tion was adequate and that counsel's decision did not prejudice his case. The court did not address the circumstances under which it would be appropriate to provide expert assistance in preparing an appeal.

In *Crutsinger*, the fifth circuit determined that Mr. Crutsinger's defense was sufficient and that further investigation into Dr. Goodness' findings would not have changed the outcome of his case. Cases involving indigent defendants who request funding for different aspects of their defense continue to raise important questions about the extent of the state's responsibility to provide such defendants with resources. In *Crutsinger*, limits were set on the right to investigative and expert assistance in a postconviction challenge and the right to a fair, but not a perfect, trial was emphasized.

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

Should Medicaid Cover the Cost of Applied Behavioral Analysis for the Treatment of Autism?

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The Eleventh Circuit Court of Appeals Considers Whether Applied Behavioral Analysis for the Treatment of Minors with Autism Spectrum Disorders Is Experimental in Deciding Whether Medicaid Coverage Is Required

In *Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. 2013), Plaintiffs KG, ID, and CC sued Elizabeth Dudek, Interim Secretary for the Florida Agency for Health Care Administration, for violating the Medicaid Act by denying Medicaid coverage of Applied Behavioral Analysis to treat plaintiffs' Autism Spectrum Disorders. The district court granted the plaintiffs a permanent injunction and subsequent declaratory judgment. Appeal was then taken to the Eleventh Circuit.

Facts of the Case

Plaintiffs KG, ID, and CC were three minors with Autism or Autism Spectrum Disorders who received Florida Medicaid. Florida, as a Medicaid participant under the federal Medicaid Act, provided early and periodic screening and diagnostic and treatment services (EPSDT) to Medicaid-eligible minors, including the plaintiffs, who were found to have Autism or Autism Spectrum Disorders when evaluated. Once plaintiffs received a diagnosis of Autism or Autism Spectrum Disorders, Florida was required under the Medicaid Act's EPSDT provision to provide them with any treatment necessary "to correct or ameliorate" those conditions discovered during EPSDT screening, regardless of whether the treatment was specifically covered by Florida's Medicaid plan.

The plaintiffs were all prescribed Applied Behavioral Analysis by their physicians, an early intensive behavioral interaction treatment that uses a structured, one-on-one program to treat the behavioral problems associated with Autism and Autism Spectrum Disorders.

However, the Florida Agency for Health Care Administration denied plaintiffs' coverage for Applied Behavioral Analysis on the basis that Florida Medicaid guidelines indicated that "Medicaid does not pay for community behavioral health services [such as Applied Behavioral Analysis] for treatment of autism [or] pervasive developmental delay" and Applied Behavioral Analysis treatment was experimental and thus not medically "necessary" for the treatment of Autism Spectrum Disorders (*Garrido*, p 1155).

Plaintiff KG alleged that, under 42 U.S.C. § 1983, Florida's denial of Applied Behavioral Analysis violated the Medicaid Act's EPSDT provision. KG sought a declaration from the district court that Florida's exclusion of behavioral health services for treatment of Autism Spectrum Disorders violated the Medicaid Act and a preliminary and permanent injunction directing Florida's Agency for Health Care Administration to amend Florida's Medicaid Handbook to ensure that KG received Medicaid coverage for Applied Behavioral Analysis, consistent with the recommendations made by the treating physician.

After a magisterial hearing, the district court directed Ms. Dudek to provide Medicaid coverage for KG's Applied Behavioral Analysis treatment as prescribed by his treating physician.

Later, two additional plaintiffs (ID and CC) joined KG, seeking similar relief. The parties filed

cross-motions for summary judgment, which the district court denied owing to a finding of disputed issues of fact concerning Florida's determination that Applied Behavioral Analysis was experimental.

At a bench trial, employees of the Florida Agency for Health Care Administration testified that the standard process was not followed in the agency's determination of whether Applied Behavioral Analysis was experimental. The plaintiffs presented expert testimony that Applied Behavioral Analysis is the standard means to treat Autism Spectrum Disorders and also evidence that Applied Behavioral Analysis was necessary to treat these specific plaintiffs.

The district court concluded that Applied Behavioral Analysis falls within the scope of a preventive or rehabilitative service, and thus the state of Florida is required to provide that service to all Medicaid-eligible minors under age 21 if necessary to correct or ameliorate a condition discovered in an EPSDT screening. The court also found "that applied behavioral analysis is medically necessary and not experimental, as defined under Florida statutory and administrative law and federal law" (*Garrido*, p 1157).

The district court granted the plaintiffs a permanent injunction, barring Florida from enforcing portions of the Florida Medicaid Handbook that excluded Applied Behavioral Analysis, and also granted a declaratory judgment that ordered the state of Florida to provide and fund Applied Behavioral Analysis to the three plaintiffs, as well as to all Medicaid-eligible persons under the age of 21 in Florida who had received a diagnosis of an Autism Spectrum Disorder and had been prescribed Applied Behavioral Analysis.

An appeal was taken to the Eleventh Circuit. Ms. Dudek did not challenge the plaintiffs' entitlement to Applied Behavioral Analysis as a covered Medicaid service or the portion of the permanent injunction invalidating the Florida Medicaid Handbook rule that excluded Applied Behavioral Analysis from Medicaid coverage.

However, Ms. Dudek appealed the scope of the permanent injunction and declaratory judgment, contending that both went beyond what was necessary to afford the plaintiffs complete relief and argued that the district court entered an injunction that impermissibly provides that all autistic Medicaid recipients under the age of 21 with a prescription for Applied Behavioral Analysis are automatically entitled to Applied Behavioral Analysis treatment, regardless of the medical necessity of Applied Behavioral Analysis treatment in any individual case.

Ruling and Reasoning

The Eleventh Circuit ruled that the district court did not abuse its discretion in issuing a permanent injunction that overruled the Florida Agency for Health Care Administration's determination that Applied Behavioral Analysis is experimental and never medically necessary.

Furthermore, the district court did not abuse its discretion in requiring Medicaid coverage of Applied Behavioral Analysis. However, the Eleventh Circuit vacated the injunction in part and remanded to the district court to modify the language in the injunction and the declaratory judgment. The modifications to the injunction include an order for the state of Florida to provide, fund, and authorize Applied Behavioral Analysis for the plaintiffs. The language that was ordered to be modified in the injunction by the Eleventh Circuit included clarification that the declaratory judgment did not eliminate the authority of the Florida Agency for Health Care Administration to make individual medical necessity determinations for other Medicaid recipients seeking Medicaid coverage for Applied Behavioral Analysis.

Discussion

Applied Behavioral Analysis has long been an accepted and mainstream treatment for Autism and Autism Spectrum Disorders. Of note, the Florida Agency for Health Care Administration initially denied Medicaid coverage for Applied Behavioral Analysis (despite the widespread acceptance of this treatment) only after circumventing established agency procedures for determining whether it was experimental. However, denial of services to physically or mentally disabled individuals is not a new phenomenon. In the notable United States Supreme Court case, *United States v. Georgia*, 546 U.S. 151 (2006), Tony Goodman, an inmate with paraplegia, also brought claims under 42 U.S. C. § 1983 seeking injunctive relief for denial of physical therapy and medical treatment. In that case, the Eleventh Circuit Court of Appeals held that the district court erred in dismissing his § 1983 claims. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the United States Supreme Court case regarding discrimination against people with mental disabilities, the Court ruled that unnecessary institutionalization of mentally ill persons who are appropriate for community placement consti-

tutes discrimination under the Americans With Disabilities Act.

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

A Single IQ Score Over 70 Supports Finding of No Intellectual Disability, Despite Conflicting Test Results and Expert Testimony

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The Defendant is not Entitled to *Habeas* Relief on his Intellectual Disability Claim, Because he did not Meet the Burden of Rebutting the Presumed Correctness of the State Court's Decision that he did not have an Intellectual Disability

In O'*Neal v. Bagley*, 728 F.3d 552 (6th Cir. 2013), the Sixth Circuit Court of Appeals affirmed a district court's denial of *habeas corpus*. The appeals court ruled, despite three separate IQ scores below 70, that because of conflicting expert witness testimony, the defendant did not rebut by clear and convincing evidence the state court's factual finding that he did not have an intellectual disability. Thus, he was ineligible for relief from execution under *Atkins v. Virginia,* 536 U.S. 304 (2002).

Facts of the Case

In September 1993, James O'Neal moved into a Cincinnati home with his wife, her four children, and his two sons from prior relationships. Mrs. O'Neal demanded that he and his sons leave after a physical altercation on December 7, 1993. On December 11, 1993, Mr. O'Neal broke in, shot Mrs. O'Neal to death, tried to shoot her son, and fled. He later surrendered. Forensic evidence linked his gun to the shooting and he confessed to the crimes.

At trial, conflicting expert witness testimony from psychologists was presented, as well as results of several IQ tests. Mr. O'Neal scored below 70 on three separate IQ tests between 1968 and 2004 and scored 71 on a fourth in 1994. In addition, the defense expert who examined and administered the 2004 test to Mr. O'Neal gave testimony supporting his opinion that the defendant had significant limitations in academic and social skills. The expert diagnosed mild to borderline intellectual disability.

Another expert witness psychologist, who evaluated Mr. O'Neal before trial and administered the 1994 IQ test, opined that Mr. O'Neal functioned higher than his IQ suggested and did not have an intellectual disability. A third psychologist, who reviewed both experts' evaluations and several other records, but did not examine Mr. O'Neal, opined that Mr. O'Neal's sub-70 IQ scores did not offset a lack of significant deficits in his adaptive functioning, as established by employment, military history, and parenting. The court ultimately agreed.

Mr. O'Neal was convicted on several counts including aggravated murder with death penalty specifications. On direct review the Supreme Court of Ohio affirmed his conviction and sentence. Mr. O'Neal exhausted his state appeals. His postconviction petition regarding the question of intellectual disability under the *Atkins v. Virginia* decision was denied. Mr. O'Neal claimed that he had an intellectual disability and was therefore ineligible for execution, on the basis of low scores on several IQ tests, significant limitations in his academic and social skills, and school records showing onset of the disability before age 18.

The state appellate court faulted the trial court for applying an improper IQ standard, but affirmed the factual determination because it was supported by "reliable, credible evidence," rendering any error "harmless." The court affirmed that Mr. O'Neal did not have significantly subaverage intellectual function on the basis of an IQ score higher than 70 and the finding that he did not have limitations in two or more adaptive skills.

In 2002, Mr. O'Neal filed a federal petition for *habeas corpus*. The district court granted a certificate of appealability on 4 of 18 claims raised, one of which addressed intellectual disability.

Ruling and Reasoning

As amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. § 2254 (d)(2) states that a defendant is entitled to *habeas* relief only if he can establish that the state appel-