

when testifying. According to the majority, choosing not to take that risk did not rise to the level of ineffective assistance of counsel in this case.

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Insanity Defense and Credibility of the Defendant

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United States Court of Appeals Affirms the District Court's Decision to Deny Appointment of Additional Experts to Assist in Development of an Insanity Defense

In *United States v. Nelson*, 609 Fed. Appx. 559 (11th Cir. 2015), the Eleventh Circuit Court of Appeals reviewed evidence on appeal to determine whether a defendant's Fourteenth Amendment due process right to a fair trial was violated by the district court's decision to deny his motion for appointment of additional experts to assist in development of an insanity defense for a conviction of armed bank robbery and using, carting, and brandishing a firearm during a crime of violence.

Facts of the Case

Andrew Nelson was indicted by a grand jury for one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d) (2012), and one count of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(C) (1) (A)(ii) (2012). Mr. Nelson submitted an affidavit of indigency and an attorney was appointed to represent him.

Mr. Nelson pleaded not guilty and informed the court of his intention to pursue an insanity defense. His motion for a psychiatric or psychological evaluation was granted, and a forensic psychologist, Dr. Kari Schlessinger, evaluated him for nine hours and submitted a lengthy report on competency and criminal responsibility. Findings from Dr. Tin Chin who conducted a 45-minute routine psychiatric evaluation of Mr. Nelson were also submitted.

In Dr. Schlessinger's report, Mr. Nelson's diagnosis was post-traumatic stress disorder (PTSD) based on his reported symptoms from a past sexual assault. Further diagnosis included a personality disorder with schizoid and narcissistic traits. The report noted that Mr. Nelson may have exaggerated his symptoms based on psychological tests and that he embellished his job skills, had an inflated sense of self-importance, lacked empathy, and came off as haughty during the interviews. Dr. Schlessinger concluded that Mr. Nelson was competent to stand trial and that, although he had PTSD, he was not impaired enough to be unable to appreciate the wrongfulness of his conduct and thus was sane at the time of his offenses. Dr. Chin diagnosed bipolar disorder and prescribed risperidone. He further concluded that Mr. Nelson's behavior was due to an episode of impulsivity that had followed a period of dysphoric mood.

Subsequent to Dr. Schlessinger's submitting her reports, Mr. Nelson moved pursuant to 18 U.S.C. § 3006A(e) for appointment of independent psychiatric or psychological experts and additional legal counsel, to assist in the development and presentation of an insanity defense.

After the pretrial § 3006A(e) hearings, the district court denied Mr. Nelson's motion for appointment of an independent mental health expert, investigator, and additional counsel because he had not shown that these services were necessary for adequate representation. The court found that Mr. Nelson's insanity defense was "implausible" as evidenced by Dr. Schlessinger's reports, inconsistencies in his VA records, recent financial expenditures that were not suggestive of depression and PTSD, and inconsistencies in his testimony (in particular, his alleged proficiency in Arabic and Mandarin, which was tested by court-appointed language experts as a means of determining his credibility).

The first trial ended in a mistrial due to the jury's inability to reach a verdict. During a second jury trial, Dr. Chin testified that Mr. Nelson had manic-depressive disorder and that Mr. Nelson had committed the bank robbery during a manic bipolar episode. Dr. Schlessinger was called to testify as a rebuttal witness. Mr. Nelson was found guilty on all counts of the indictment. He appealed, stating that the court had wrongfully denied his § 3006A(e) motion.

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.

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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