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 evaluee'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

Susana Fehr Lampley, MD
Fellow in Forensic Psychiatry

Kehinde A. Obikoya, MD
Assistant Professor of Psychiatry

Department of Psychiatry
University of Texas Medical Center
Dallas, Texas

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

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Key words: insanity; acquittees; commitment; confinement; challenge; *habeas*

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

considered whether a person acquitted by by reason of insanity can challenge the outpatient conditions of release. The U.S. District Court for the Western District of New York had ruled that Mr. Janakievski's *habeas corpus* petition was moot because he had been released from confinement. In vacating the district court ruling, the Second Circuit decided the petition was not moot because Mr. Janakievski was still subject to an "order of conditions" that was a consequence of the original confinement order his petition challenged.

Facts of the Case

In December 2007, Steven Janakievski stabbed a co-worker in the head and neck, believing the victim to be a Russian spy. Mr. Janakievski had been using controlled substances and was experiencing paranoid delusions at the time. He was charged with first-degree assault, to which he pleaded not responsible by reason of mental disease or defect (NGRI) under N.Y. Crim. Proc. Law § 330.20 (1980). The court accepted Mr. Janakievski's plea and ordered him to undergo a psychiatric examination to determine which of three "tracks" or categories he belonged to. According to this statute, after a finding of NGRI, the court must determine if the acquittee has a "dangerous mental disorder" that makes him "a physical danger" to himself or others. In that case, the acquittee would be assigned to "track one," and the court must issue a commitment order confining him to a secure mental health facility for six months. If he were found to be mentally ill but not dangerous, he would be classified as "track two." The court must then issue an "order of conditions" and an order committing the acquittee to a nonsecure mental health facility under the civil Mental Hygiene Law. If he were found to be neither dangerous or mentally ill, he would be classified as "track three" and must either be discharged unconditionally or released subject to an order of conditions. The status of track one defendants is subject to ongoing review, and the state must apply for periodic retention orders to keep the defendant in inpatient confinement. The defendant's track is permanent and "governs his level of supervision in future proceedings" (*Janakievski*, p 317).

In April 2009, Mr. Janakievski was classified as track one and was thus involuntarily committed to a secure psychiatry facility, Rochester Psychiatric Center (RPC), for six months. Several subsequent retention orders were issued to continue his involuntary commitment in October 2009, October 2010, December 2010, and August 2012. In August 2012, he was deemed no longer dangerous but still mentally ill, necessitating inpatient psychiatric treatment. He was transferred to a nonsecure psychiatric facility for confinement until July 2013. After July 2013, Mr. Janakieveki remained confined to the nonsecure wing of the RPC under a temporary retention order.

In April 2014, while still in the custody of the New York State Office of Mental Health, Mr. Janakievski filed a *pro se* petition for a writ of *habeas corpus* that challenged his original commitment in 2009 and the subsequent retention orders. Mr. Janakievski asserted hospital records would show he was in full remission and should have been released. He alleged the recommitment orders did not have sufficient evidence to support his commitment and this violated his due process and Eighth Amendment rights. In June 2018, while this petition was pending, Mr. Janakievski was released from the RPC subject to an "order of conditions." He was mandated to continue outpatient mental health treatment, refrain from drug or alcohol use, and to seek state approval prior to changing his address or leaving the state for three years until June 2021. The conditions could be extended for an additional three years on showing good cause. In September 2018, Mr. Janakievski's petition was dismissed as moot by the district court because he had already been discharged from inpatient custody. The Second Circuit reviewed the denial of the *habeas* petition.

Ruling and Reasoning

The Second Circuit reversed and remanded the district court's decision. The court ruled that Mr. Janakievski's release from inpatient custody did not moot his *habeas corpus* petition because the orders from 2009 to 2012 that he challenged in the petition continued to impose restrictions on his liberty. Although Mr. Janakievski did not directly challenge the 2018 order of conditions to which he remained subject, that order was a mandatory consequence of his confinement orders and constituted an ongoing injury that could be redressed by a favorable judicial decision.

The Second Circuit ruled that the district court should not have dismissed Mr. Janakievski's *habeas* petition as moot because it procedurally challenged only the expired orders from 2009 to 2012

and did not directly challenge the 2018 order of conditions. As a prisoner raising a *pro se* challenge to his confinement, Mr. Janakievski should have the opportunity to amend his *habeas* submissions to "raise the strongest arguments they suggest" (*Janakievski*, p 319).

The Second Circuit reviewed the law governing mootness of a *habeas* petition. At each stage of litigation, a party must have an actual injury that is likely to be redressed by a favorable judicial decision. The court stated that although the 2018 order of conditions to which Mr. Janakievski remained subject was separate from the expired orders from 2009 to 2012, it was still a "direct and necessary consequence" of the expired orders. The Second Circuit noted that once Mr. Janakievski was assigned to track one, it was inevitable that Mr. Janakievski would be subject to an order of conditions on release from confinement. Thus, the Second Circuit ruled that Mr. Janakievski suffered a "continuing actual injury" because of the challenged orders from 2009 to 2012.

The Second Circuit indicated there were two crucial aspects of the order of conditions. First, under N.Y. Crim. Proc. Law § 330.20(13) (1980), Mr. Janakievski would not be eligible for a discharge order until he had spent three years continuously as an outpatient following conditional release from confinement, if the discharge order is "consistent with the public safety and welfare of the community and the defendant" (*Janakievski*, p 323). Second, under N.Y. Crim. Proc. Law § 330.20(13), while an order of conditions remains in effect, Mr. Janakievski remains subject to involuntary recommitment to a secure psychiatric facility at any time if, upon application of the state, a court finds by a preponderance of the evidence that he has a dangerous mental disorder. This contrasts with the procedures for involuntary civil commitment of people with mental illness, which requires a showing by clear and convincing evidence that the person is mentally ill and poses a danger to himself or others. Therefore, for a minimum of three years, Mr. Janakievski would be vulnerable to recommitment in a state psychiatric facility without the same protections he would enjoy if he previously had been released from custody unconditionally. Thus, the Second Circuit reversed the district court's decision that Mr. Janakievski's release from inpatient treatment meant he was no longer suffering a continuing injury from the expired orders.

The Second Circuit Court reasoned that Mr. Janakievski could potentially have his order of conditions invalidated if he could demonstrate he should have been unconditionally discharged in 2009. Mr. Janakievski argued that even if he failed to show he should have been unconditionally released in April 2009, if he showed he was entitled to an earlier conditional release at the time of one of the prior retention orders between 2010 and 2012, the three-year postrelease period mandated in N.Y. Crim. Proc. Law § 330.20(13) would be "backdated" and he would not necessarily have to wait until July 2021 to become eligible for a discharge order. The Second Circuit noted that vacation of these 2010 and 2012 retention orders extended during Mr. Janakievski's confinement could also serve to partially redress his injuries, should he show he was entitled to an earlier release.

Discussion

Janakievski highlights the importance of clear documentation of the risk assessments in the justification of the confinement or postconfinement conditions of insanity acquittees. By allowing the challenge of the original terms of confinement following insanity acquittals, *Janakievski* opens the door for examination of the ongoing terms of release of acquittees even years after their original confinement has ended. This ruling could potentially trigger the re-examination of extensions of inpatient commitment orders that, on a successful appeal, could retroactively back date when defendants should have had their terms of release changed, resulting in a cascade of previously unanticipated treatment abbreviations.

Janakievski also identifies another key consideration quite relevant to inpatient care of insanity acquittees: expiring commitments. Clinicians often view expiring commitments as a time for renewal. We suggest that the evaluator view this as an opportunity to re-examine an individual's ongoing need for inpatient commitment, to carefully evaluate and document the factors that support the need for continued inpatient care versus those that support the appropriateness of an outpatient or less restrictive environment. Various structured risk assessment tools developed over the years have demonstrated reliability and could

increase the accuracy of clinical risk assessment in these treatment decisions (McDermott B, Scott C, Busse D, *et al*: The conditional release of insanity acquittees: three decades of decision-making. *J Am Acad Psychiatry Law* 36: 329–36, 2008). More research is needed on how best to integrate the information from these assessment tools to further improve their accuracy in clinical settings. Ultimately, the courts often depend on the expertise and documentation provided by psychiatrists to make these important decisions that affect the lives and wellbeing of patients and the community.

Capital Punishment and Youth Offenders

Carol Barnes, MD
Resident in Psychiatry

Jennifer Piel, JD, MD
Associate Professor in Psychiatry
Director, Center for Mental Health, Policy, and the Law

Department of Psychiatry
University of Washington School of Medicine
Seattle, Washington

Constitutionality of Age-Eligibility for Capital Punishment Cannot Be Challenged Prior to Conviction

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In *Commonwealth v. Bredhold*, 599 SW.3d 409 (Ky. 2020), the Supreme Court of Kentucky vacated and remanded a trial court order that raised the age for death-penalty eligibility to 21. The appellees successfully persuaded the lower court that the evolving standards of decency in decisions on the Eighth Amendment precluded the death penalty for those who committed offenses between the ages of 18 and 21. The state supreme court ruled that, as none of the appellees had been convicted, there was no standing to hear the challenge.

Facts of the Case

This case consolidated three related cases. The Commonwealth gave notice of intent to seek the death penalty for all three cases. The first case was that of Travis Bredhold, who was indicted on counts of murder, first-degree robbery, theft, trafficking less than eight ounces of marijuana, and carrying a concealed weapon. On December 17, 2013, when Mr. Bredhold was eighteen years and five months old, he allegedly robbed a gas station and fatally shot a gas-station employee. In anticipation of the trial, Dr. Ken Benedict, a clinical psychologist and neuropsychologist, evaluated Mr. Bredhold. He found "Bredhold was about four years behind his peer group in multiple capacities, including the capacity to regulate his emotions and behavior, and that he suffered from a number of mental disorders" (*Bredhold*, p 413).

The second and third cases involved Justin Smith and Efrain Diaz, Jr., co-defendants who allegedly robbed and fatally shot Jonathan Krueger on April 17, 2015. They were each indicted and charged with one count of murder and two counts of first-degree robbery. Mr. Smith was eighteen years and five months old at the time of the alleged offense, whereas Mr. Diaz, Jr., was twenty years and seven months old at the time of the alleged offense. Dr. Benedict evaluated Mr. Smith and concluded that Mr. Smith's "executive functions related to planning, anticipating the consequences of his actions, and impulse control are below those of an adult and he too exhibited a number of mental disorders" (*Bredhold*, p 413). The trial court called an evidentiary hearing for Mr. Diaz and Mr. Smith, during which Dr. Laurence Steinberg, an expert in adolescent development, testified to current research on brain development. The court supplemented Mr. Bredhold's record with Dr. Steinberg's testimony as well.

The appellees moved the court to exclude the death penalty as a sentencing option. They asked the court to extend the holding in *Roper v. Simmons*, 543 U.S. 551 (2005), to persons who commit offenses under the age of 21. *Roper* precludes the death penalty for persons who commit their offense under the age of 18. The trial court issued three separate orders declaring Kentucky's death penalty statute unconstitutional under the Eighth Amendment as it pertains to capital punishment for offenders under 21 years of age at the time of the offense. The court concluded that the individual psychological findings for Mr. Bredhold and Mr. Smith further supported excluding the death penalty in each of their cases.