ties to address the question of whether the testimony had been improperly restricted. On the one hand, the defense and the state cited case law relevant to Del. R. Evid. 704 (2001), which pertains to the admissibility of expert witness testimony when it "embraces" an ultimate legal issue. On the other hand, the parties presented their arguments overall in terms of Del. R. Evid. 702 (2001), which requires that expert witness testimony, to be admissible, must be "based upon sufficient facts or data" and "a product of reliable principles and methods" and that "the witness [must have] applied the principles and methods reliably to the facts of the case." Given that the argument in the lower court was framed in terms of Del. R. Evid. 702, the higher court restricted its assessment of the trial court's decision to the question of whether it reasonably based its decision upon the principles of Del. R. Evid. 702. Although it appeared that Dr. Mark had reviewed the sleep study, the higher court noted that his testimony was based only on Mr. Rivera's prepared statement and the statements of third parties who were not qualified medical experts and noted that he had not conducted an independent examination of Mr. Rivera. For these reasons, it was reasonable, not an abuse of discretion, for the lower court to find that there were not "sufficient facts or data" (Del. R. Evid. 702) to render Dr. Mark's testimony admissible. Moreover, given that a conclusion regarding whether Mr. Rivera experienced sleep terrors would be based on this insufficient data, it was also not an abuse of discretion for the lower court to restrict the expert's testimony based on a concern that the methodology was not reliable. Finally, although Dr. Mark was not allowed to testify as to whether Mr. Rivera was experiencing a sleep terror the night Ms. Pate died, he did present his view that Mr. Rivera had sleep terrors, and presented Mr. Rivera's version of the events of that night in a light favorable to the view that he did not have the requisite *mens rea* to be convicted of first-degree murder. That is, the restriction on Dr. Mark's testimony did not, as the defense had argued, prevent Dr. Mark from providing evidence regarding Mr. Rivera's state of mind on the night in question.

Discussion

This case was reviewed on the basis of Del. R. Evid. 702, addressing whether the expert's testimony would be reliable and based upon sufficient information. The American Academy of Psychiatry and the Law's *Ethics Guidelines for the Practice of Forensic Psychiatry* (May 2005; available at http://aapl.org/ethics.htm. Accessed November 30, 2012) stipulate that, in most circumstances, a forensic psychiatrist must examine an individual. If examination is not possible, then the psychiatrist should make this limitation explicit and delineate how it may constrain the resulting opinion. According to a review article by Siclari *et al.* (*Brain* 133:3494–509, 2010), diagnostic procedures relating to sleep disorders associated with violence generally include polysomnography; home videos when possible (as various sleep disorders do not occur in the laboratory setting); and a history and a general physical, neurological, and psychiatric examination. In the present case, it is not clear why an independent examination was not conducted. Although there may have been legitimate reasons not revealed in the higher court's decision, the court was concerned about the adequacy of the data presented and the resulting methodology. This case illustrates both the importance of performing comprehensive and transparent evaluations and a central danger of not doing so, a potential loss of credibility with the court system that restricts the utility of the forensic work.

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Difficulties in Determining Competency and Appropriate Sentences for Defendants With Intellectual Impairments

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The State Is Not Required to Adopt a Higher Competency Standard to Waive Counsel for Mentally Ill and Intellectually Impaired Defendants

In *State v. Bell*, 53 So. 3d 437 (La. 2010), the Louisiana Supreme Court reviewed the appeal of Anthony Bell, who argued that the trial court erred in

convicting and sentencing him to death, because his waiver of the right to appointed counsel was not valid and because his mental retardation exempted him from the death penalty.

Facts of the Case

On May 21, 2006, Mr. Bell interrupted services at the Ministry of Jesus Christ Church, asking Pastor Brown's permission to address the congregation. Present were six adults and five children: Mr. Bell's wife, Erica, the couple's three children, Pastor Brown (Erica's mother), four other adults related to Ms. Bell, and two of their children. Pastor Brown knew that her daughter's marriage was troubled and granted Mr. Bell's request. He asked Erica to reconcile with him; when she refused, Mr. Bell became agitated and left. According to testimony of Pastor Brown, Mr. Bell returned as people were leaving. She, the only adult survivor, heard gunshots, found herself lying face down, and saw Mr. Bell force Ms. Bell and their three children into a car. Pastor Brown called the police, identifying him as the shooter.

Shortly thereafter, Mr. Bell called the police, reporting that his wife had committed suicide. They found him outside his apartment holding his infant son. Ms. Bell was in the passenger seat of the car with a gunshot wound to her head and a revolver held lightly in her hand. Mr. Bell was arrested and advised of his *Miranda* rights. During the investigation, he provided conflicting accounts, stating both that he was sorry about the shootings and identifying his wife as the shooter. Then, he declined to say more without counsel.

The court appointed counsel for Mr. Bell. He was indicted on five counts of first-degree murder and one count of attempted murder and faced the death penalty. Defense counsel made requests of the court concerning his mental state, asking for an IQ assessment and an evaluation for competency to stand trial. After a hearing in August 2007, Mr. Bell was found competent. Asserting that counsel was withholding documents from him, he filed several *pro se* motions between July 2007 and January 2008. In February 2008, the court granted his motion to represent himself.

On April 11, 2008, after deliberating for two hours on the final evening of a three-day trial, during which Mr. Bell mounted his defense in one-half day, the jury found him guilty on all counts. The next morning, as the penalty phase was to begin, he requested reappointment of counsel. The court agreed but refused counsel's motion for a 60-day continuance, granting 2 days instead. During the capital sentencing hearing, the jury was to determine whether Mr. Bell was mentally deficient pursuant to La. Code Crim. Proc. Ann. art. 905.5.1(A) (2010), which exempts defendants with mental retardation from execution. The defense's psychologist, Dr. Mark Zimmerman, diagnosed Mr. Bell with intellectual deficiency based on an IQ of 53, while Dr. Hoppe, the state's psychologist opined that Mr. Bell was malingering. Dr. Hoppe cited Mr. Bell's lower IQ score of 50 on the same test administered less than three months after Dr. Zimmerman's evaluation as evidence of Mr. Bell's intentional underperformance. Dr. Hoppe argued that research on "practice effect" showed that the second IQ score within six months of the first should increase rather than decline. Dr. John Thompson, a court-appointed expert, opined that Mr. Bell was intentionally underperforming to appear severely mentally retarded. Dr. Zimmerman ultimately "retracted" his conclusion about mental retardation when the evidence regarding malingering became available. His former employers testified about his work as a tank washer who also supervised other employees and as a stocker and cashier at local supermarkets, "with no reported problems in functioning" (*Bell*, p 457). The jury rejected the mental retardation claim and sentenced Mr. Bell to death.

Ruling and Reasoning

The Louisiana Supreme Court affirmed Mr. Bell's convictions and the sentence of death, concluding that his waiver of appointed counsel was valid and that there was not sufficient evidence that the jury had erred in rejecting his mental retardation claim. Regarding his waiver of counsel, Mr. Bell cited *Indiana v. Edwards*, 554 U.S. 164 (2008), in which the Supreme Court held that the Constitution allows judges to take a defendant's mental capabilities into account when deciding a motion for *pro se* representation. It held that even defendants found competent to stand trial under *Dusky v. United States*, 362 U.S. 402 (1960), can be denied the right to self-representation when mental illness is severe "to the point where they are not competent to conduct trial proceedings by themselves" (*Edwards*, p 178). Relying on *Edwards*, Mr. Bell argued that the trial court failed to consider his significant cognitive deficits when evaluating his waiver of counsel and request for self-

representation. The supreme court rejected his argument, stating that "*Edwards* authorizes, but does not require, the states to adopt a more rigorous competency standard for mentally ill or incapacitated defendants" who seek self-representation (*Bell*, p 446). The court found insufficient evidence to suggest that Mr. Bell was mentally impaired to the extent that *Edwards* would be applicable.

The court also cited *Faretta v. California*, 422 U.S. 806 (1975), which acknowledges defendants' Sixth Amendment right to self-representation and sets guidelines that judges should use in determining whether defendants should be denied this right. The court found that the trial judge had conducted an adequate assessment during Mr. Bell's *Faretta* hearing and had correctly determined that he demonstrated sufficient understanding of potential risks and consequences of self-representation.

In ruling that the jury did not err in rejecting Mr. Bell's mental retardation claim, the court cited *Atkins v. Virginia*, 536 U.S. 304 (2002). It acknowledged the prohibition against executing mentally retarded defendants under the Eighth Amendment, but held that he had not proved by a preponderance of the evidence, as required by Louisiana statute, that he was intellectually deficient. The court held that the state's expert was more credible than the defense's expert. It based its finding both on the concurrence of opinion between the state and the court-appointed experts and on the defense expert's retraction of the original opinion in light of new information. The court further reasoned that his school and work histories did not show significant deficits in adaptive functioning. Moreover, during the penalty phase, the jury members witnessed his self-representation and thus had the opportunity to observe his cognitive state and assess his claim of mental retardation.

Discussion

This case illustrates the complexity involved in assessing cognitive deficiencies and legal competency. In deciding that Mr. Bell was competent to waive counsel and represent himself, the trial court and the Louisiana Supreme Court placed a significant amount of weight on his functioning at that moment in time, as opposed to his capabilities over time. The courts highlighted Mr. Bell's ability during the *Faretta* hearing as the indicator of his understanding of the risks associated with his decision to represent himself, despite the defense's concerns about his mental condition throughout the proceedings. Although the court cited *Edwards*, it interpreted that Supreme Court ruling as one that permits but does not compel a higher standard for mentally ill defendants seeking to waive counsel. Thus, the court saw no need to consider the role his intellectual impairments and paranoid thinking played in his decision to represent himself.

This case demonstrates the inequitable emphasis on IQ testing over critical examination of adaptive capacity. The case also demonstrates how a finding of exaggeration of deficits can unduly influence the overall conclusion. Both experts assessed Mr. Bell's IQ at the lower range of mild retardation (55–70); the state's expert argued that Mr. Bell was exaggerating his cognitive deficits. His exaggeration was presented as evidence that he did not have mental impairment. Research shows that defendants who meet criteria for mild mental retardation are capable of exaggerating their cognitive deficits when evaluated for competency (Everington C, Notario-Small H, Horton ML: Can defendants with mental retardation. . . . *Behav Sci Law* 25:545–60, 2007). "Exaggeration of deficit" is a term that implies that an actual deficit is known or that there is no underlying deficit. Neither is the case. An expert has the responsibility of determining adaptive capacity through behavioral observation and collateral data to estimate intellectual functioning in the absence of valid testing.

Atkins prohibits mentally impaired defendants from being executed in accordance with the Eighth Amendment. However, such cases as *Bell* illustrate how the complexity of determining intellectual deficiency and the adversarial nature of making this determination may cause defendants with *bona fide* mental retardation to reach death row. The United States Supreme Court in *Atkins* and in *Edwards* provides the foundation for expert psychological opinion of defendants' intellectual and cognitive capacities. In *Godinez v. Moran*, 509 U.S. 389 (1993), the dissent by Blackmun (with Stevens concurring) provided an apt analogy to guide psychologists who conduct such assessments: "[A] defendant who is utterly incapable of conducting his own defense cannot be considered competent to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered competent to make such a choice." The utterly incapable determination requires thoughtful consider-

ation and thorough assessment. In cases in which defendants face the loss not only of their liberty but also of their lives, the assessment of intellectual and cognitive capacity and rational choice about their defense merits meticulous attention, diligence, and analytical consideration.

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Special Considerations and Disposition for Persons With Intellectual Disabilities in the Criminal Justice System

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Developmentally Disabled Defendant Deemed Incompetent to Stand Trial and Dangerous Ordered Held in Protective Custody

In *In re M.A.*, 22 A.3d 410 (Vt. 2011), the Supreme Court of Vermont reviewed a trial court's decision to place a developmentally disabled defendant, who had been found not competent to stand trial for charges of sexually assaulting a minor, in the custody of the Commissioner of Disability, Aging, and Independent Living (DAIL).

Facts of the Case

In February of 2004, M.A. was arrested and charged with sexual assault and lewd or lascivious conduct with a child, following a police investigation into two reports of possible sexual abuse of a nine-year-old girl. The arrest was made after Mr. A. voluntarily agreed to go to the police station for an interview, during which he admitted to committing numerous sexual acts with the identified minor over the course of the previous three years, beginning when he was in his late 20s and the child was 6 years old.

During the four-hour videotaped interrogation, a detective employed a variety of techniques to elicit a confession, including pretending to be Mr. A.'s friend, reassuring him that he was not in custody or in trouble, and implying that it was acceptable for Mr. A. to engage in a sexual relationship with a minor as long as they were "in love." Near the conclusion of the interview, Mr. A. produced a love letter that he had written to the child that implied that he had some understanding that his relationship with her could land him in trouble.

Before his trial, Mr. A. attempted to suppress the statements that he had made during the interrogation as "involuntarily made and the result of oppressive interrogation techniques and his intellectual limitations" (*M.A.*, p 412). Based on the videotape of the interrogation and mental health experts' opinion, the district court denied this motion, concluding that although the interrogation had involved "intense" periods, it was not coercive nor were Mr. A.'s statements made under duress. The court also noted the "essential consistency" of his confession with the alleged victim's testimony. Ultimately, it held his confession to be voluntary.

At jury selection, the defense counsel questioned Mr. A.'s competency to stand trial. Dr. Paul Cotton, MD, a forensic psychiatrist, evaluated Mr. A. He noted that Mr. A.'s full-scale IQ was 52 and testified that, because of his intellectual limitations, he was "incapable of moving beyond a simple fact" and did not have a rational understanding of the trial process or plea agreements (*M.A.*, p 413). The court found him incompetent to stand trial and ordered a placement hearing.

At the placement hearing, during which both the detective and the alleged victim testified, the trial court found by clear and convincing evidence that Mr. A. had "committed sexual assaults and lewd or lascivious behavior" against the child and was "therefore a danger to others" (*M.A.*, p 413). Under Vermont's placement statute (Vt. Stat. Ann. tit. 18, § 8843 (2008)), he was placed in the custody of the Commissioner of DAIL. He appealed to the Supreme Court of Vermont.

Ruling and Reasoning

The Supreme Court of Vermont affirmed the district court's decision to place Mr. A. in the custody of the Commissioner of DAIL. Mr. A. argued two points: that the district court lacked jurisdiction and that there was insufficient evidence to support the finding that he presented a danger of harm to others.