vacy interest in confidential communications made to certain professionals, but recognizes the patient-litigant exception. Section 622.10 recognizes two competing interests: a patient's right to privacy and the need of a defendant to present a full and fair defense to the plaintiff's claims.

Reminiscent of the *McMaster* protocol, the majority found:

> . . . the party seeking the waiver must make a showing that he or she has a reasonable basis to believe the specific records are likely to contain information relevant to an element or factor of the claim or defense . . . , need only advance some good faith factual basis demonstrating how the records are reasonably calculated to lead to admissible evidence germane to an element or factor of the claim or defense . . . , and must show a nexus between the records sought and a specific claim or defense made in the case. If a party can make this showing, the patient-physician privilege is lost as to those records and the party requesting the waiver shall be entitled to the waiver to obtain those records within the scope of discovery [*Fagen*, p 835].

The majority reasoned that using this protocol would allow the court to determine when the record relates to the condition alleged by a party and therefore should be released.

Dissent

Justice Mansfield, writing for the dissent, opined that Mr. Fagen's appeal should be rejected for three reasons: the plaintiff is alleging "mental disability" which is not the same as "garden-variety" emotional distress; Iowa Code § 622.10 (2013) does not allow for a garden-variety exception; and in the personal injury context, garden-variety exceptions could be construed as either an attempt to obtain "double recovery" (from garden variety emotional distress and pain and suffering) which is not permitted, or as an attempt to obtain compensation for mental health injuries different from and more extensive than the typical "anguish, grief, distress, fear, and pain and suffering," which amounts to putting his mental health condition at issue, and therefore Iowa Code §§ 622.10(2) would apply.

Discussion

Mental health records are privileged, meaning that the patient has a right to prevent treating clinicians from disclosing the records. There are certain exceptions to this privilege including imminent violence, medical emergencies, and the patient-litigant exception, at issue in this case. When a patient places his mental health at issue by seeking psychiatric damages, he cannot block access to information material to that claim.

In re Lifschutz, 467 P. 2d 557 (Cal. 1970) illustrated that the patient, not the psychiatrist, had the testimonial privilege. Joseph Lifschutz was held in contempt for refusing to release his treatment records for a teacher, who had alleged "physical injuries, pain, suffering and severe mental emotional distress" as the result of an assault by a student. Dr. Lifshutz had declined to release the records even though his patient had not objected to the release. The court found that the patient himself had waived the privilege as it applies to information relevant to the claim.

Later in *Jaffee v. Redmond,* 518 U.S. 1 (1996), the U.S. Supreme Court recognized the psychotherapist–patient privilege. Officer Mary Lu Redmond was accused of using excessive force when she shot and killed Ricky Allen, Sr., a suspect in an attempted assault. When she sought to withhold records of the counseling she received from Karen Beyer, a social worker, after the shooting, the jury was instructed to assume that the counseling notes contained incriminating information. The Supreme Court found that the lower court had erred in their jury instructions, because there was never an assertion that Ms. Redmond had waived her patient–psychotherapist privilege. The records were confidential and protected by an absolute federal common law privilege.

The decision in *Fagen* is consistent with both *Lifschutz* and *Jaffee*; a psychotherapist–patient privilege exists until it is shown that an exception is warranted. In *Fagen*, the Iowa Supreme Court outlines a protocol for balancing the patient's privacy with the probative value of the protected information.

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

Determining Intellectual Disability in a Post-Atkins Death Penalty Case

Cortney Kohberger, MD
Fellow in Forensic Psychiatry
Case Western Reserve University

Stephen Noffsinger, MD
Associate Professor of Psychiatry

University Hospitals Case Medical Center
Cleveland, Ohio

The Court of Appeals for the Fifth Circuit Held That the Defendant Failed to Demonstrate That He Had an Intellectual Disability for the Purposes of Capital Sentence Mitigation, Leaving the State *Habeas* Court Free to Weigh Historical and Observational Evidence More Heavily Than Scientific and Expert Reports When Determining If a Capital Defendant Has an Intellectual Disability

In *Matamoros v. Stephens,* 783 F.3d 212 (5th Cir. 2015), the Fifth Circuit affirmed the denial of *habeas* relief by the U.S. District Court for the Southern District of Texas despite defense expert testimony alleging intellectual disability, and without expert testimony from the state. The court held that the Texas Court of Criminal Appeals was free to give more weight to nonscientific evidence than to scientific evidence and expert opinion.

Facts of the Case

In November 1992, John Reyes Matamoros stood trial in Texas and was found guilty of the capital murder of his neighbor, Eddie Goebel. The state trial court sentenced him to death. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence.

After the Supreme Court held that it is unconstitutional to execute persons with intellectual disability in *Atkins v. Virginia,* 536 U.S. 304 (2002), Mr. Matamoros filed his initial federal *habeas* petition, asserting that he was ineligible for the death penalty under *Atkins* because he had an intellectual disability.

The district court remanded the case to state court for reconsideration in light of *Atkins*.

In 2006 the trial court held a hearing to consider Mr. Matamoros' *Atkins* claim. Mr. Matamoros offered expert testimony from psychologist Susana Rosin, who testified that Mr. Matamoros had an intellectual disability. She based her conclusions on interviews with Mr. Matamoros and his family, Texas Youth Commission (TYC) records, Texas Department of Criminal Justice records (TDCJ), psychological reports, Mr. Matamoros' letters, and Mr. Matamoros' test results during his incarceration at TYC. Among other psychological standardized tests, Dr. Rosin administered the Wechsler Adult Intelligence Scale. She found that Mr. Matamoros had a verbal IQ of 66, a performance IQ of 69, and a full-scale IQ of 65. Mr. Matamoros also presented evidence of intellectual disability based on tests that had been administered to him before the age of 18.

In contrast, the state offered testimony from psychologist George Denkowski that Mr. Matamoros did not have an intellectual disability. Dr. Denkowski administered psychological test measures and reviewed medical, disciplinary, and behavioral records. Dr. Denkowski's conclusions were based on upward adjustments he made to Mr. Matamoros' scores on the Adaptive Behavior Assessment System based, in part, on Mr. Matamoros' plan for stealing cars, and his documented ability to formulate plans and to carry them through.

The state argued that Mr. Matamoros' testimony was evidence of his ability to think logically, rationally, and thoughtfully. The state introduced Mr. Matamoros' denial that he had committed crimes of which he had been accused or convicted. Mr. Matamoros testified that he had pleaded guilty for an assault he had not actually committed, because he thought a jury was likely to believe the victim's word over his own. The state argued that this explanation was evidence of Mr. Matamoros' having a logical understanding of how the criminal justice system works. The state also introduced records from Mr. Matamoros' time in state custody that stated that Mr. Matamoros socialized, had leadership potential, and was proficient in his daily living skills.

The trial court found that Mr. Matamoros had no intellectual disability under *Atkins*, and the Texas Court of Criminal Courts affirmed.

However, in April 2011, Dr. Denkowski "had his license officially reprimanded" because his "diagnostic practices [had] come under considerable professional scrutiny" (*Matamoros*, p 214). In a settlement with the Texas State Board of Examiners of Psychologists, Dr. Denkowski agreed to "not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings" (*Matamoros*, p 214).

Mr. Matamoros then filed a motion in state court, requesting a rehearing on his *Atkins* claim in light of the settlement agreement regarding Dr. Denkowski's license, supported by affidavits from defense experts supporting his claim of intellectual disability. The Court of Criminal Appeals remanded the case to the state trial court "to allow it the opportunity to re-evaluate its initial findings, conclusions, and recom-

mendation in light of the Denkowski Settlement Agreement" (*Matamoros*, p 214).

Without acknowledging the defense affidavits or holding a new hearing, the state trial court again denied Mr. Matamoros' application, although the court stated in open court that it had discounted Dr. Denkowski's testimony. The Court of Criminal Appeals again denied Mr. Matamoros' writ application, "based upon the trial court's findings and our own review."

Mr. Matamoros then filed a motion in the Fifth Circuit, asking the court to remove the previously filed stay on his federal *habeas* proceedings and to order remand to the district court "to reconsider [his] *Atkins* claim *de novo* without taking into account or in any respect relying on Dr. Denkowski's analysis" (*Matamoros*, p 215).

Federal *habeas* proceedings are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) which states that relief may be granted only if the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings" (28 U.S.C. § 2254(d)(2)(2006)). Thus, the issue before the U.S. Court of Appeals for the Fifth Circuit was whether Mr. Matamoros had shown, by clear and convincing evidence, that the Texas Court of Criminal Appeals had unreasonably determined that Mr. Matamoros did not exhibit adaptive behavior deficits that originated before the age of 18, and therefore he had no intellectual disability.

Ruling and Reasoning

The Fifth Circuit held that Mr. Matamoros did not show by clear and convincing evidence that the Texas Court of Criminal Appeals was unreasonable in concluding that Mr. Matamoros did not meet his burden of proving that he had an intellectual disability. The court held that the Court of Criminal Appeals was free to weigh the observational evidence and its own interpretation of Mr. Matamoros' testimony more heavily than the scientific and expert reports presented by Mr. Matamoros.

In Texas, the standard for determining whether a person has an intellectual disability and thus is ineligible for the death penalty was established by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The *Briseno* court placed the burden of proof on the defendant to show by the preponderance of the evidence that he had an intellectual disability.

The *Briseno* court noted that "the adaptive behavior criteria are exceedingly subjective" (*Briseno*, p 8). The *Briseno* court further noted that "although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether [a] person is, in fact, mentally retarded . . . is one for the finder of fact, based upon all of the evidence and determinations of credibility" (*Briseno*, pp 8–9).

The *Briseno* court listed seven factors that courts may consider in their adaptive behavior analysis:

> (1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination? (2) Has the person formulated plans and carried them through or is his conduct impulsive? (3) Does his conduct show leadership or does it show that he is led around by others? (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? (5) Does he respond coherently, rationally, and on point to oral and written questions or do his responses wander from subject to subject to subject? (6) Can the person hide facts or lie effectively in his own or others' interests? (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? (*Briseno*, pp 8–9).

The U.S. Court of Appeals for the Fifth Circuit, in prior cases, has held that the *Briseno* factors are a constitutionally permissible application of *Atkins* and has denied federal *habeas* relief when the state court relies only on *Briseno* factors.

Discussion

The *Matamoros* decision grants the courts wide latitude in determining intellectual disability. In this case, the court discounted the scientific evidence in the form of standardized IQ testing as well as expert opinions. As the trier of fact, the court is free to make its own determination of fact based on its own analysis of the defendant's behavior.

In *Atkins*, the Supreme Court held that executing a person with an intellectual disability is unconstitutional, reasoning that persons with intellectual disabilities are at special risk of wrongful execution. However, the Court left states to devise procedures to determine what constitutes an intellectual disability and therefore who should be excluded from capital punishment. This ruling led to consideration of the

relationship between clinical and legal definitions of intellectual disability and questions of whether states should be compelled to rely on professional definitions or whether they can craft their own classifications. Most states have defined intellectual disability according to the three-prong test from the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV): substantial limitations in intellectual functioning, substantial limitations in adaptive behavior, and evidence of the condition before the age of 18.

Several states, including Florida, Georgia, Mississippi, and Texas, have set their own standards. These standards have effectively excluded all but those with the most severe disabilities from the protections afforded by *Atkins* and have become the basis of appeal by death row inmates seeking relief under an *Atkins* claim.

Georgia set the standard of proof of intellectual disability at beyond a reasonable doubt. Therefore, those who do not have profound intellectual disability would be at risk of execution because of their inability to satisfy Georgia's standard of proof. In *Hill v. Humphrey*, 662 F.3d 1335(11th Cir. 2011), the U.S. Court of Appeals for the Eleventh Circuit *en banc* majority reasoned that AEDPA demands deference to prior decisions of a state *habeas* court, and therefore the Georgia State Supreme Court's decision affirming the state's reasonable-doubt standard remains in place.

Florida set a bright-line standard IQ of 70, holding that any defendant with an IQ over 70 is eligible for the death penalty, regardless of the severity of his limitations and ignoring the scientific consensus that IQ scores represent a range of intellectual functioning, with standard deviation, rather than a definite determination of intellectual functioning. Florida's scheme was ultimately heard by the Supreme Court in *Hall v. Florida, 134 S. Ct. 1986* (2014). The Court held that Florida's determination process was unconstitutional, as it created an intolerable risk of executing a citizen with intellectual disability.

The Texas process of determining intellectual disability via the anecdotal *Briseno* criteria grants the courts wide latitude in determining intellectual disability. Under those criteria, a person can be excluded from being categorized as having an intellectual disability based on nonscientific factors. As it stands, the *Matamoros* decision affirmed the court's freedom to make its own determination of fact based on its own analysis of the defendant's behavior, ignoring scientific evidence and expert opinions.

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

Privileged Communication Between a Patient and Clinician

Shree Sarathy, MD
Resident in Psychiatry
University Hospitals Case Medical Center
Cleveland, OH

Sara West, MD
Assistant Professor of Psychiatry
Case Western Reserve University School of Medicine
Cleveland, OH

Statements Made to a Clinician During the Course of Treatment Are Not Privileged if the Imminent-Harm Exception Applies

In *Walden Behavioral Care v. K.I.*, 27 N.E.3d 1244 (Mass. 2015), the Supreme Judicial Court of Massachusetts affirmed the holding of the lower courts that the clinician–patient privilege is overcome by the imminent-harm exception and that the court-ordered examination exception to clinician–patient privilege is not applicable to this case.

Facts of the Case

In August 2012, K.I., a patient diagnosed with schizophrenia, was reportedly experiencing auditory hallucinations that were commanding him to kill himself. He was emergently admitted to Walden Behavioral Care, a psychiatric treatment facility in Massachusetts. K.I. was subsequently committed to the facility for a three-day evaluation period, during which he was examined and treated by psychiatrist David Brendel, who filed a petition for K.I.'s continued commitment pursuant to Mass. Gen. Laws ch. 123, § 7,8 (2012), which states that a superintendent of a facility may petition for commitment and retention of any patient at said facility if the superintendent has determined that failure to hospitalize would create a likelihood of serious harm as a result of mental illness.

K.I. stated that he was never informed that his communications with his treating psychiatrist may be admissible in legal proceedings. He filed a motion to exclude Dr. Brendel's testimony, maintaining that