

between intelligence and adaptive capacity, implying causality in the phrase “resulting in.” However, the *Atkins* decision adds the phrase “or associated with” denoting, in fact, a meaningful distinction between a causal and a correlational relationship for intelligence and adaptive capacity.

Although the initial ruling of the Eleventh Circuit implies an appreciation of the lack of diagnostic precision by recognizing that beyond a reasonable doubt is too high a standard, the decision does not clarify how cases with divergent and clinically inconsistent findings are to be decided. The *Atkins* decision parsed the diagnostic context in which IQ, adaptive function, and age of onset are to be considered together as correlated but free-standing determinants. From that ruling, it is a short step to a situation in which the legal standard can be applied to each criterion separately. In *Hill*, the court treated the diagnostic criteria as statutory elements to be proved separately, rather than as diagnostic markers to be evaluated as components of a unitary concept. *Hill* illustrates the difficulty in applying clinical criteria, derived from scientific theory and used as a guide to assessment and treatment, to a legal question that requires absolute certainty.

Follow-Up

In November 2010, following a poll of Eleventh Circuit judges in active service, the court ordered a rehearing *en banc* and vacated the previous decision (*Hill v. Schofield*, 625 F.3d 1313 (11th Cir. 2010)). The decision from that *en banc* hearing was published November 22, 2011 (*Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. (2011))). Regarding the issue of the appropriate standard of proof, the majority noted that “*Atkins* expressly left it for the states to develop the procedural and substantive guides for determining who is mentally retarded” (*Hill*, p 2). Regarding the burden of proof the court stated:

Because there is no specific, much less “clearly established” by Supreme Court precedent, federal rule regarding the burden of proof for mental retardation claims [the Antiterrorism and Effective Death Penalty Act of 1996] mandates that this federal court leave the Georgia Supreme Court decision alone—even if we believe it incorrect or unwise—and affirm in this case [*Hill*, p 2].

Clearly, this is an evolving area of law, and future developments will continue to define the standards and procedures deemed constitutionally acceptable.

Disclosures of financial or other potential conflicts of interest: None.

Conditions of Release for Insanity Acquittees

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Compliance With Treatment Is the Only Condition That Can Be Imposed on an Insanity Acquittee When Released From a Hospital

In *United States v. Crape*, 603 F.3d 1237 (11th Cir. 2010), the United States Court of Appeals for the Eleventh Circuit addressed the conditions of release for an insanity acquittee. The acquittee appealed his recommitment to the hospital from conditional release, arguing that the district court overstepped its authority by requiring that he abstain from writing threatening letters. The appellate court considered whether district courts may impose conditions in addition to compliance with psychiatric and medical treatment on conditionally released insanity acquittees.

Facts of the Case

In 2002, Michael Crape was arrested and charged with mailing threatening letters to President Bush and Vice President Cheney. Mr. Crape was found not guilty by reason of insanity and committed to a psychiatric hospital, where he remained for five months before being conditionally released. The conditions of his release were to comply with prescribed psychiatric and medical treatment and to refrain from writing threatening letters. Sometime after leaving the hospital, Mr. Crape resumed writing threatening letters. He was arrested in 2006 for sending a letter to the Palm Beach County Sheriff’s office demanding “7.3 million for the return of six 15-year-old white females” and threatening to “chop off their heads and mail them to [the sheriff’s office]” (*Crape*, p 1240). A status conference was held in his absence, and, as a result, Mr. Crape’s conditional discharge was revoked. He returned to the hospital.

Mr. Crape appealed the revocation of his conditional release to the Eleventh Circuit Court of Appeals for the first time in *United States v. Crape*, 314

Fed. Appx. 199 (11th Cir. 2008). He argued that the status conference was improper and that, in order to revoke his release, the government must prove that he violated the conditions of release at a formal hearing in which he had the opportunity to present evidence on his behalf. The appellate court agreed, and the district court's order to revoke the conditional release was vacated. Subsequently, a formal hearing was held in Mr. Crape's presence. During that hearing, the district court considered Mr. Crape's behavior in light of the two conditions of his release: whether he had complied with treatment and whether he had written threatening letters. The court acknowledged that Mr. Crape's compliance with treatment was uncertain (i.e., he may have taken his medications as prescribed, but they did not work), but his conditional release was revoked based on definitive evidence of his having written threatening letters.

Following this hearing and revocation of his conditional release, Mr. Crape appealed to the Eleventh Circuit Court of Appeals for a second time.

Ruling and Reasoning

In his second appeal to the Eleventh Circuit, Mr. Crape argued that the district court erred in imposing the condition that he refrain from writing threatening letters. In support of his argument, he cited the language of the federal conditional release statute, 18 U.S.C. § 4243(f) (2001), which states that the court shall order "as an explicit condition of release, that [the acquittee] comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment." In Mr. Crape's view, this statute prohibited the district court from imposing any condition on him other than compliance with treatment. Therefore, the court had no authority to order the additional condition of his release—that he abstain from writing threatening letters.

In contrast, the government argued that the conditional release statute should not be read literally or interpreted narrowly. The government argued that the intent of conditional release is to provide the courts with a mechanism for protecting the public from the potentially dangerous behavior of a mentally ill individual. In the government's view, the phrase "an explicit condition of release" was not equivalent to the only condition of release, and courts should be free to impose any conditions on an acquittee that are necessary to provide sufficient pro-

tection of the public. The government drew an analogy between conditional release and supervised release (probation) following incarceration, where judges are given broad latitude to impose conditions on offenders. The government argued that restricting the ability to impose ancillary conditions of release would leave the district court with no mechanism to revoke the release of an acquittee who was clearly dangerous but still compliant with treatment. This result—having no power to hospitalize the dangerous acquittee whose medications were ineffective—was described as "absurd" (*Crape*, p 1244).

The court approached the dilemma from several angles. First, it examined the language of the conditional release statute and tried to determine whether its meaning was clear. The court interpreted the phrase "an explicit condition of release" to mean the only condition of release, reasoning that the word "an" was chosen only to avoid an ungainly grammatical construct, not to convey that other conditions of release were possible.

Next, the court examined similar cases in other federal appellate courts. The Seventh, Eighth, and Ninth Circuit appellate courts had also considered whether insanity acquittees can be subject to ancillary conditions of release, and all three courts had decided that ancillary conditions were permissible. However, in this case, the court disagreed with the conclusions of its sister circuits. The Eleventh Circuit Court reasoned that the examples cited by those courts as evidence of the permissibility of ancillary conditions were not persuasive and not directly applicable to this case.

The court also considered the legislative intent of the conditional release statute, 18 U.S.C. § 4243(f). The statute was drafted as part of the Insanity Defense Reform Act of 1984, which contained several major changes to existing law and therefore was accompanied by a detailed report from the Senate Judiciary Committee explaining its meaning and intent. In that report, the legislature explained that the Act was intended to provide a mechanism to manage situations in which the released person failed to comply with treatment. In light of this clear legislative intent, the court reasoned that noncompliance with treatment should be the only circumstance in which an acquittee's conditional release is revoked.

Finally, the court considered the analogy between conditional release of insanity acquittees and supervised release after a period of incarceration. In com-

paring the two statutes, the court noted that the supervised release statute states explicitly, “the court may order, as a further condition of supervised release . . . any other condition it considers to be appropriate” (18 U.S.C. § 3583(d) (2001)). The conditional release statute contains no such language. Thus, the court reasoned that the omission of a provision allowing judges to impose ancillary conditions on insanity acquittees was deliberate, as Congress would not have written two statutes with different language if they were intended to have the same meaning.

The court held that a district court may not revoke an insanity acquittee’s conditional discharge unless the acquittee has failed to comply with his prescribed regimen of medical, psychiatric, or psychological care or treatment. The court acknowledged that this limits the ability of courts to hospitalize potentially dangerous individuals. However, it suggested that such a dangerous person could be arrested, or the prescribed treatment regimen could be modified. District courts were urged not to hesitate in pursuing either of these courses of action.

Discussion

In clarifying that insanity acquittees may be remanded to the hospital only if they are noncompliant with treatment, this case raises the interesting question of how to manage patients who are dangerous in the community despite treatment compliance. The court ruled that Mr. Crape could be arrested if he continued to write threatening letters. While this is certainly an option that serves the goal of public protection, it potentially starts the whole cycle of criminal charges, insanity pleas, hospitalization, and conditional release all over again. One wonders whether this is really the most sensible approach to containing dangerous behavior and attending to an acquittee’s treatment needs.

Another option for managing the compliant but dangerous insanity acquittee that this case mentions is a judicial modification of the treatment plan. As a conceptual matter, this seems reasonable, but it is unclear whether judicial intervention could occur in a time frame that would be sufficient to contain the danger. For example, in the event that Mr. Crape wrote several letters with escalating threats over the course of a few days, how long would it take for a hearing to be scheduled, adequate due process to be observed, and the treatment plan to be modified?

The pace of the judicial process may simply be too slow to intervene effectively in an acutely dangerous situation.

Last, by stating that the district court may not order ancillary conditions of release prohibiting Mr. Crape from writing threatening letters, this decision seems to suggest that such conditions should be added to his psychiatric treatment plan. If that were the case, Mr. Crape would be considered non-compliant with treatment and therefore subject to hospitalization if he wrote a threatening letter. This method clearly shifts the responsibility for monitoring aspects of the patient’s behavior (i.e., criminal activity) that are typically under the purview of a probation officer or the courts to the mental health clinician. The clinician is then placed in the uncomfortable dual role of providing both treatment and court monitoring. Although this decision does not address the potential strain placed on the therapeutic alliance by such an arrangement, it is certainly worthy of consideration by mental health professionals before initiating treatment with conditionally released insanity acquittees.

Disclosures of financial or other potential conflicts of interest: None.

Improper Rejection of Evidence and Expert Testimony

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Kentucky Supreme Court Reverses Ruling Involving Admissibility of Expert Witness and Interview Tapes in a Child Sexual Abuse Allegation

In *Jenkins v. Commonwealth*, 308 S.W.3d 704 (Ky. 2010), the Kentucky Supreme Court found that a trial court erred in not allowing expert witness testimony regarding improper interviewing techniques that could affect the reliability or accuracy of a child witness’s memory. Further, the Kentucky Supreme Court also reversed the trial court’s ruling that a