

the criteria for civil commitment. This topic is pertinent, not only to mental health providers specializing in forensics, but to all practicing psychiatrists who are expected to make clinical determinations of when to petition for ongoing commitment or to discharge patients from inpatient settings. This case reconfirms that it is appropriate to consider demographic, historical, and clinical factors associated with increased risk of aggression as opposed to simply considering the patient's recent behavior. The factors presented by the psychiatrists in *United States v. Taylor* are similar to those typically considered by clinicians and evaluators when conducting risk assessments. For example, the court cited several prior legal cases in making the decision in *United States v. Taylor* (see *United States v. Cox*, 964 F.2d 1431 (4th Cir. 1992), p 1433; *United States v. Ecker*, 30 F.3d 966 (8th Cir. 1994), p 970).

Although all states permit involuntary commitment based on risk of harm to self or others, local jurisdictional practice may vary in what data can be incorporated into the commitment opinion. That said, this case highlights the importance of considering the risk of harm if released, which is different from considering only the risk of harm within the hospital.

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Intellectual Disability and the Death Penalty: Factors to Consider

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Texas Court Decision Upheld: All Evidence Was Fairly Considered in Determination of Intellectual Disability

In *Hernandez v. Stephens*, No. 12-70006 (5th Cir. filed Aug. 2, 2013), the Fifth Circuit Court of Ap-

peals upheld a Texas state court's decision that Mr. Hernandez was not intellectually disabled. Mr. Hernandez had appealed, claiming that the court did not adequately consider evidence to support a finding of intellectual disability and instead relied exclusively on evidence that opposed such a finding. The appeals court determined that the state court had not erred in its findings and had reasonably considered the facts in the case.

Facts of the Case

On October 14, 1997, Ramiro Hernandez, a Mexican national, went to the home of his boss, Glen Lich, and bludgeoned him to death. He then tied Mr. Lich's wife to her bed and raped her repeatedly. He threatened to harm her mother, who was sleeping in the adjoining room if she tried to call the police and told her that she would have to pay him if she ever wanted to see Mr. Lich again. Mrs. Lich was eventually able to escape and get help. Mr. Hernandez was convicted of capital murder and sentenced to death in 2000.

He appealed to the state district court on the basis that he was intellectually disabled and that his execution would therefore violate his Eighth Amendment protection against cruel and unusual punishment per *Atkins v. Virginia* (536 U.S. 304 (2002)). The Texas Court of Criminal Appeals ordered an evidentiary hearing, during which the state court found that he did not have intellectual disability. The Texas Court of Criminal Appeals adopted these findings, and he was denied the relief he sought.

Mr. Hernandez then applied for relief in the United States district court, alleging that his Constitutional rights had been violated because of his intellectual disability and that he had received ineffective assistance of counsel based on several arguments, including that a thorough investigation and presentation of mitigating evidence had not been made during his trial. The district court denied his application and granted a certificate of appealability on the intellectual disability claim but not on the other claims. He appealed the denial of the intellectual disability claim and also sought a certificate of appealability on three other claims. We focus only on his appeal of the finding that he was not intellectually disabled.

The Fifth Circuit Court of Appeals noted that it had held in *Chester v. Thaler*, 666 F.3d 340 (5th Cir. 2011), that Texas' standards for determining mental

retardation, known as the *Briseno* factors (*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)), were consistent with the U.S. Supreme Court's *Atkins* criteria. Specifically, in *Briseno*, the Texas Court of Criminal Appeals defined mental retardation as containing three factors, "(1) significantly subaverage general intellectual functioning (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs before the age of 18" (*Briseno*, p 2). Mr. Hernandez did not appeal this contention. Rather, he argued that evidence indicating that he had intellectual disability was not considered and that the opposing evidence that was considered provided a very "one-sided" and unfair view of his claim.

In the investigation of these claims, the appeals court detailed the evidence both for and against the claim of intellectually disability. Two psychologists administered psychological assessments to Mr. Hernandez in the context of his trial. The first of these evaluators, a licensed psychologist, testified that Mr. Hernandez scored a 54 on the nonverbal portion of the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), and a 57 on the Test of Nonverbal Intelligence (TONI). A second licensed psychologist testified that Mr. Hernandez scored a 52 on the TONI and a 70 on the full administration of the WAIS-III, when scaled to Mexican norms, with a score of 87 on the performance portion of the test and a 66 on the verbal portion of the test. This psychologist also cited a score of 83 on a TONI administered a few years earlier by a master's level psychological associate in the prison system, but dismissed it as outdated and unreliable. In addition, a psychiatrist diagnosed Mr. Hernandez with schizophreniform disorder, but concluded that he was competent to stand trial. This psychiatrist believed that Mr. Hernandez was feigning intellectual deficits. Another psychiatrist who evaluated him regarding his mental state at the time of the offense, concluded that he had a mood and thought disorder that was the result of a history of drug use and head injury. However, he concluded that Mr. Hernandez was not malingering, because malingerers typically provide information that would benefit them, while Mr. Hernandez volunteered that he was a member of a prison gang, which would be deleterious to his case.

In addition, a third psychiatrist who did not interview Mr. Hernandez reviewed the psychological test data and concluded that some of the tests had not

been properly administered and scored. He also noted that the psychologist did not include several subtests on which Mr. Hernandez performed well because of the absence of comparative norms. Furthermore, this psychiatrist, while not stating that Mr. Hernandez was malingering, nevertheless concluded that "motivational variables" most likely affected his scores on the intelligence tests. Finally, this psychiatrist reviewed evidence of his adaptive functioning and concluded that Mr. Hernandez was not intellectual disabled.

The appeals court ruled that the state district court appropriately took all of the data into account in arriving at its decision that Mr. Hernandez was not intellectually disabled, including review of his developmental history and his adaptive functioning. For the former, the evidence showed that he had difficulty following directions and frequently fell asleep as a child. Also, he did not interact well with other children, was unable to count money, and had problems with hygiene. Despite that information, there was limited testimony to indicate that people who knew him as a child thought that he was intellectually disabled. For the question of adaptive functioning, conflicting evidence was considered on several factors. Mr. Hernandez's sisters testified that he had difficulty using public transportation, which was countered by evidence that he had escaped from police custody in Mexico, entered the United States, and obtained employment. In addition, his relatives testified that he had "irrational responses during his childhood." However, evidence was presented that he had requested certain food during his incarceration without difficulty when his food was disagreeable to him. Although one psychologist stated that Mr. Hernandez discussed unrelated topics during interviews, a Texas law-enforcement officer testified that Mr. Hernandez had no difficulty responding directly during the posthomicide interview. Finally, the court focused on evidence of the planned and carefully executed crime against Mr. and Mrs. Lich which demonstrated that Mr. Hernandez was able to formulate a plan and follow through with it.

Ruling and Reasoning

The Fifth Circuit Court of Appeals held that the evidence presented did not demonstrate that Mr. Hernandez had significantly subaverage general intellectual functioning. In addition, the court held

that the evidence did not indicate significant limitations of adaptive functioning, according to the *Briseno* criteria, nor was there evidence of the manifestation of intellectual disability before the age of 18. Thus, the appeals court concluded that although there were some factual questions about whether he was intellectually disabled, the state court had properly evaluated the conflicting evidence, and there was no error in its conclusion that he did not meet criteria for intellectual disability.

Discussion

Following the Supreme Court's decision in *Atkins* that execution of intellectually disabled individuals is unconstitutional, many thorny questions have arisen concerning the determination of intellectual disability. Some of the concerns have included the definitions of intellectual disability adopted by states, the accuracy of IQ scores, and whether there should be rigid cutoff scores (as in the recently heard arguments before the Supreme Court, in Transcript of Oral Argument, *Hall v. Florida*, No. 1210882. Available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf. Accessed March 3, 2014). *Hernandez* did not involve questions about the appropriateness of Texas' standards for intellectual disability, but rather whether the standards were properly applied. Of particular interest to mental health professionals are the questions raised in this case of administration and scoring errors, cultural differences (Mr. Hernandez was a Mexican national, and there are hints that there may have been a language problem, as most of the tests administered were nonverbal), and assessment of effort and feigning. Given the very high stakes in *Atkins* cases, this case serves as a reminder of the need for properly trained evaluators who are familiar with the relevant tests and can inform the court of the limitations of many tests standardized in the United States when applied to individuals from different cultures. Furthermore, it is concerning in this case that assessment of feigning was seemingly based at least in part on idiosyncratic clinical judgment (*e.g.*, that the defendant volunteered that he was a member of a prison gang), rather than on validated instruments designed specifically to address feigning and proper effort.

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Denial of Social Security Benefits In Contrast to the Treating Doctor's Opinion

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Denial of Social Security Benefits Were Upheld (Despite the Controlling Decision of a Prior Administrative Law Judge) Due to Evidence of Improvement (Despite the Treating Physician's Opinion)

In *Rudd v. Comm'r of Social Security*, 531 F. App'x 719 (6th Cir. 2013), Jerry Rudd contended that the Social Security Administrative Law Judge (ALJ) erred in failing to apply the prior ALJ's residual functional capacity (RFC) finding, as required by *Drummond v. Comm'r of Soc. Sec.*, 126 F.3d 837 (6th Cir. 1997), that subsequent ALJ findings are bound by previous ALJ findings unless evidence of improvement in the claimant is presented. Mr. Rudd also contended that his new mental evaluation established that he had greater mental impairment and limitations and that the ALJ erred in not giving controlling weight to the opinions of his treating physician. Mr. Rudd appealed the denial of his disability claims in the United States Court of Appeals for the Sixth Circuit after an ALJ found that he had an RFC for reduced range of sedentary work with some mental limitations and that he was not disabled, in that he could perform other work.

Facts of the Case

Mr. Rudd had suffered various injuries from an April 2002 motor vehicle accident, had had surgery on his right knee in 2005, and had had treatment for depression. He filed applications for a period of disability, disability insurance benefits, and Supplemental Security Income. The ALJ denied these claims, finding him not disabled from June 1, 2003 through June 25, 2007. The ALJ found that he had severe impairments of cognitive and adjustment disorders and was unable to carry out detailed instruc-