

Mitigating Mental Health Evidence in Death Penalty Cases

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Trial Counsel Found Ineffective Based on Strickland Criteria after Failing to Explore Credible Possibility of Additional Mitigating Evidence

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In *Jones v. Ryan*, 52 F.4th 1104 (9th Cir. 2022), the Ninth Circuit Court of Appeals reviewed Danny Lee Jones's *habeas corpus* petition challenging his death sentence in Arizona after he was convicted of two murders. The court found that Mr. Jones's claim of ineffective assistance of counsel was supported by meeting the two criteria established in *Strickland v. Washington*, 466 U.S. 668 (1984), specifically highlighting counsel's failure to hire a mental health expert to explore potentially mitigating evidence in his case.

Facts of the Case

In March 1992, Mr. Jones was drinking alcohol and using crystal methamphetamine with Robert Weaver in Mr. Weaver's garage. At some point over the course of the evening, Mr. Jones killed Mr. Weaver with a baseball bat, assaulted Mr. Weaver's grandmother, Katherine Gumina, with the bat, and killed Mr. Weaver's daughter by hitting and suffocating her. After these attacks, Mr. Jones stole Mr. Weaver's collection of guns and sold them, using that money to flee from Arizona to Nevada, where he was later arrested. He was indicted on two counts of murder in the first degree and one count of attempted murder. Ms. Gumina died from her injuries seven months later.

Mr. Jones was assigned a public defender who requested \$5,000 from the court for expert witnesses and was authorized \$2,000, which he split between a crime scene investigator and an addictionologist. Mr. Jones was convicted on all counts.

At the sentencing hearing the public defender presented testimony from Mr. Jones's second stepfather, Randy Jones, who testified to multiple complications when Mr. Jones's mother gave birth to him, as well as Mr. Jones' experiencing numerous head injuries as a child. Randy Jones provided the history that Mr. Jones's first step-grandfather introduced him to cannabis when he was nine or 10 years of age, noting that Mr. Jones had a significant personality and behavioral change around the age of 13 or 14, including problematic behaviors such as lying, skipping school, drinking, and using drugs.

In accordance with Arizona Rules of Criminal Procedure, the trial court appointed an independent forensic psychiatrist, Dr. Jack Potts, to examine Mr. Jones. Dr. Potts evaluated Mr. Jones for four hours. At sentencing, Dr. Potts testified that it would be valuable to have "some neurologic evaluations," including an MRI, CT, and EEG, as well as additional neurological testing. He indicated a strong possibility that Mr. Jones had traumatic brain injury and possible organic neurologic dysfunction. Mr. Jones was given two death sentences, and the Supreme Court of Arizona affirmed his conviction and sentence on direct review.

Following his two first-degree murder convictions and subsequent death sentence, Mr. Jones filed a petition for a writ of *habeas corpus*, claiming ineffective assistance of counsel for defense counsel's failure to hire a mental health expert and failure to obtain neurological and neuropsychological testing. The U.S. district court granted an evidentiary hearing and subsequently dismissed both claims. Mr. Jones appealed this dismissal, and the Ninth Circuit reversed and remanded the case to the district court with an order to issue a writ of *certiorari*. The state appealed and the U.S. Supreme Court granted *certiorari*, ultimately vacating the Ninth Circuit's ruling and remanding the case for further consideration. On remand, the district court again denied the petition, which Mr. Jones appealed again to the Ninth Circuit.

Ruling and Reasoning

A panel of three judges for the Ninth Circuit Court of Appeals denied a petition for a panel rehearing and

denied a petition for a rehearing *en banc*. The panel reversed and remanded the case for the second time, holding that Mr. Jones' claims of ineffective counsel were reasonable, and they ordered that a writ of *habeas corpus* be issued.

In coming to their decision, the Ninth Circuit panel reviewed *de novo* the district court's dismissal of Mr. Jones's *habeas* petition. They found that the record indicated that the defending counsel's failure to hire a mental health expert to present mitigating evidence, especially during the sentencing phase of a capital case, fell below "prevailing professional norms." They noted that reliance on a court-appointed witness was not sufficient to present mitigating evidence, in part because a court-appointed witness is not obligated to further the interest of the defendant, and that not hiring a mental health defense expert in this case was not a strategic choice but rather the result of poor planning. The Ninth Circuit held that the defense's failure to investigate further mental health factors satisfied the first prong of the *Strickland* standard for proving ineffective assistance of counsel: that counsel's performance was deficient.

Regarding the second *Strickland* prong, whether counsel's deficient performance prejudiced the defense, the Ninth Circuit panel's *de novo* analysis led them to examine additional evidence that was presented in the federal district court hearing. This evidence included testimony from several other expert witnesses for the defense, including psychiatrist Dr. Pablo Stewart, psychologist Dr. David Foy, and neuropsychologist Dr. Alan Goldberg. The panel found that additional mental health assessment and testimony suggested that Mr. Jones had sustained numerous traumas, head injuries, and mental health diagnoses that were not adequately explored during his trial and that there was the reasonable probability that, had this information been presented during trial, the outcome of his sentencing might have been altered. Finding that both *Strickland* prongs for ineffective assistance were met, the panel reversed and remanded back to the district court.

Dissents

Judge Bennett, joined by eight other judges, dissented from the denial of rehearing *en banc* and said that the panel's analysis lowered the high bar of the *Strickland* standard and failed to give proper deference to the district court's findings. The dissent presented a point-by-point refutation of the additional

evidence presented in the federal district court, which the panel considered potentially mitigating, arguing that evidence of cognitive impairment, posttraumatic stress disorder, attention deficit hyperactivity disorder, mood disorder, substance abuse, and new sexual and physical abuse evidence was all contestable or inconclusive. Ultimately, the dissent said that the panel gave excess weight to these potential mitigating factors over the overwhelming aggravating evidence, and that there was not a reasonable probability that the reweighing of evidence would change the sentencing outcome. The dissent also indicated that *en banc* review was warranted owing to the importance of the case and to "maintain uniformity" in its cases.

In a second dissenting opinion, three more of the Ninth Circuit judges also disagreed with the denial of rehearing *en banc*; they said that the panel should not have conducted a *de novo* review and should have given deference to the district court's factual findings.

Discussion

This case highlights the necessity of thorough mental health evaluations in capital trials, especially during the sentencing phase. Given the life-and-death stakes in such cases, it is unsurprising that there are high expectations for defense attorneys to explore adequately any potential mitigating factors, and a failure to do so can result in ineffective assistance of counsel. That 12 of the Ninth Circuit judges dissented on grounds that this case should have been heard *en banc* also highlights the contentious nature and perceived importance of the question of mitigation in capital trials.

The Ninth Circuit's reasoning in this case provides interesting insight into how courts might view mental health expert witnesses in capital trials. Dr. Potts, the psychiatrist in the original trial, was assessed by the Ninth Circuit to be an insufficient witness in part because he was court-appointed and therefore not under obligation to further the defense's cause. This particular view of the psychiatrist as expert witness seems to contradict the forensic psychiatrist's ethical imperative to "strive for objectivity," regardless of the retaining party. Additionally, the Ninth Circuit panel appeared to give weight to factors like the number of potential different diagnoses uncovered or the sheer amount of time spent by an evaluator on a case (i.e., Dr. Stewart's spending 130 hours on the case versus Dr. Potts' "short and cursory" four-hour evaluation) when assessing potentially mitigating evidence. In

performing assessments in capital cases, it is useful for forensic evaluators to be aware of how such factors may influence the court.

A final interesting question raised by this case is who will fund the in-depth mental health evaluations considered essential in death penalty cases. The original \$2,000 allotted to Mr. Jones's trial attorney would presumably have only covered a small fraction of a forensic psychiatrist's 130 hours of billing time. It would seem unfair if the ability of a capital defendant to receive a just sentence were predicated in part on having sufficient money to hire forensic evaluators to do extensive work, but this scenario is a possible implication of the ruling in this case.

Qualified Immunity of Public Officials

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Jailers Not Protected by Qualified Immunity for Unlawful Detention of Defendant with Mental Illness

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In *Harris v. Clay County*, 47 F.4th 271 (5th Cir. 2022), the U.S. Court of Appeals for the Fifth Circuit considered whether Steven Jessie Harris's jailers were entitled to qualified immunity after unlawfully detaining him for six years after he was found incompetent to stand trial without an expectation of competency restoration and after his civil commitment proceeding was dismissed. The court ruled that his jailers were not entitled to qualified immunity and their actions were an "obvious" constitutional violation.

Facts of the Case

Mr. Harris, a Black man with schizophrenia, was charged with murdering his father, shooting three law enforcement officers, shooting into occupied vehicles, carjacking, and kidnapping. He pleaded not

guilty in a Clay County, Mississippi circuit court and was ordered to remain in custody without bail. His competency to stand trial evaluation concluded that there was "no substantial probability that Mr. Harris [could] be restored to competence to proceed legally in the foreseeable future" (*Harris*, p 272). From a hearing held on October 12, 2010, the court agreed that Mr. Harris was not competent. It was ordered that the state pursue civil commitment proceedings in the chancery court and Mr. Harris be detained until the court's determination. On the same day the circuit court removed his criminal case from its active docket, the chancery court dismissed the just-filed commitment proceeding for lack of jurisdiction owing to the pending criminal charges in the circuit court. On October 25, 2010, Sheriff Laddie Huffman and Deputy Eddie Scott signed and submitted a "Diligence Declaration" to the circuit court related to a separate indictment against Mr. Harris, asserting that they were unable to locate Mr. Harris in the county, despite his still being in custody.

The district attorney, Forrest Allgood, approached Mr. Huffman in 2012 after learning of the court's error. Mr. Huffman acknowledged Mr. Harris's continued confinement and that his mental health was improving. Mr. Allgood submitted a motion for reevaluation to the circuit court. The circuit court never ruled on this motion.

A local news outlet began to ask questions about the case four years later. Sheriff Scott reached out to the district attorney at that time, who then filed a motion for the chancery court to reconsider its dismissal of Mr. Harris's civil commitment case. The chancery court accepted the civil case in June 2016 and civilly committed Mr. Harris, determining that he was a danger to himself and others. During a later evaluation, Mr. Harris was again found incompetent to stand trial without hope of regaining competence. The circuit court dismissed his criminal charges in 2017. Mr. Harris was released to his family soon after.

Mr. Harris's mother, on his behalf, sued Mr. Allgood, Mr. Huffman, Mr. Scott, and Clay County, alleging that they violated Mr. Harris's Fourteenth Amendment rights by unlawfully detaining him for years and giving him forced medications, and that the county was liable.

The district court dismissed Mr. Allgood from the case owing to absolute prosecutorial immunity and qualified immunity and determined that Mr. Huffman