

state that the victim's brother had failed a polygraph test, and evidence undermining the state's theory of the case. The court stated that to prevail on a *Brady* claim, a petitioner need only show that the undisclosed evidence was "likely admissible under Ohio law" (*Gumm*, p 369).

The court of appeals concluded that Mr. Gumm was not entitled to relief on the prosecutorial misconduct claim based solely on the prosecutor's motion to admit hearsay statements in the psychiatric reports, but held that the prosecutor's remarks regarding Mr. Gumm's sexual habits were improper and that the prosecutor's misconduct was "flagrant and severe." (*Gumm*, p 383). The court reasoned that the prosecutor used background testimony on Mr. Gumm in an intentional and deliberate manner. He used the testimonies from witnesses to depict Mr. Gumm as a "sexual deviant" who had sex with little boys, although there was no evidence on record. The court stated that the testimony used by the prosecutor was then used to mislead and prejudice the jury. The court reasoned that the case against Mr. Gumm was so weak and the prosecutor's misconduct so "pronounced and persistent" that it too had a "probable cumulative effect upon the jury which cannot be disregarded as inconsequential" (*Gumm*, p 385).

#### Discussion

This case raises numerous points, including the occurrence of false confession in individuals with intellectual disabilities and prosecutorial misconduct when psychological testimony intended to be favorable to a defendant is misused to prejudice a jury against a defendant. The U.S. Supreme Court in *Atkins v. Virginia* expressed its concerns about the heightened possibility of false confessions by individuals with intellectual disabilities. In *Atkins*, the Court recognized that the individuals with intellectual disabilities are capable of knowing the difference between right and wrong, but that their impairments cause a diminished capacity to understand and process information, to communicate, to reason logically, and to learn from their mistakes. Those with intellectual disabilities are particularly susceptible to the wishes of authority figures, even in the absence of direct pressure (Cloud M, *et al*: Words without meaning: the constitution, confessions, and mentally retarded suspects. U. Chi. L. Rev. 69:495, 511, 2002). Individuals with an intellectual disability are more likely to answer rather than remain silent, more

likely to confess when interrogated, less likely to give a truthful statement and yet more likely to be found by the court to have confessed voluntarily, knowingly, and intelligently (Hourihan PT: Earl Washington's confession: mental retardation and the law of confessions. Va. L. Rev 81:1471, 1493, 1995).

Psychiatrists and psychologists, when evaluating and preparing reports for the courts, frequently use information gathered from medical reports and collateral information to arrive at an opinion. Although the totality of the report is admissible as evidence, in *Gumm*, the Sixth Circuit recognized limitations on the hearsay evidence in the report and criticized the prosecution's misuse of the information. Mr. Gumm's counsel introduced Dr. Leland's report in this case to show that Mr. Gumm's confession to the police was not reliable; however, the prosecution used parts of the report to prejudice the jury against Mr. Gumm and used background witness testimony to present Mr. Gumm as sexually deviant.

Finally, the withholding of exculpatory material was deemed inappropriate, in violation of the *Brady* Rule, when the state did not turn over to Mr. Gumm's counsel more than 170 pages of witness statements and confessions by others gathered by the police that would have helped the defense in its case. The Sixth Circuit upheld the district court ruling that highlighted these concerns and, based on its reasoning, concluded, "This is such a case in which extreme malfunctions in the state criminal justice system prejudiced Petitioner and caused him to suffer extreme violations of his constitutional rights" (*Gumm*, p 385).

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## Defendant With an Intellectual Disability Appealed for a New Trial Based on the State's Withholding Evidence

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### The Sixth Circuit Court of Appeals Rules That Withholding Evidence Pertaining to Potential Other Suspects Requires Reversal of Conviction Under *Brady*

In *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014), petitioner Michael Bies appealed the decision of the U.S. District Court for the Southern District of Ohio granting *habeas* relief on one claim but denying on other arguments. Mr. Bies entered a federal *habeas* claim after denial from Ohio state courts of postconviction relief. The district court reversed Mr. Bies' conviction in the 1992 murder of a 10-year-old boy based on a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), a U.S. Supreme Court decision that established the government's responsibility to disclose all information that serves the ends of justice, including investigatory discovery that may be exculpatory. In 2000, when Mr. Bies filed his initial *habeas* claim and almost 9 years after Mr. Bies' conviction and denial in several postconviction hearings, the state turned over exculpatory evidence that had not been disclosed. In his revised *habeas* claim, after Mr. Bies' death sentence was vacated under an *Atkins* claim (*Atkins v. Virginia*, 536 U.S. 304 (2002)), Mr. Bies asserted violation of his due process rights when the state withheld exculpatory evidence in violation of *Brady*, improper admission of his custodial statements at trial, and ineffective assistance of counsel. The district court granted a conditional writ of *habeas* related to *Brady* only, and the Sixth Circuit affirmed.

#### Facts of the Case

Mr. Bies was tried and convicted for the 1992 kidnapping, attempted rape, and aggravated murder of 10-year-old Aaron Raines and was sentenced to death in Ohio state court. The Cincinnati Police Department interviewed several suspects, two of whom confessed to the murder, and after two months of investigation settled on Darryl Gumm, an apparent acquaintance of Mr. Bies. Mr. Gumm came to the attention of police based on a tip from his sister stating that Mr. Gumm was familiar with the abandoned building where the boy's body was discovered and that he was in the neighborhood the evening of the murder. Mr. Gumm, who had borderline intellectual functioning, was arrested, confessed to the murder, and gave statements that implicated Mr. Bies by description, but not by name.

The police then traveled to Hazard, Kentucky, to the home of Mr. Bies. He was invited for an interview at the Kentucky highway patrol office and advised of his *Miranda* rights. Mr. Bies made statements during the inter-

view that were consistent with diminished mental capacity. He stated that he was in Cincinnati on the night of the murder and got a ride from three people, one of whom fit Mr. Gumm's description. The interview was taped but interrupted several times when the tape was turned off, as the officers stated that they "wanted to make him aware of the facts" (*Bies*, p 390).

Mr. Bies waived his right to extradition and was driven by police to Cincinnati on the following day, stating that he wanted to return to the scene. At the scene of the crime, police video recorded the walk-through. Mr. Bies stated, "I've studied the police for seven years and I wanted to return back to the scene so I could help out with the crime" (*Bies*, p 392). At the scene, Mr. Bies offered inconsistent details of the crime. He maintained that he did not commit the murder and implicated Mr. Gumm. The officers proceeded to the bus stop with Mr. Bies and again turned off the interview tape at the request of Mr. Bies, according to the police. At that time, Mr. Bies reportedly gave a confession. Subsequently, Mr. Bies maintained that he did not request that the recorder be turned off, and he refuted the claim that he gave a confession to the police.

At trial, Mr. Bies' court appointed counsel submitted a motion to suppress his custodial statements and a *Brady* motion for the court to order the police to produce all information from the investigation for the prosecuting attorney. The motion to suppress was denied, and the investigative evidence was not disclosed, as the Cincinnati Police Department had a system of producing a "homicide book." The book contained only affirmative evidence to provide to the prosecution and did not contain any exculpatory evidence. The prosecutors were not aware of the evidence that was not included in the homicide book and therefore did not know that information was not disclosed to the defense before trial.

Evidence not provided at the time included reports that Roger Cordray had confessed to the crime, had a history of sleeping in the abandoned building where Mr. Raines was murdered, and was seen in the area by a witness on the night of the crime. In addition, witnesses described his hands as "all scraped up." Another suspect, Reggie Hetsler, also confessed to the murder. Yet an additional suspect, Raymond Moore, was seen by a witness entering the abandoned building on the night of the murder and told police that he was helping to look for the then-missing child a full two hours before the child was reported missing. None of this potential exculpatory evidence was available at trial, and in 2000 during discovery for a federal *habeas* claim, the state

provided the exculpatory evidence that had never before been provided to the court.

Following a 2002 *Atkins* hearing, Mr. Bies was determined to have an intellectual disability, and his death penalty was vacated. His 2000 federal *habeas* claims proceeded to the U.S. District Court for the Southern District of Ohio on the *Brady* claim, the custodial confession, and ineffective assistance of counsel. The district court granted a conditional writ of *habeas corpus* related to *Brady* only, and Mr. Bies filed an appeal to the Sixth Circuit Court of Appeals.

#### Ruling and Reasoning

On review, the Sixth Circuit affirmed Mr. Bies' *Brady* claim. In *Brady*, the Supreme Court advanced the principle of prosecutorial responsibility and the importance of fairness in criminal trials. The circuit court quoted the Supreme Court, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly" (*Brady*, p 87). The Court further noted in *Brady* that prosecutors are charged with seeking justice, not "with winning trials" (*Brady*, pp 87–8). There are three considerations in a *Brady* violation: the evidence withheld must be favorable to the accused, whether it is exculpatory or impeaching of others; the evidence must have been suppressed by the state, whether willfully or inadvertently; and prejudice must have ensued because of the absence of the evidence. The court of appeals concluded that the first two conditions were not disputable. It then analyzed the ways in which evidence pertaining to other suspects undermined the state's original theory of the case, which led to Mr. Bies' conviction, and concluded with a discussion of why Mr. Bies' custodial statements were inadmissible.

The court discussed the admission of Mr. Bies' custodial statement, and the language in *Atkins* is referenced. The Sixth Circuit quoted from *Atkins* describing people with intellectual disabilities. Individuals with intellectual disability "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" (*Atkins*, p 318). The court was particularly concerned about the possibility of false confessions with such defendants:

Under the circumstances, the officers' uninhibited use of leading questions, off-the-record "fact-feeding", failure to adequately explain Bies' *Miranda* rights, and alleged failure to re-advise Bies of his rights after long breaks in questioning heighten the risk that Bies' confession was false or coerced, and call into question the admissibility of his custodial statements [*Bies*, p 404].

The circuit court stated strongly that Mr. Bies' confession and custodial statements would infringe upon his due process rights if admissible at trial. The Sixth Circuit affirmed the district court's *habeas* relief on the *Brady* claim and declined to rule on the remaining claims, given the court's decision to grant Mr. Bies a new trial.

#### Discussion

The *Bies* decision is a reminder of the vulnerability of those with intellectual disabilities during police interrogation. Within the Sixth Circuit's discussion, the court cites not only *Atkins*, but also Welsh S. White in *What is an involuntary Confession Now?* (Rutgers L. Rev 50:2001, 1998) and Richard A. Leo and other experts on false confession, who have contributed to our understanding of how those with intellectual disabilities are susceptible to the wishes and suggestions of authority figures and often strive to please the authorities. In addition, the Sixth Circuit strongly criticized the interrogation practices of the police who questioned Mr. Bies and reached a decision that stands for the proposition that a fair justice system must embrace full and transparent disclosure of all evidence, especially exculpatory evidence that raises doubts about the prosecutorial theory of a case and may actually exonerate a defendant with an intellectual disability who is vulnerable to making a false confession.

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## Sex Reassignment Surgery in a Correctional Setting

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