

sentencing. The Eleventh Circuit Court agreed with the trial court that he was competent to waive counsel and to proceed to sentencing with only standby counsel. The court of appeals pointed out that he had demonstrated his competence during the trial process via communicated objections and arguments made to the court. The court also noted that the final report from the Center had recommended that he be deemed competent to proceed. The Eleventh Circuit asserted that, while all criminal defendants have a right to counsel, “they do not have an unqualified right to [the] counsel of their choice; and absent good cause to dismiss a court-appointed lawyer, an indigent defendant must accept the appointed lawyer or proceed *pro se*” (*Morris*, p 411). Citing its own opinion in *Garey*, the court asserted that when a trial court is:

... confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a *pro se* litigant [*Garey*, p 1267].

The court asserted that “a defendant may waive his right to counsel by his uncooperative conduct, so long as his decision is made with knowledge of his options and the consequences of his choice” (*Garey*, p 1267). The Eleventh Circuit affirmed the trial court’s decision to find Mr. Morris competent to waive counsel and to allow him to proceed to the sentencing phase *pro se*. The court held that through his uncooperative conduct, he had “knowingly and voluntarily waived his right to counsel” (*Garey*, p 1267).

#### Discussion

In reviewing the question of trial competence, the Eleventh Circuit Court first made a distinction between “*Dusky* competence” (*Dusky v. United States*, 362 U.S. 402 (1960)) and the arguably higher standard necessary to waive counsel and proceed *pro se*. The court approached the issue in *arguendo*, since the idea of a uniformly higher *pro se* competency standard remains unresolved. The Eleventh Circuit categorized *Dusky* as the “standard governing the issue of competence to stand trial with counsel” (*Morris*, p 411), but then demurred to articulate the higher standard. The court of appeals simply stated that the record generated by the trial court “amply” supported the conclusion that Mr. Morris “was compe-

tent to waive counsel and proceed to sentencing as he did” (*Morris*, p 410). He had asserted that the trial court had “erroneously required [him] to proceed *pro se* at sentencing, in violation of the Supreme Court’s decision in *Indiana v. Edwards*” (554 U.S. 164 (2008)). The court of appeals found that *Edwards* did not require a different result, since it “decides a different question” (*Morris*, p 410). The court asserted that *Edwards* “focused on the right of a defendant to represent himself” and “whether a court may lawfully require a criminal defendant who, although competent to stand trial, suffers from severe mental illness to proceed with counsel, despite the defendant’s request for self-representation” (*Morris*, pp 410–11). In reality, the scenario in *Morris* was antithetical to that in *Edwards*. Although Mr. Morris had a history of mental health treatment, his assessment at the Center indicated that he was malingering. The trial court did not regard Mr. Morris as a possibly incompetent, mentally ill defendant seeking to proceed *pro se*, but rather as a competent, uncooperative defendant refusing to proceed *pro se*.

Uncooperativeness is not, *per se*, a mental disorder. In a criminal trial uncooperativeness might be interpreted as a sign of mental illness, even severe mental illness, but, if a defendant is thoroughly evaluated in a hospital setting and is determined, with reasonable certainty, to be voluntarily uncooperative, such behavior should not be labeled incompetence. One cannot choose incompetence any more than one can choose intellectual disability. The concept of “voluntary incompetence” is inherently oxymoronic.

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

## Social Security Disability Regulations regarding the Assessment of Intellectual Disability

**Gagandeep Jattana, MD**  
Fellow in Forensic Psychiatry

**J. Richard Ciccone, MD**  
Professor of Psychiatry  
Director, Psychiatry and Law Program

University of Rochester Medical Center  
Rochester, NY

### **Social Security Benefits for Intellectual Disability Require a Finding of Deficits in Both Cognitive and Adaptive Functioning Before the Age of 22**

In *Talavera v. Astrue*, 697 F.3d 145 (2d Cir. 2012), the court ruled that Christina Talavera's cognitive limitations as an adult (i.e., having a documented full scale IQ of 64 at age 34), created a rebuttable presumption of intellectual disability before the age of 22, as required by Social Security Administration (SSA) regulations; however, the court found, because Ms. Talavera failed to establish that she had deficits in adaptive functioning resulting from her low IQ, she was not cognitively disabled as defined by SSA regulations.

#### *Facts of the Case*

Ms. Talavera was born in 1970. She attended regular classes and left school after the 10th grade. She studied for her GED but stopped after her father died. Later she attended a business school that closed after one year. In 1990, she worked as a receptionist for four months. She was a telemarketer in 1992 for three months. In 1996, she worked as a cashier for seven months; in October 1996, she injured her back. The cashier job was her last gainful employment. In February 2000, a psychiatrist opined that Ms. Talavera had an adjustment disorder, histrionic personality disorder, average intelligence, and no psychiatric limitations to prevent her from employment. In November 2004, a psychologist recorded that Ms. Talavera had a full scale IQ of 64 and slight limitations in carrying out simple instructions.

The court took note of Ms. Talavera's multiple diagnoses: chronic back pain with radiculopathy, migraine headaches, carpal tunnel syndrome, obesity, hypertension, osteoarthritis, depression, and mild cognitive limitations.

#### *Procedural History*

The *Talavera* case has a complex procedural history. In 1999 at the age of 29, Ms. Talavera began her almost 13-year quest for Supplemental Security Income (SSI) under Title XVI of the Social Security Act (42 U.S.C. § 138 et seq). She first applied for benefits in December 1999, claiming that she had been injured while working as a cashier when she picked up a case of oil. After a hearing in January 2002, an Administrative Law Judge (ALJ) denied her claim, finding that despite her physical impairments

she had the residual capacity to perform a full range of light work.

Ms. Talavera requested a review of the ALJ's decision. In May 2002, the Appeals Council vacated that decision and remanded the case for further review. In November 2002, after a Supplemental Hearing, the ALJ again denied her disability benefits. A year later, in November 2003, the Appeals Council, vacated the ALJ's November 2002 decision and directed that a different ALJ evaluate her mental limitations and other physical impairments.

At the hearing before a different ALJ, in March 2005, Ms. Talavera presented evidence that her psychological testing six months earlier revealed a full scale IQ of 64. Six months later, her claim was denied because she had the residual capacity to perform light work. The mild mental limitations further restricted her residual capacity to work, but there were a significant number of jobs that she could perform.

In May 2006, the appeals council denied Ms. Talavera's request for review. In August 2006, she filed an action in the U.S. District Court for the Eastern District of New York. The court granted an administrative review. The review before ALJ Hoppenfeld and the decision issued in August 2008 found that Ms. Talavera was not disabled as defined by SSA regulations. The appeals council declined to review the decision. The court reopened her case and, in its August 2011 decision, upheld the decision of the Commission of Social Security that she was not disabled and, therefore, not entitled to SSI.

#### *Ruling and Reasoning*

Ms. Talavera appealed the judgment of the district court to the United States Court of Appeals for the Second Circuit; arguments were heard in September 2012 and, in a decision handed down in October 2012, the Second Circuit affirmed the judgment of the district court.

The court's analysis pointed out that to be eligible for SSI benefits, Ms. Talavera had to demonstrate that, as a result of physical or mental impairment, she was unable to perform both her previous work and any other kind of gainful work.

The court reviewed the SSA regulations that call for a five-step process to evaluate a disability claim. The claimant has the burden of proving the first four steps. The Commissioner considers whether the claimant is gainfully employed and, if not employed, whether the claimant has a severe impairment. If the

claimant has a severe impairment, it must be among those listed in the SSA regulations. If the impairment is not listed, the claimant must state whether he has the residual functional capacity to perform his past work. If not, the Commissioner has the burden of proof in the fifth step, in determining whether there is other work that the claimant could perform.

The court noted that the SSA regulations require a finding of the onset of cognitive disability before the age of 22. The court opined that it is reasonable to presume that claimants will have a fairly constant IQ throughout their lives and that Ms. Talavera's IQ of 64 at age 34 met her *prima facie* burden of establishing that she had a cognitive disability before age 22. The second part of her burden was to prove that she had qualifying deficits in adaptive function (i.e., "ability to cope with challenges of ordinary everyday life" (*Talavera*, p 148)). The appeals court pointed that she showed ability to provide competent care for her two children, she had attended regular classes until 10th grade, she had held three jobs at various times, and multiple evaluations of her mental functioning had reported no significant limitations to her adaptive functioning as a result of mental impairments.

The court concluded that Ms. Talavera did not establish that she had deficits in adaptive function resulting from her cognitive impairments and, therefore, she was not "mentally retarded" as the term is defined by SSA regulations.

#### Discussion

Various regulations and statutes continue to refer to mental retardation. The appeals court noted that the term is offensive to many. Regulatory agencies and the courts are following the lead of the American Association of Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA) in transitioning to using the term intellectual disability to replace the older terminology.

There is general agreement on the definition of intellectual disability. It has three components: a significant deficit in intellectual functioning; a significant impairment in adaptive functioning; and onset of intellectual and adaptive deficits in the developmental period.

IQ test result scores are approximations of intellectual function. Several problems can confound the interpretation of an IQ score, including the test used

and the quality of the standardization underlying the measure of intelligence, standard error of measurement surrounding a specific IQ score, the Flynn effect, practice effects, personal effort, and comorbid factors (e.g., medication side effects, chronic insomnia, and substance abuse). The SSA's definition of intellectual disability calls for a valid verbal, performance, or full scale IQ of 59 or less, or an IQ score of 60 through 70 and an additional impairment (<http://www.ssa.gov/disability/professionals/bluebook/12.00.MentalDisordersAdult12-05>). Accessed February 10, 2014). DSM-5 uses specifiers (mild, moderate, severe, and profound) that are defined on the basis of adaptive functioning, not IQ scores, because adaptive functioning determines the level of support required (American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. Arlington, VA, American Psychiatric Association, 2013).

The measurement of adaptive functioning is equally challenging. The SSA's definition requires evidence of dependence on others for personal needs and marked limitations in daily living or social functioning. DSM-5 describes deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Complicating the problems that come with applying these definitions are that the deficit may exist because the individual never learned the skill or the individual may not know when to use the skill.

Richard Bonnie and Katherine Gustafson provided a thoughtful discussion of these questions that can confound the accurate assessment of an intellectual disability (Bonnie RJ, Gustafson K: The challenge of implementing *Atkins v. Virginia*. . . . *U Rich L Rev* 41:811–60, 2007).

DSM-5 requires that deficits "have their onset in the developmental period," without further defining developmental period (DSM-5, p 33). The SSA requires that the age of onset of the deficits in intellectual functioning and adaptive impairment manifest during the developmental period, meaning before the age 22. The judge in *Talavera* found that a low IQ in adulthood creates a rebuttal presumption of a deficit in intellectual functioning during the developmental period.

The clinician who undertakes the forensic evaluation of an intellectual disability faces a compound diagnostic assessment and the difficult task of relat-

ing the findings to the relevant legal standard, a standard that may vary from agency to agency and state to state. *Talavera* highlights the complex nature of this undertaking.

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

## Prisoners' Rights

**Marc Libman MD**

*Fellow in Forensic Psychiatry*

**Robert Weisman, DO**

*Associate Professor of Psychiatry*

*Co-Director, Forensic Psychiatry Fellowship*

*University of Rochester Medical Center*

*Rochester, NY*

### **An Inmate Transferred to a Psychiatric Hospital Is Still Considered a Prisoner as It Pertains to the Prison Litigation Reform Act**

In *Gibson v. City Municipality of New York*, 692 F.3d 198 (2d Cir. 2012), the U.S. Court of Appeals for the Second Circuit considered whether a defendant in New York State being held under a temporary order of observation (that is, found not competent to stand trial and transferred to the custody of the Commissioner of the Office of Mental Health for the State of New York for treatment in a forensic hospital) is still considered a prisoner, as it pertains to legislation affecting prisoner rights.

#### *Facts of the Case*

Bennie Gibson was charged with criminal mischief in the third degree. Having been found not competent to stand trial, he was transferred from jail to Kirby Forensic Psychiatric Center, a state psychiatric hospital, on a Temporary Order of Observation (N.Y. Crim. Proc. Law § 730.40(1)).

While being detained on the forensic psychiatric unit, Mr. Gibson filed a complaint in federal district court alleging that various defendants had violated his civil rights. He requested to proceed *in forma pauperis* (i.e., without having to pay the required court fees). He was barred by the district court from filing his complaint *in forma pauperis*, in accordance with the Prison Litigation Reform Act (PLRA) of 1996 (Public L. No. 134 (1996)), because he had previously submitted more than three lawsuits that were deemed frivolous. On January 19, 2013, he appealed the denial of his motion to the United

States Court of Appeals for the Second Circuit. He stated that he was not a prisoner while hospitalized and in the custody of the Commissioner of Mental Health, and therefore the rules of the PLRA should not apply to him.

#### *Ruling and Reasoning*

The judgment of the district court was affirmed by the appellate court. The term prisoner in the PLRA is defined as “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs” (28 U.S.C. § 1915(h)). Mr. Gibson, having been found not competent to stand trial, was transferred to the custody of the state’s mental health commissioner for restoration of competency. Although he was not confined in a jail or a prison at the time of his filing, he was a person detained at a facility with pending criminal charges. Per New York State law, criminal action is temporarily suspended while the defendant is having his capacity restored, but not terminated, unless the temporary order expires or the charges are dropped (N.Y. Crim. Proc. Law § 730.60(2)). Criminal action was suspended while Mr. Gibson was hospitalized for restoration of capacity; however, he was still an individual detained as a result of an accusation of a violation of criminal law. It was thus determined that he was still a prisoner within the intentions and common-sense reading of the PLRA.

#### *Discussion*

*Gibson v. City Municipality of New York* offers an opportunity to re-examine the dynamic balance between effectively and efficiently managing a court system while also protecting the rights of the increasing population of incarcerated people. The question at the heart of this case is whether an inmate transferred to a forensic psychiatric unit is still considered legally a prisoner, as the definition pertains to the PLRA. The Second Circuit Court determined the answer in the affirmative and felt that, by definition, this is a straightforward conclusion. Based on the language of the PLRA, it would be difficult to question the court’s logic as it pertains to this narrow question. However, *Gibson* is also a useful opportunity to review the original context of the PLRA and its subsequent impact.