

The Seventh Circuit indicated that the *Klessig* decision “strayed from the ‘mental functioning’ sense of competence over to educational achievement and familiarity with the criminal justice system” (*Tatum*, p 467). The Wisconsin Supreme Court said that in determining a defendant’s competency to represent himself, “the circuit court should consider factors such as defendant’s education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury” (quoting *Klessig*, p 724).

The Seventh Circuit said that nothing in the colloquy, in Mr. Tatum’s case, suggested that Mr. Tatum had “deficient mental functioning, as opposed to a limited education” (*Tatum*, p 467). In fact, Mr. Tatum demonstrated a relatively good knowledge of the criminal process and that “*Faretta* requires no more” (*Tatum*, p 467). The Seventh Circuit also noted that the Wisconsin courts inappropriately placed the burden on Mr. Tatum to show that he “understood and accepted the challenges of self-representation” (*Tatum*, p 468). The court said that *Faretta* places “the duty on the trial court to warn the defendant about what he is getting into, and then leave the defendant free to decide how he wants to proceed” (*Tatum*, p 468). The court concluded by saying, “By failing to recognize that the Supreme Court’s *Faretta* line of cases focus only on competence as it relates to mental functioning, and forbids the consideration of competence in the sense of accomplishment, the Wisconsin courts reached a result that is contrary to, as well as an unreasonable application of, the Supreme Court’s rulings” (*Tatum*, p 469).

Discussion

The Seventh Circuit’s reasoning in this case relied heavily on the U.S. Supreme Court precedent: *Faretta*, *Godinez*, and *Edwards*.

In *Faretta*, the Supreme Court addressed what is required to waive counsel. The Court held that criminal courts cannot constitutionally force a lawyer on an individual who desires to conduct his own defense. The Court said that when a defendant represents himself, he gives up several of the “traditional benefits” associated with the right to an attorney. Therefore, “[i]n order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits” (*Faretta*, p 835). A defendant

does not need to have the skill and experience of a lawyer; in fact, technical legal knowledge was not deemed to be “relevant to an assessment of his knowing exercise of the right to defend himself” (*Faretta*, p 836).

In *Godinez*, the Court said that the competency standard for pleading guilty or waiving the right to counsel is not higher than the standard for competency to stand trial, except in the sense that the waiver must be knowing and voluntary. The Seventh Circuit indicated that the *Godinez* opinion showed that the critical question was a defendant’s “mental functioning” rather than “any particular knowledge he may have” (*Tatum*, p 465).

The Seventh Circuit said that state courts mistakenly thought that *Edwards* introduced the possibility of considering a defendant’s legal knowledge. In *Edwards*, the U.S. Supreme Court held that the state may force counsel upon a defendant in the scenario where the accused is mentally competent to stand trial if represented, but is “not mentally competent to conduct that trial himself” (*Edwards*, p 167). The Seventh Circuit emphasized that the opinion in *Edwards* was focused on mental competence, rather than a particular skill.

In summary, the Seventh Circuit’s ruling in *Tatum* emphasizes that the right to represent oneself is a constitutional right that is not to be infringed upon based on a lack of education, skill, or achievement; rather, competence to proceed *pro se* must be considered as it relates to mental functioning.

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Determination of Intellectual Disability in Death Penalty Cases

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United States Supreme Court Rules That the Courts Must Use Current Medical Diagnostic Criteria for Assessment of Intellectual Functioning in Death Penalty Determinations

In *Moore v. Texas*, 137 S.Ct. 1039 (2017), a Texas man found guilty of murder and sentenced to death in 1980 pursued multiple efforts for resentencing. He ultimately filed a state *habeas* petition, arguing that he was ineligible for the death penalty because he was intellectually disabled. The state *habeas* judge agreed; however, the Texas Court of Criminal Appeals (CCA) determined intellectual functioning based on several measures, including outdated clinical guidelines based on a previous case in Texas that established criteria for intellectual disability. The United States Supreme Court ruled that the courts should not use obsolete standards when more current clinical diagnostic frameworks exist.

Facts of the Case

In April 1980, Bobby James Moore, at the age of 20, and two accomplices attempted to rob a grocery store. In the course of the robbery, Mr. Moore shot and killed a clerk. He was convicted and sentenced to death in July 1980. Over the next 35 years, Mr. Moore engaged in a legal battle to overturn his death sentence. In 1995, a federal *habeas* court vacated the death sentence because of ineffective assistance of counsel, which was affirmed by the Fifth Circuit Court of Appeals in 1999. After a second sentencing hearing, Mr. Moore again received the death penalty in 2001, which the Texas CCA affirmed.

In 2014, Mr. Moore's case was reviewed in the state *habeas* court regarding his intellectual functioning. Numerous individuals testified and submitted affidavits, including Mr. Moore's family, prior counsel, and court-appointed mental health experts. The court found that Mr. Moore had extensive mental and social difficulties that began at an early age, including an inability to understand the days of the week, tell time, or demonstrate basic principles of math by the age of 13. He failed all his ninth-grade courses. He subsequently dropped out of school, was kicked out of his home, and lived on the streets. The state *habeas* court used current medical diagnostic standards in determination of Mr. Moore's intellectual disability, including the 11th edition of the American Association on Intellectual and Developmental Disabilities (AAIDD-11) clinical manual (Schalock RA, Borthwick-Duffy SA, Bradley VJ, *et al*: *Intellectual Disability: Definition, Classification,*

and System of Supports (ed 11). Washington, DC: AAIDD, 2010), the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) (Arlington, VA, American Psychiatric Association Publishing, 2013) and the generally accepted diagnostic definitions of intellectual disabilities. This included three elements: (1) intellectual-functioning deficits (IQ score of 70 with standard error of 5), (2) adaptive deficits, and (3) deficits developed before age 18. Mr. Moore met the criteria for intellectual disability according to these standards because he had an IQ score average of 70 and significant adaptive deficits noted by mental health experts. The state *habeas* court thus recommended that the CCA "reduce his sentence to life in prison or grant a new trial on intellectual disability" (*Moore*, p 1046). The CCA disagreed and rejected these recommendations citing *Ex parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004), which established guidelines for determination of intellectual disability in 1992. The *Briseno* court concluded there were seven factors to consider for the determination of intellectual disability. The CCA indicated that the state *habeas* judge erred by using the current clinical guidelines instead of *Briseno* as *Atkins v. Virginia*, 536 U.S. 304 (2002), "left it to the States" to determine how best to enforce the limitation of execution of the mentally disabled, and Texas legislation had not displaced *Briseno*. Referencing the nonclinical *Briseno* factors, the CCA held that Mr. Moore was not intellectually disabled for the purposes of execution. The U.S. Supreme Court granted *certiorari* to evaluate whether the CCA's use of *Briseno* and disregard of current medical standards complied with Eighth Amendment and prior Supreme Court precedents.

Ruling and Reasoning

Justice Ruth Bader Ginsburg wrote the majority 5-to-3 opinion. The Court reviewed previous findings from *Atkins* and *Hall v. Florida*, 134 S.Ct. 1986 (2014). In *Atkins*, the Court held execution of intellectually disabled persons unconstitutional under the Eighth Amendment. In *Hall*, the Court ruled "that a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70" (*Moore*, p 1048). While the Court at that time left the details of enforcement for the states to determine, they noted that the determination of intellectual disability must be within clinical diagnostic standards (which, in this case, included the

DSM-5 and the AAIDD-11). The Court determined that the CCA erred in their decision in several areas. *Hall* instructed that the courts must consider a test's standard deviation for error and the range reflected by that deviation. For IQ, the standard error of measurement is 5; therefore, Mr. Moore's IQ score of 74 should have been considered to be in the range of 69 to 79. The CCA followed testimony that the lower score may have reflected external factors at the time of testing, such as depression, which may have artificially lowered the score. With a score near 70, the Court requires that a person's adaptive functioning then be evaluated to determine intellectual disability. The Court noted that the CCA considered Mr. Moore's adaptive functioning in a manner that did not conform to current medical guidelines. In particular, the CCA "overemphasized Moore's perceived adaptive strengths" (*Moore*, p 1050), and that these strengths outweighed his numerous adaptive deficits. The Court indicated the CCA erred in their assertion that his adaptive impairments were not due to a personality disorder, in that co-occurring mental illness and developmental disabilities are common in intellectual disabilities and the occurrence of one does not rule out the presence of the other.

In *Hall*, the Court stated that the reliance on the *Briseno* factors led to an "unacceptable risk that person with intellectual disability will be executed" (*Hall*, p 1990). Indeed, the Court noted that the *Briseno* factors relied on amateur assessments and understanding of intellectual disability, as opposed to expert opinion, such as considering who society would consider to be intellectually disabled. The Court noted that the *Briseno* factors were rarely used in other courts and that even Texas did not apply *Briseno* in other circumstances outside of capital cases. The Court reported that the state *habeas* court used current medical guidelines in their conclusion that Mr. Moore was intellectually disabled and that the death penalty could not be enforced, which the CCA disregarded in favor of outdated 1992 guidelines and the *Briseno* factors. For these reasons, the Court vacated the judgment of the Texas Court of Criminal Appeals, and the case was remanded for further proceedings "not inconsistent with this opinion" (*Moore*, p 1053).

Dissent

Chief Justice John Roberts wrote the dissent for this decision and was joined by Justice Clarence

Thomas and Justice Samuel Alito. Chief Justice Roberts cited several disagreements with the Court majority in this case. Of note, he pointed to the Court's precedents that what is considered cruel and unusual relied on "judicial judgment about societal standards of decency, not a medical assessment of clinical practice" (*Moore*, p 1058). The dissent noted that the majority opinion lacked guidance for determination of intellectual disability; on the one hand allowing for flexibility, but at the same time stating that the courts could not disregard current medical standards. He observed that the CCA did not disregard current medical standards. He noted the "CCA considered clinical standards and explained why it decided that departure from those standards was warranted" in their determination that Mr. Moore was not intellectually disabled and was thus eligible for the death penalty (*Moore*, p 1058).

Discussion

In a previous Legal Digest analysis in the Journal Drs. Quimson-Guevarra and Jones discussed the "positive impact that advances in psychiatry and psychology can have on the judicial system" (*J Am Acad Psychiatry Law* 44:394–96, 2016, p 396) when they reviewed a similar case, *State v. Agee*, 364 P.3d 971 (Or. 2015). Mr. Agee was deemed death penalty-ineligible based on the DSM-5 and after the U.S. Supreme Court decided *Hall*. Since that time, the Court has granted *certiorari* for additional death penalty cases involved in defining intellectual disability for legal purposes.

With *Hall* and *Moore*, the Court specified that the states have some leeway in how they evaluate if one is intellectually disabled, but they should not disregard current medical guidelines to use older, less clinically relevant standards. In these cases, the Court favors the approach that if there is a close case in regard to determination of intellectual functioning, the courts should err on the side of caution to avoid executing those who may be intellectually disabled. With this further clarification from the Court, experts should recognize the importance of using current clinical guidelines in their reports and testimony about IQ scores, adaptive functioning, and diagnostic criteria in their evaluation of intellectual functioning for the courts.

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Asylum Case Further Defines Proof of Persecution for Gay Man

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In *Bringas-Rodrigue v. Sessions*, 850 F.3d 1051 (9th Cir. 2017), the Ninth Circuit Court of Appeals held that Mr. Carlos Alberto Bringas-Rodriguez (Bringas), a gay man who is a native and citizen of Mexico, had met the evidentiary standards for establishing past persecution and compelled the conclusion that Mr. Bringas had been subjected to past persecution that the Mexican government was unable or unwilling to control.

Facts of the Case

Mr. Bringas was abused by his father, an uncle, cousins, and a neighbor while living in Mexico. They all perceived him to be gay or to have effeminate characteristics. His uncle, cousins, and neighbor never called him by his name, instead they referred to him as “fag, fucking faggot, queer” and they “laughed about it” (*Bringas-Rodriguez*, p 1056). Mr. Bringas fled Mexico in 2004 to escape his abusers. He entered the United States without inspection and lived in both Kansas and Colorado. In August 2010, he pleaded guilty to attempted contribution to the delinquency of a minor in Colorado. He spent ninety days in jail, and during that time, he attempted suicide and was hospitalized. This suicide attempt precipitated his telling a doctor and then his mother about his childhood abuse.

The Department of Homeland Security (DHS) issued a Notice to Appear in August 2010. Mr. Bringas applied for asylum, withholding of removal, and Convention Against Torture (CAT) protection in 2011. He stated that he had been unaware that the U.S. government could protect him and found out about this protection when he spoke with a U.S. Customs and Immigration (ICE) officer in 2010. In his asylum application, Mr. Bringas described the sexual abuse he endured in Mexico and explained

that he feared he would be persecuted if he returned to Mexico because he is gay, as well as that the Mexican police would not protect him. Mr. Bringas testified about his gay friends’ experiences with the Mexican police in Veracruz. He said that his friends went to the police to report that they had been raped, the officers ignored their reports and “laug[ed] on [sic] their faces” (*Bringas-Rodriguez*, p 1057). He submitted 2009 and 2010 Department of State Country Reports for Mexico and several newspaper articles that documented violence against gay and lesbian individuals.

Both the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) recognized the serious abuse that Mr. Bringas had experienced as a child. However, Mr. Bringas did not demonstrate that the “abuse was inflicted by government actors or that the government was unwilling or unable to control his abusers” (*Bringas-Rodriguez*, p 1057). The BIA rejected Mr. Bringas’s argument that he had a well-founded fear of future persecution because he had failed to show a pattern of persecution of gay men in Mexico because “the record . . . d[id] not demonstrate widespread brutality against homosexuals or that there [was]any criminalization of homosexual conduct in Mexico” (*Bringas-Rodriguez*, p 1057). The BIA concluded that Mr. Bringas failed to show that Mexico was unable or unwilling to control private individuals who perpetuated violence against homosexual persons. The BIA rejected Mr. Bringas’s withholding of removal and CAT claims, and he appealed.

Ruling and Reasoning

A panel of the Ninth Circuit denied Mr. Bringas’s petition for review, but he was then granted a rehearing *en banc*. The court first reviewed the evolution of U.S. Refugee Law, and pointed out that the Attorney General can grant asylum to applicants in the United States who meet the definition of “refugee.” Under 8 U.S.C. § 1101(a)(42)(A) and 8 U.S.C. § 1158 (b)(1), a “refugee” is someone who is unable or unwilling to return to his home country because of a well-founded fear of future persecution” (*Navas v. INS*, 217 F.3d 646, 654 (9th Cir. 2000)) because of race, religion, nationality, membership in a particular social group, or political views. The applicant can demonstrate the “well-founded fear” of future persecution by either proving previous persecution or by