

psychiatrists who consult on malpractice cases or psychological autopsies.

On the other hand, there is the argument that ineffective claims deserve greater consideration in death penalty cases. As Justice William Brennan wrote, “Counsel’s general duty to investigate . . . takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care” (*Strickland*, p 706). In a case such as *Runyon*, where there is overwhelming evidence of guilt, mitigation may represent the only chance a defendant has to avoid the death penalty. Forensic psychiatrists are familiar with how important and ubiquitous mental health matters are in death penalty mitigation. In *Runyon*, the defense assembled substantial mental health evidence from experts but did not use it in mitigation. According to the Fourth Circuit, this could be ineffective assistance.

Runyon also illustrates an interesting ethics question. The majority opinion seems to give particular weight to the former defense lawyer’s statements, made many years after the trial, that mental health evidence could have helped his mitigation argument. The ethics quandary facing the lawyer here involves helping a past client by admitting a mistake and accepting the blame. The parallel in medicine is when a doctor makes an error that harms a patient and considers whether admission of the mistake represents evidence of malpractice or makes a malpractice suit less likely to begin with. State laws differ in their approaches to encouraging, or even imposing a duty regarding informing patients of adverse medical outcomes. Currently, most states have partial apology laws that make apologies and statements of regret inadmissible in malpractice suits. Only a few states have full apology laws that also protect admissions of error or fault. (Ross NE, Newman WJ: The role of apology laws in medical malpractice. *J Am Acad Psychiatry Law* 49:406–414, 2021) While the intent of apology laws is to foster open communication with patients and limit malpractice liability, some research suggests that these laws may instead increase the probability of lawsuits (Hodge Jr., SD: Should a Physician Apologize for

a Medical Mistake? . . . *Clev. St. L. Rev.* 69: 1–33, 2020).

Intellectual Disability in Capital Murder Cases

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Failure to Introduce Mitigating Evidence That Does Not Outweigh the Aggravating Evidence It Invites Does Not Constitute Ineffective Assistance of Counsel

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In *Rodriguez v. Sec’y, Fla. Dep’t of Corr.*, 818 F. App’x 945 (11th Cir. 2020), the U.S. Court of Appeals for the Eleventh Circuit found that the U.S. District Court for the Southern District of Florida properly denied Mr. Rodriguez’s petition for a writ of *habeas corpus*, in which he claimed ineffective assistance of counsel at his capital sentencing hearing (because of failure to present mitigating evidence) as well as ineligibility for the death penalty because of intellectual disability. The Eleventh Circuit ruled that because the postconviction mitigating evidence Mr. Rodriguez presented was weak, there is not a substantial likelihood that the imposed penalty would have been different had his attorney acted differently. Furthermore, the Eleventh Circuit ruled that the lower courts appropriately applied *Atkins v. Virginia*, 536 U.S. 304 (2002) in rejecting the intellectual disability diagnosis, given Mr. Rodriguez’s failure to present clear and convincing evidence of below average intellectual functioning and adaptive

behavior deficits with onset prior to age 18, as required by Florida law.

Facts of the Case

Juan David Rodriguez was charged with first-degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted first-degree murder for events occurring during a two-day crime spree in 1988. While awaiting trial, Mr. Rodriguez also attempted to bribe a fellow inmate to perjure testimony and allege that Mr. Rodriguez's co-conspirator committed the murder; the inmate refused and instead testified to the bribe at trial. Mr. Rodriguez was found guilty of all charges.

Prior to the penalty phase, Mr. Rodriguez's defense attorney moved for the appointment of an independent psychological examiner. This psychologist evaluated Mr. Rodriguez twice. The examination included a psychosocial interview as well as the Bender-Gestalt Visual Motor Test. The psychologist concluded that Mr. Rodriguez did not meet any of the Florida statutory criteria for capital mitigation, although he described Mr. Rodriguez's childhood as "difficult" and "unhappy." On the basis of the Bender-Gestalt Test, he opined that Mr. Rodriguez might have an "organic brain syndrome" but added that, in the absence of a significant history of substance abuse, mental health symptoms, or functional impairment, the potential contribution of such a syndrome to mitigation would be minimal at best.

During the penalty phase, Mr. Rodriguez's attorney declined to call the psychologist as a witness, fearing that the minimal potential benefit of the testimony would be outweighed by the likelihood that the psychologist would be forced to divulge information about Mr. Rodriguez's significant past criminal history on cross-examination. The jury unanimously recommended a death sentence.

Before the trial court imposed the sentence, a neurologist also examined Mr. Rodriguez. On the basis of a normal neurological examination and electroencephalogram, he concluded that there was no evidence indicative of "brain damage" or other cognitive impairment. The trial court, finding three statutory aggravating factors and only one nonstatutory mitigating factor, imposed a death sentence in 1990. Mr. Rodriguez appealed, and the Supreme

Court of Florida affirmed the trial court's decision. The U.S. Supreme Court denied Mr. Rodriguez's petition for *certiorari*.

In 1994, Mr. Rodriguez filed a motion for post-conviction relief, alleging his defense counsel rendered ineffective assistance by failing to investigate adequately his personal and mental health history, and that the psychological evaluation was inadequate. He also introduced testimony from a second psychologist who opined that Mr. Rodriguez had "mild mental retardation." She indicated that, in making this diagnosis, she relied upon the ninth revision of the International Classification of Diseases (ICD-9) rather than upon the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), and that ICD-9 merely required an intelligence quotient (IQ) score below 70 for diagnosis, whereas DSM-IV required that deficits in adaptive functioning also be present.

The state, in rebuttal, presented testimony from the original psychologist, who cited Mr. Rodriguez's facility with language, his previous employment, his ability to manage finances, and the covert means under which he committed many of his crimes (e.g., using false names and birthdates, his leading role in some offenses) as evidence that Mr. Rodriguez was not intellectually disabled or impaired in adaptive functioning. The postconviction trial court ruled that the psychological evaluation was adequate and that Mr. Rodriguez's attorney had reasonably decided not to present psychological testimony at sentencing "because the potential mitigating effect of [the psychologist's] testimony did not clearly outweigh the harm of permitting the State to question him about Rodriguez's criminal history" (*Rodriguez*, p 954). The Supreme Court of Florida then affirmed the postconviction trial court's denial of postconviction relief.

Mr. Rodriguez subsequently filed a motion for determination of intellectual disability under Florida Rule of Criminal Procedure 3.203 (2009), which required proof of an IQ below 70 and adaptive functioning deficits with onset prior to age 18. Two additional psychologists testified at an evidentiary hearing. A psychologist called by the defense diagnosed intellectual disability on the basis of neuropsychological testing and assessment of Mr. Rodriguez's adaptive behavior throughout his life. A psychologist called by the state opined that Mr. Rodriguez's test performance suggested malingering and that his life activities both before and during his incarceration

did not suggest impaired adaptive functioning. The postconviction trial court denied Mr. Rodriguez's motion. Mr. Rodriguez then appealed to the Eleventh Circuit Court of Appeals with two claims: ineffective assistance of counsel during the penalty phase, and ineligibility for the death penalty due to intellectual disability under *Atkins v. Virginia*.

Ruling and Reasoning

The Eleventh Circuit Court of Appeals affirmed the denial of Mr. Rodriguez's writ of *habeas corpus*, disagreeing with both of his claims.

First, Mr. Rodriguez failed to demonstrate prejudice related to his attorney's alleged ineffective performance. In light of the substantial evidence that not only incriminated Mr. Rodriguez but also highlighted traits such as lack of emotion, ruthlessness, and cunning, the jury unanimously recommended a death sentence and would have done so regardless of whether the attorney had represented Mr. Rodriguez differently. Furthermore, the mitigation evidence Mr. Rodriguez presented on appeal (i.e., the testimony of the psychologist who diagnosed intellectual disability on the basis of ICD-9 criteria) was "left in . . . tatters" by the state's cross-examination, again indicating that the outcome of the trial would have not been substantially different had his attorney acted differently.

Second, the Florida Supreme Court correctly applied standards delineated in *Atkins*, which left to the states the method of determining a diagnosis of intellectual disability. Faced with conflicting expert testimony, the state supreme court's decision to credit the state's expert (who suggested malingering but not intellectual disability) rather than the defense's expert (whose psychological testing methods were found to be questionable) was reasonable in light of the evidence.

Discussion

The holdings in this case emphasize the importance of forensic clinicians being familiar with how the state in which they are testifying has defined intellectual disability post-*Atkins*. In this case, multiple experts utilized varying criteria, including one expert who did not use the DSM definition and did not include any assessment of adaptive functioning. Reports and testimony that do not rely upon accepted definitions (including DSM criteria and any local statutory definitions) can be confusing to a court and may lead to an inaccurate clinical picture. Current standards for diagnosing intellectual disability

require that adaptive functioning be assessed, including through the use of standardized scales and by obtaining collateral reports of the evaluatee's behavior (e.g., from family, teachers, employers, jail records, etc.). Several of Mr. Rodriguez's evaluators did not address his adaptive functioning, leading to criticism by opposing experts and ultimately by the court.

Experts also need to be aware of relevant cultural factors that might complicate assessment and could be challenged in court. For example, a state expert testified that one defense expert in this case relied upon a Mexican version of the Wechsler Adult Intelligence Scale (WAIS-III) in making a diagnosis of intellectual disability, when in fact Mr. Rodriguez was Cuban. The state expert also testified that the defense expert normed the test to U.S. IQ levels in a way that would likely underestimate Mr. Rodriguez's IQ given his lack of a high school education.

Finally, this case highlights the importance of forensic clinicians, considering all potentially relevant data and not limiting themselves to only considering a single psychological measure (such as IQ). The case also demonstrates the importance of experts always considering (and commenting on) the possibility of malingering in forensic evaluations.

Outpatient Conditions of Release following NGRI Acquittal

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Acquittes Allowed to Challenge Outpatient Conditions of Release after Discharge from Psychiatric Hospitalization

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In *Janakievski v. Executive Director*, 955 F.3d 314 (2d Cir. 2020), the Second Circuit Court of Appeals