The court addressed some additional claims, which although not central to its overall holdings, were interesting. For example, the Agency claimed that Mr. Ramirez had needed to try to obtain the MMPI records himself and had not done so. The court noted that Mr. Ramirez did not have a treatment relationship with the psychologist and thus did not have a reasonable expectation of being able to obtain that information. Furthermore, the Agency had not even attempted to obtain the MMPI records.

The court vacated the arbitration award and remanded the case with a mandate to provide Mr. Ramirez, or his agent, with the MMPI assessments, responses, and interpretations, and provide an opportunity to challenge that evidence at a new hearing. The majority opinion declined to decide what to do if the MMPI data were no longer available, though that question was discussed in depth in the concurring opinion.

Discussion

This case involves an extension in the Federal Circuit of what has been seen in the Fifth Circuit with other types of testing data (e.g., urine drug tests in *Banks v. Fed. Aviation Admin.,* 687 F.2d 92 (5th Cir. 1982) and a proprietary algorithm in *Houston Federation of Teachers, Local 2415 v. Houston Independent School District*, 251 F. Supp. 3d 1168 (S. D. Tex. 2017). Specifically, government employees who are removed from their jobs have a constitutional right to due process, which includes the right to challenge testing data that that the government uses to support the employee's removal. In this case, that meant the ability to obtain the data, analysis, and interpretation of the MMPI. The mere fact that such a test is incorporated into a secondary report does not shield the underlying data.

As forensic psychiatrists, we often use psychological testing to support our diagnosis or opinion of malingering, both in civil and criminal realms (e.g., the MMPI, Miller Forensic Assessment of Symptoms Test, Test of Memory Malingering, etc.). The opinions that we make using such results can have profound implications for an evaluee. Although *Ramirez* was specific to psychological test results pertaining to a government employee's fitness for duty, the underlying legal concept would seem equally applicable to psychological testing used in other forensic realms. This prompts the question of whether forensic psychiatrists who refer out their psychological testing should consider obtaining the scoring data, results, and interpretations to retain in their files.

Determination of Intellectual Disability for Capital Punishment Clarified

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Standardized Measures Not the Only Criteria to Establish Adaptive Functioning Deficits in Intellectual Disability Determination for Capital Cases

DOI:10.29158/JAAPL.210128-21

Key words: intellectual disability; adaptive functioning; capital punishment; standardized testing; post-conviction relief

In *Commonwealth v. Cox*, 240 A.3d 509 (Pa. 2000), the Pennsylvania Supreme Court vacated the ruling of the court that heard the Post Conviction Relief Act (PCRA) claim of Russell Cox, an individual on death row. The PCRA court had ruled that Mr. Cox did not provide sufficient evidence of intellectual disability to render him ineligible for execution. The state supreme court held that the PCRA court's strict adherence to performance on standardized measures to establish adaptive functioning deficits was erroneous. The court further ruled the PCRA court failed to consider additional significant evidence in support of deficits in Mr. Cox's adaptive functioning. The court remanded the case for further consideration of the question of interest.

Facts of the Case

On February 27, 1986, Mr. Cox and Percy Lee entered the home of Evelyn Brown and her 17-year-

old daughter, Tina. Upon entry, Mr. Lee bound Ms. Brown's hands and feet, gagged her, and stabbed her 48 times, resulting in her death. Mr. Lee also bound Tina's hands, placed a gag in her mouth, and tied a noose around her neck. Mr. Cox then raped Tina and Mr. Lee subsequently killed her, inflicting 53 stab wounds. Both Mr. Cox and Mr. Lee were arrested and charged in relation to the deaths and tried jointly before a jury.

Mr. Cox was found guilty of first-degree murder (two counts), rape, criminal conspiracy, and possessing an instrument of crime. During the sentencing phase, the jury identified both aggravating and mitigating factors, though determined the aggravating factors to be more significant and recommended death sentences for the two murder convictions. On May 22, 1987, Mr. Cox received two death sentences to run concurrently. He was further sentenced for the convictions of rape (10 to 20 years), criminal conspiracy (five to 10 years), and possessing an instrument of crime (two and one half to five years), to run concurrently with the sentence for the initial murder conviction.

Mr. Cox filed several postsentence motions, all of which were denied by the trial court, and the appeal of his death sentences was affirmed by the Supreme Court of Pennsylvania. He petitioned for a writ of *certiorari* to the Supreme Court of the United States, which was denied. In December 1997, Mr. Cox filed a *pro se* petition under the PCRA. He was appointed counsel, and a series of additional amendments were filed, with oral arguments heard by the PCRA court. In June 2002, the PCRA court formally dismissed Mr. Cox's petition, and he appealed to the state supreme court, which affirmed the dismissal. In February 2005, Mr. Cox filed a subsequent PCRA petition in accordance with *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that executing individuals with intellectual disabilities violated the Eighth Amendment prohibition on cruel and unusual punishment. The petition was dismissed without a hearing, with the court asserting that Mr. Cox did not provide evidence to support his claim of intellectual disability. Mr. Cox appealed and petitioned the state supreme court for a remand, which was granted.

The PCRA court held several evidentiary hearings, which included testimony of Mr. Cox's family members and childhood friends who provided evidence of deficits in his intellectual and adaptive functioning throughout his lifetime. An inmate who was incarcerated with Mr. Cox testified that Mr. Cox's ability to read and write was impaired, and he required support to understand and respond to legal correspondence. Honorable William Meehan, Jr., former counsel for Mr. Cox, stated Mr. Cox appeared to demonstrate deficits in understanding the court proceedings. He testified he sought testing of Mr. Cox's intellectual functioning, which yielded an intelligence quotient (IQ) score of 69.

Three psychologists testified for Mr. Cox, citing multiple areas of deficits in adaptive functioning, the relevance to Mr. Cox's situation of the Flynn effect (an observed increase in standardized intelligence test scores across time), and deficits in vocabulary and perception. Expert witnesses for the Commonwealth disputed the relevance of the Flynn effect in the case, testified that poor testing conditions may have instead depressed his measured IQ score, and questioned the methodology of one of the defense experts in determining adaptive functioning deficits.

The PCRA court determined that testing protocols used by the expert witnesses to evaluate intellectual functioning were unreliable, and Mr. Cox did not provide sufficient evidence to prove impairments in adaptive functioning. Thus, he had failed to prove that he was intellectually disabled.

Mr. Cox appealed to the state supreme court, which issued a remand to the PCRA court, citing *Moore v. Texas*, 137 S. Ct. 1039 (2017). The court stated that the PCRA court had erred in discounting intelligence testing results because of the potential that testing conditions may have adversely affected the outcome and in relying on the testimony of lay witnesses as evidence to support that Mr. Cox did not have adaptive functioning deficits. Upon remand, the PCRA court determined Mr. Cox did not prove he was intellectually disabled by a preponderance of the evidence, as he did not provide probative evidence of substantial adaptive functioning impairments. Again, the court found the testimony of Mr. Cox's adaptive functioning was not credible, and given no additional standardized testing results regarding adaptive functioning, Mr. Cox had not provided sufficient evidence of intellectual disability. Mr. Cox again appealed to the state supreme court, arguing that the PCRA court erred in determining he failed to

meet the burden of proof regarding impaired adaptive functioning, as standardized testing was not required to establish such deficits.

Ruling and Reasoning

The Pennsylvania Supreme Court vacated the PCRA court's ruling that Mr. Cox had failed to establish intellectual disability. The state supreme court reviewed the finding of the PCRA court based on the common elements of intellectual disability defined in *Commonwealth v. Miller*, 888 A.2d 624 (2005): impaired intellectual functioning, substantive adaptive deficits, and onset before age eighteen. The focus of the appeal was noted to be the role of standardized testing in assessment of adaptive functioning.

In *Miller*, the recommendation from the American Association on Intellectual and Developmental Disabilities (AAIDD) that standardized testing be used to measure adaptive functioning impairments was highlighted. The PCRA court appeared to equate the recommendation with medical community consensus and thus did not consider evidence outside of results from standardized testing, which were not found credible. The state supreme court cited *Hall v. Florida,* 572 U.S. 701 (2014) that per the Eighth Amendment, in matters related to intellectual disability, modern medical practices should guide decision-making. While medical standards recommend the use of standardized testing to assess adaptive behavior, it is not required, and additional evidence may be utilized to inform decisions.

The court did not dispute the credibility finding of the PCRA court regarding the psychological testimony about adaptive functioning, but it was noted the PCRA court did not consider additional evidence presented regarding Mr. Cox's adaptive functioning. Specifically, testimony from Mr. Cox's family members, friends, acquaintances, former counsel, and expert witnesses was disregarded or deemed unreliable or not credible. The court indicated that the PCRA court erred when it discontinued analyzing the available evidence following the decision to disregard one expert's testing results. While the state supreme court did not assert a position regarding the additional evidence to be reviewed, the court stated that the totality of the evidence may have implications regarding impairments in Mr. Cox's adaptive abilities. The case was remanded for further consideration of the evidence regarding Mr. Cox's adaptive functioning.

Discussion

This case provides guidance for determination of adaptive functioning in establishing intellectual disability in death penalty cases. The court concluded that while use of standardized measures is recommended to establish deficits in adaptive functioning, it is not required. Further, additional evidence, such as collateral records, testimony from family members or friends, or expert witnesses regarding adaptive skills, should be considered when results of standardized testing are unavailable or determined not to be credible. From a psychological assessment standpoint, this case highlights the importance of proper administration of standardized measures, along with gathering multiple sources of data to support diagnostic considerations, which may be instrumental in informing the court's decision regarding intellectual disability in capital punishment cases.

Psychotherapist-Patient Privilege Violation in Act 21 Proceedings

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Harmless Error Doctrine Not Applicable to Violation of Psychotherapist-Patient Privilege in Act 21 Case

DOI:10.29158/JAAPL.210128L1-21

Key words: psychotherapist-patient privilege; harmless error doctrine; sexual violence; redact; Act 21

In *In the Interest of J.M.G.,* 229 A.3d 571 (Pa. 2020), the Supreme Court of Pennsylvania examined the superior court's ruling in an Act 21 case, which involves potential civil commitment for 20-year-old individuals residing in institutional placements who have been adjudicated delinquent for sexually violent