S. as an investigator to interview potential witnesses in California and Mr. Doe's home state, where Mr. Doe had an alleged prior felony conviction for armed robbery. Mr. Doe pleaded not guilty and denied all allegations and charges. The jury returned with guilty verdicts for the murder and both counts of burglary and findings of true for felony-murder-burglary and not true on the felony-murder-rape special-circumstances allegation. During the penalty phase, the jury returned a sentence of death.

The California Supreme Court denied Mr. Doe's direct appeal and twice denied his *habeas corpus* petition, and the U.S. Supreme Court denied his petition for *certiorari*. Mr. Doe then filed a federal *habeas* petition with the district court, which also denied it. The district court affirmed the conviction, rejecting several of the guilt-phase challenges. It found that Mr. Doe's counsel "had performed deficiently in failing to investigate and present various categories of mitigating evidence" (*Doe*, p 428). However, the court noted that Mr. Doe could not establish that he had been prejudiced as a result, as required under *Strickland v. Washington*, 466 U.S. 668 (1984), and thus affirmed the sentence.

*Ruling and Reasoning*

The Ninth Circuit affirmed Mr. Doe's conviction, agreed that counsel's performance was ineffective, but disagreed that Mr. Doe was not prejudiced. As a result, the circuit court reversed the sentence and instructed the district court to grant the writ of *habeas corpus*.

The standard of review in this petition is based on standards in place before the Effective Death Penalty Act of 1996 (AEDPA), as the original *habeas* petition was filed in 1995.

Under these standards state court judgments of conviction and sentence carry a presumption of finality and legality and may be set aside only when a state prisoner carries his burden of proving that his detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution [*Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007), p 980].

Mr. Doe raised several challenges to his conviction, all of which were rejected by the district court and affirmed by the court of appeals. The analysis here is focused on the court's *de novo* review of the penalty-phase claim of ineffective assistance of counsel. The circuit court concluded that the investigation was "facially inadequate" (*Doe*, p 443) and that J.B. "fell far short of his sacrosanct duty to conduct a full and complete mitigation investigation" (*Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005), p 1175). The court found that J.B.'s "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment" (*Doe*, p 444). The mitigating evidence that was presented "was quite bland, and apparently proved insufficient to overcome even the relatively minimal presentation of aggravating evidence offered by the state" (*Doe*, p 449).

The appeals court then commended the *habeas* counsel's "powerful evidence" presented after the "appropriate mitigating investigation" (*Doe*, p 450) was conducted, including detailed investigation with two psychological experts, relevant records, and witness declarations, plus declarations of experts on corrections in Mr. Doe's home state. The court then considered the following factors in its mitigating circumstances analysis: rape in prison, mental illness, childhood abuse and neglect, and substance abuse.

The circuit court noted chilling details of the multiple instances Mr. Doe was raped while in prison as a juvenile in his home state. Further, the court noted the findings by psychological experts, showing how five years of such experiences might have shaped Mr. Doe's mental state, including patterns of behavior engaged in to avoid further harm. The court noted that these mitigating circumstances would have been likely to make some impact on the jury during sentencing.

The court next turned its attention to Mr. Doe's mental illness and the psychological impacts of his prison experiences. Friends and family described

Mr. Doe's trauma and the impact these experiences had in his transition from a shy withdrawn teen to "a crazy man," as Mr. Doe's ex-girlfriend observed. Another friend suggested that Mr. Doe was "like people who come back from Vietnam and could never talk about their time there" (*Doe*, p 456) and how his behavior was constantly "off" after his release from prison. One of the psychological experts, J.C., after reviewing Doe's prison files and interviewing him several times, concluded that Mr. Doe's rapid mental disintegration, when placed into custody following the first burglary, was a result of the rape he had suffered during his juvenile incarceration and the "internalized shame, guilt and rage" that had resulted from these experiences. The court again found that these mitigating circumstances would have likely made some impact on the jury in deciding Mr. Doe's sentence.

The court then reviewed the evidence regarding Mr. Doe's childhood abuse and neglect at the hands of his uncle. Once again, the court found that this evidence would have had a powerful impact on the jury.

The court concluded that:

Doe received profoundly deficient assistance of counsel during the penalty phase of his trial: while very strong mitigating evidence existed, it was never uncovered by J.B., and the resulting presentation was so anemic as to be virtually without value. These failures were due, defense counsel readily admits, not to any sort of strategic judgment, but rather to incompetence [*Doe*, p 465].

#### Discussion

In addressing the question of ineffective assistance of counsel in the guilt and sentencing phases of Mr. Doe's trial, the court analyzed the use of psychological experts, Mr. Doe's psychological history, and the involvement, or lack thereof, of mental health experts in trial preparation.

The court notes the importance of the retention and use of psychological experts as part of a defense attorney's duties to help establish a defendant's mental condition (including psychological trauma, physical abuse, and sexual assault), in both the guilt and penalty phases of the trial. In this particular case, the court is critical of the lack of attention to Mr. Doe's psychological and psychiatric past for mitigation purposes (as well as the later well-documented, and easily attainable, physical and sexual abuse he suffered throughout his life) and the lack of further assessment by the psychologist retained by counsel beyond a "relatively brief evaluation" (*Doe*, p 440). The

court's careful description of the defendant's long history of mental illness and a lifetime of trauma at the hands of others illustrates the type of mental illness analysis that it expects mental health experts to provide in capital cases.

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## Competency to Waive Fifth Amendment Rights During Custodial Interview

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### During a Custodial Hearing, Invocation of the Right to Counsel Is Waived by Reinitiating Communication with the Police

In *Johnson v. Stephens*, 2015 U.S. App. Lexis 11529 (5th Cir. 2015), the Fifth Circuit Court of Appeals held that Dexter Johnson, a state inmate, was not entitled to *habeas* relief on a Fifth Amendment claim that his statements made during a second investigation should have been inadmissible, despite his revoking his right to counsel during a prior interrogation. The court stated that, even if he had properly invoked his right to counsel, he waived his right by subsequently reinitiating communication with the police. The court had several additional holdings related to procedural law around obtaining a certificate of appealability.

#### Facts of the Case

On the morning of June 18, 2006, while driving around with the intention to rob someone, Dexter Johnson and four companions came across Maria Aparece and her boyfriend, Huy Ngo, who were sitting inside Ms. Aparece's parked car. Mr. Johnson and Keithron Fields ran up to the car with guns and threatened to shoot if the victims did not open the door. When the victims complied, Mr. Johnson and Mr. Fields forced them into the back of the car and drove them around, demanding money, while their