

such case was the United States Court of Appeals for the Ninth Circuit's decision in *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003). Similar to *State v. Expose*, the defendant made threats during a therapeutic session that the provider reported and subsequently testified about in trial court. The court of appeals ruled the district court erred in admitting the provider's testimony, finding there is no "dangerous person" exception to testimonial privilege.

At face value, these cases raise the question of how one would potentially prosecute someone who makes a protected threat in therapy. In accordance with the letter of the Minnesota decision, therapists can warn a potential victim but not testify against a client seen in treatment if the violence is carried out. The aforementioned Minnesota statute on patient confidentiality does not mention physicians, suggesting that psychiatrists engaged in therapy might not be forbidden to testify against dangerous clients. One could argue that threats made in the context of protected therapy dyads are seldom carried out and that these protected forums may well decrease actual violence. In addition, therapists have long argued against mandatory reporting for fear that it can damage the therapeutic relationship by making patients reluctant to openly express their thoughts and feelings. Indeed, it is almost expected that an individual undergoing anger management treatment may have an angry outburst or use threatening language. This problem remains a contentious one, and there are likely to be similar cases in the future where courts weigh the right to privacy and confidentiality against the greater good of protecting others.

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Post-Atkins Determination of Intellectual Disability in a Death Penalty Case in Oregon

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State Supreme Court Rules that DSM-5 Criteria for Intellectual Disability Should be Used in Evaluating an Individual Facing the Death Penalty

Following *Atkins v. Virginia*, 536 U.S. 304 (2002), which exempts persons with intellectual disability from the death penalty, states are determining how to apply this ruling in their courts. Their challenges include setting criteria and developing procedures to determine whether a defendant has an intellectual disability. The Oregon Supreme Court ruled in *Oregon v. Agee*, 364 P.3d 971 (Or., 2015) that Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) criteria for intellectual disability should be used in evaluating a defendant facing the death penalty. Moving away from IQ scores and toward using adaptive functioning for diagnosis further provides defendants with intellectual disability protection from the death penalty.

Facts of the Case

Isaac Agee was sentenced to the Oregon State Penitentiary to serve a 40-year sentence for attempted murder and other offenses. It was alleged that in February 2008, Mr. Agee, along with James Davenport, killed a fellow inmate. Both were charged with aggravated murder for intentional homicide. The state sought the death penalty for the offense. Mr. Agee moved the trial court to declare him intellectually disabled and therefore to be ineligible for the death penalty under *Atkins v. Virginia*. The trial court did not grant Mr. Agee's motion.

Oregon did not have specific procedural guidelines to determine when a defendant is ineligible for the death penalty under *Atkins*. Therefore, the trial court conducted a pretrial hearing at which Mr. Agee had the burden of proof to establish by a preponderance of the evidence that he was intellectually disabled.

During the pretrial hearing in April 2011, the court heard testimony from psychologists and psychiatrists regarding Mr. Agee's diagnosis and intellectual abilities. The trial court concluded Mr. Agee had partial fetal alcohol syndrome, but did not find that he had established intellectual disability that would exclude him from the death penalty on a constitutional basis. A jury was empaneled for a guilt-phase trial in May 2011, after which Mr. Agee was found guilty of aggravated murder.

The standard used to establish intellectual disability in the pretrial hearing was based on the DSM, 4th

Edition, Text Revision (DSM-IV TR), which the court used and was current at the time of trial. According to the state, Mr. Agee did not meet the first prong, which is a significant subaverage intellectual function, defined as an IQ score below 70. Because Mr. Agee's IQ score ranged around 82–84, the trial court found that he did not meet the burden of proof to establish intellectual disability.

The penalty-phase hearing then took place according to the Or. Rev. Stat. § 163.150 (2011). The evidence of Mr. Agee's intellectual disability was not discussed during the penalty phase of the jury trial. During this phase, the jury determined that Mr. Agee should receive the death penalty, as he committed the act deliberately and represented a continued threat to society. The trial judge entered a sentence of death. An automatic direct review by the Oregon Supreme Court ensued.

Mr. Agee argued that significant changes in the DSM-5 and judgment in a previous case, *Hall v. Florida*, 134 S. Ct. 1986 (2014), called into question the rationale applied to establish his intellectual disability. Mr. Agee contended both *Hall* and the DSM-5 de-emphasized the role of IQ score in determining intellectual disability. Furthermore, Mr. Agee argued that the *Hall* holding compelled consideration of other evidence in addition to IQ to determine intellectual functioning.

The DSM-5 was released in May 2013. The diagnostic criteria for intellectual disability were revised and were no longer dependent on the rigid application of IQ scores, placing more emphasis on adaptive functioning. The revised criteria rendered Mr. Agee's prior argument at trial that his adaptive functioning was at the level of a seven-and-a-half-year-old more compelling.

A similar case in 2014, *Hall v. Florida*, 134 S. Ct. 1986 (2014), also addressed use of IQ score in determining intellectual disability. In 1978, Freddie Hall was found guilty of murder. The trial court reasoned that his behavior was inconsistent with his claims of intellectual disability and sentenced him to death. After *Atkins*, Mr. Hall filed a *habeas* petition with the Florida Supreme Court. The court, however, affirmed that Mr. Hall did not have an intellectual disability, based on interpreting his IQ score as an absolute value, rather than as a range. Mr. Hall appealed to the U.S. Supreme Court in 2013. The Court reasoned that the Florida Supreme Court's reliance on IQ scores to determine intellectual delay

runs contrary to the views held by many mental health professional organizations, including the American Psychiatric Association, American Academy of Psychiatry and the Law, and the American Psychological Association, and the Court held that Mr. Hall's ruling was unconstitutional and remanded the case to the Florida Supreme Court in May 2014.

Ruling and Reasoning

On appeal, the Oregon Supreme Court affirmed Mr. Agee's conviction, but the death sentence was vacated, and the case was remanded to the circuit court. The Oregon Supreme Court held that the pre-trial hearing used an inappropriate standard to determine whether the burden was met for intellectual disability. The court also held that the trial court erred by not permitting Mr. Agee's expert witnesses to testify in regard to his diagnosis during the penalty phase.

Upon reviewing the case, the Oregon Supreme Court pointed out the changes in the medical standard when determining intellectual disability. After the publication of DSM-5, the severity of intellectual disability has been defined by impairments in adaptive function, not IQ score. Although the court still agreed with the use of IQ scores, following *Hall*, they held that clinical assessment and standardized intelligence test results together confirm a person's deficits in intellectual functioning. Even though the trial court ruling was based on medical standards current at the time, the court concluded that new medical standards should be applied. Therefore, they remanded the case to the lower circuit court for a new *Atkins* hearing.

Discussion

Agee describes Oregon's adaptation of standards for determination of intellectual disability set forth by *Atkins*. States and statutes often lag behind current medical standards. DSM-5 enacted significant changes in diagnostic criteria for intellectual disability, moving the emphasis away from IQ scores to adaptive functioning. There is no mention in DSM-5 of IQ score in the diagnostic criteria. Instead, "deficits in intellectual functions" is used to meet the first prong of the diagnosis, which is "confirmed by both clinical assessment and individualized, standardized intelligence testing" (DSM-5: Washington, DC: American Psychiatric Association, 2013, p 33). Severity of intellectual disability is de-

terminated more by adaptive functioning, because that is what determines the level of support needed by the individual.

The Oregon Supreme Court decision, influenced by the ruling in *Hall*, awards more mentally disabled individuals protection against the death penalty. Determination of intellectual disability will continue to rely on evaluation and testimony from forensic evaluators. The shift in emphasis to adaptive functioning presents new challenges on how best to evaluate for intellectual disability. Although there are some objective measures, the evaluation of adaptive functioning is mainly subjective. An evaluator should interview many informants; however, even their accounts can be biased. In addition, when determining the level of function before 18 years of age, informants may have a difficult time retroactively commenting on specific details. There is also difficulty when evaluating an individual's level of adaptive functioning when living in settings where he is not primarily responsible for meeting his needs (for example, in jail).

This decision, and other recent Supreme Court decisions that extend protections to vulnerable psychiatric populations, such as juveniles and those with mental disability, underscore the positive impact that advances in psychiatry and psychology can have on the judicial system. As would be expected, laws pertaining to these populations often do not take into account state-of-the-art scientific knowledge, and forensic experts play a central role in educating courts about current thinking in the field of mental health.

The decision in *Agee* provides additional opportunities for legal challenge for intellectually disabled individuals facing the death penalty in Oregon. *Agee* expands those who qualify for an intellectual disability diagnosis. By minimizing IQ scores and emphasizing adaptive functioning when determining intellectual disability, low-functioning defendants who originally did not qualify via DSM-IV TR criteria, may now meet criteria through DSM-5 and potentially be spared the death penalty. This shift in emphasis toward adaptive functioning may also mean that individuals with an IQ score below 70, who might have been spared the death penalty previously, may now be considered eligible.

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Forced Medications in the Restoration of Competency

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The Government Failed to Meet Its Burden of Proof That Forced Medication Was Substantially Likely to Restore Defendant's Competency

In *United States v. Watson*, 793 F.3d 416 (4th Cir. 2015), the Fourth Circuit Court of Appeals reversed the United States District Court for the Eastern District of Virginia's decision to grant the government's request that John Watson, Jr., be medicated by force, stating that the government had not met its burden of proving that the proposed treatment was substantially likely to restore his competency as required by *Sell v. United States*, 539 U.S. 166 (2003). Furthermore, the district court failed to give enough consideration to a defense expert's opinion that Mr. Watson, who had a diagnosis of delusional disorder, persecutory type, would be unlikely to respond to such treatment.

Facts of the Case

On September 28, 2012, John Watson, Jr. was observed shooting a handgun at a Coast Guard helicopter. The helicopter was not damaged and none of the Coast Guard employees on board was injured. Mr. Watson was indicted for attempted destruction of an aircraft (18 U.S.C. § 32(a)(1) (2009)); possession of a firearm by a felon (18 U.S.C. § 922(g)(1) (2009)); and use of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)(A) (2009)). Following his arrest, Mr. Watson underwent a competency evaluation, during which he expressed the belief that he had been a covert operative for the British special forces, thereby entitling him to diplomatic immunity; that the Coast Guard and Secret Service were working to help protect him; and that his phones and computer were being tapped. Mr. Watson was deemed incompetent to stand trial and was transferred to the Federal Medical Center in Butner (FMC Butner), North Carolina, for mental health evaluation and treatment.