pecially instructive are the reasons that the court gave weight to the evaluation and opinions of Dr. Kavanaugh: that she had done extensive record review, had employed psychological testing, had interviewed various persons who had knowledge of Mr. Newman contemporaneous with the relevant periods in question, had spent much time in interviewing him, and had used testing for malingering.

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Intellectual Disability Bars the Death Penalty

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The Determination of Intellectual Disability Requires Courts to Consider General Intellectual Functioning, Adaptive Functioning, and the Timing and Onset of Those Deficits

In *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013) the court reviewed Andrew Sasser's third death penalty appeal of his 1994 capital murder conviction. He applied for a federal *habeas* petition in 2000 after a failed direct appeal in 1995 and an unsuccessful attempt at postconviction relief in the Arkansas Supreme Court in 1999. While his petition was pending in the Eight Circuit, the United States Supreme Court barred execution of individuals with intellectual disability in *Atkins v. Virginia*, 536 U.S. 304 (2002). The circuit court then remanded the petition to the district court to determine whether *Atkins* made Mr. Sasser ineligible for the death penalty. Without a hearing, the district dismissed his petition, finding a procedural default in his claim. On further appeal, the Eight Circuit reversed and remanded to the district court which, after a two-day evidentiary hearing, found that Mr. Sasser had no intellectual disability under Arkansas state law and *Atkins.* Mr. Sasser again appealed to the Eighth Circuit.

Facts of the Case

On July 12, 1993, Mr. Sasser murdered Jo Ann Kennedy in Garland City, Arkansas, while she was working at the E-Z Mart Convenience Store. He was charged and convicted of capital felony murder. A series of appeals ensued, to include an amended challenge in 2003, asking whether *Atkins* made the intellectual disability provision of the Arkansas death penalty statute (Ark. Code Ann. § 5-4-618 (1993)) unconstitutional. Upon first appeal to the Eighth Circuit, the case was remanded to the district court to decide the claim of intellectual disability in light of *Atkins*. When the district court dismissed the claim as procedurally barred, it was again appealed to the Eight Circuit, which remanded to the trial court for an evidentiary hearing, stating that *Atkins* created a "new federal constitutional right. . .separate and distinct from preexisting Arkansas statutory right" (*Sasser*, p 838).

During the two-day evidentiary hearing, several witnesses testified concerning whether Mr. Sasser had an intellectual disability. The defense expert, Dr. Jethro Toomer, testified that Mr. Sasser's IQ scores, along with pertinent qualitative factors, were suggestive of meeting the criteria for intellectual disability at the time of the offense. He explained that Mr. Sasser's IQ in 1994 was 79, but should be corrected for the Flynn Effect (Flynn J R: Massive IQ gains in 14 nations. . . *Psychol Bull* 101:171–91, 1987), a phenomenon that results in inflated IQ scores when individuals are scored on outmoded scoring standards. He further testified that a 2010 IQ score of 83 was consistent with research showing that incarceration leads to improved verbal reasoning. Dr. Toomer noted Mr. Sasser's history of inability to live independently and difficulty performing simple jobs as also consistent with intellectual disability.

The state's witness, Dr. Roger Moore, testified that Mr. Sasser did not meet the criteria of intellectual disability under Ark. Code Ann. § 5-4-618. Dr. Moore argued against correction for the Flynn Effect. He testified that the cutoff score for intellectual disability was 70 and noted that Mr. Sasser demonstrated evidence of adaptive functioning, such as cooking for himself, traveling independently, holding a job, maintaining two significant relationships, and fathering a child.

Long before *Atkins*, Arkansas enacted a statutory provision barring the execution of individuals with intellectual disabilities (Ark. Code. Ann. § 5-4-618 (1993)), and the Arkansas Supreme Court has interpreted its standards as consistent with the ruling in *Atkins* (*Anderson v. State*, 163 S.W.3d 333 (Ark.

2004)). The district court applied the Arkansas statute which requires meeting the state's four-prong test of intellectual disability: significantly subaverage general intellectual functioning; significant deficit or impairment in adaptive functioning; development before the age of 18; and a deficit in adaptive behavior. Applying a strict cutoff IQ score of 70 or below, the district court concluded that Mr. Sasser did not meet the first prong, and, as to the second prong, found inconclusive the evidence related to the claim of significant deficits in adaptive function. In light of the failure to meet the first two elements of the statute, the district court concluded that neither the state statute nor *Atkins* shielded Mr. Sasser from the death penalty. The case was again appealed to the Eighth Circuit.

Ruling and Reasoning

The Circuit Court held that the district court erred in finding that Mr. Sasser did not meet the first prong of intellectual disability as defined by Arkansas law and *Atkins* by requiring a bright line "of 70 or below." Consistent with the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM IV-TR), and the psychiatric and psychological communities in general, significantly subaverage intellectual function is not a fixed cutoff score; instead it is an approximation score with adaptive function an additional consideration. Arkansas law is consistent with this notion and does not define significantly subaverage intellectual function as a bright-line IQ score.

Impairment in adaptive functioning has been defined by the DSM-IV-TR as "significant limitations in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (p 41)." The Eighth Circuit's ruling in *Jackson* v. *Norris* (615 F.3d 959 (8th Cir. 2010), p 962) established that Arkansas law holds the same standard as *Atkins* in requiring assessment for significant limitations and that, if more than one significant adaptive limitation is identified, there is also "significant deficit or impairment in adaptive functioning." The circuit court held that the district court had misunderstood the meaning of "significant deficits" by failing to interpret it, consistent with DSM-IV, to mean "significant limitations." Further, the circuit court found that the district court erred when counterbalancing limitations against abilities in their assessment of adaptive functioning.

Timing is relevant in the application of *Atkins* or state law to the determination of intellectual disability. The Arkansas State Supreme Court has interpreted the Arkansas standard as applicable to those who have intellectual disabilities, either at the time of the offense or at the time of execution, effectively adopting *Atkins*. In their decision, the district court created a "composite portrait of [Mr.] Sasser" (*Sasser*, p 849) based on his adaptive functioning at various points throughout his life that was not reflective of his mental capacity at either relevant time. The temporal question compounded the erroneous balancing approach applied to the second prong because the district court tried to assess whether an intellectual disability existed at all times throughout Mr. Sasser's life, instead of addressing whether "a significant deficit or impairment in adaptive function" (*Sasser*, p 849) existed at either relevant point in time.

The circuit court found several errors in the district court's reasoning, including not construing significant deficits of adaptive functioning to mean significant limitations in functioning; using strengths of adaptation to offset limitations; using different time points to seek a composite portrayal of adaptation; and failing to apply the onset age of 18 years for appearance of a deficit in adaptive behavior. These errors resulted in the district court's answering the wrong legal questions, while leaving other pertinent legal questions unanswered. Thus, the Eighth Circuit vacated the district court's finding that Mr. Sasser had no intellectual disability and remanded so that the district court could consider the facts applied to the correct legal standard.

Discussion

Atkins v. Virginia held that imposing the death penalty on individuals with intellectual disability is unconstitutional under the Eighth Amendment's protections from cruel and unusual punishment. Mr. Sasser's appellate claim is emblematic of the challenges placed on the courts in defining what constitutes, and how to determine, intellectual disability in light of *Atkins*. The utilization of a strict IQ score alone has been deemed insufficient in determining intellectual disability (*Hall v. Florida*, 134 S. Ct. 1986 (2014); discussed above in "Intellectual Disability, IQ Measurement Error, and the Death Penalty"); hence, expert testimony becomes increasingly

relevant to comprehensive assessments of intellectual aptitude and multiple domains of adaptive functioning and then education of courts on the nuance, variability, and meaning of the IQ scores and areas of adaptive function.

Expanding the role for behavioral science experts in assisting the courts in determining the presence or absence of intellectual disability seems unlikely to simplify the burden and challenge of the court's decision-making. Rather, one can reasonably anticipate the call for an army of eager mental health experts ready to opine on the implications of a particular IQ score or whether an individual manifests a deficit, impairment, or limitation in a particular area of function.

The Eighth Circuit specifically clarified the proper standard for impaired adaptive function to be the seemingly gentler and vaguer term "limitation," rather than the harsher, more explicit terms "deficit or impairment." Eleven areas of adaptive function have been identified. These are sometimes difficult to define and what constitutes a limitation may be open to endless interpretation. Just as it has been deemed difficult and unacceptable to draw a "bright line" with regard to IQ scores, it seems potentially more challenging to draw even a "fuzzy line" for determining what constitutes a limitation in self-direction or leisure. Courts trying to decide such matters may confront pitched battles of the experts around issues that are inherently difficult to define with confidence.

Our already overwhelmed and highly scrutinized mental health system may be further stressed by an increasing need for comprehensive individualized assessments and subsequent clinician testimony. In addition, the increased role for mental health experts in these cases will highlight the rapidly evolving landscapes in the neurosciences and social sciences. Attorneys are likely to push the limits in these arenas, exposing courts to ideas and technologies not universally accepted by the field and perhaps not ready for routine use. This reality is evident by the emergence of a distinct field of law and neuroscience and by an explosion of scholarship, conferences, and joint law–neuroscience programs.

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