

Capital Defendants with Intellectual Disability

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Strengths in Adaptive Functioning Need Not Be Considered to Identify Defendants with Intellectual Disability in Death Penalty Cases

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In *Jackson v. Payne*, 9 F.4th 646 (8th Cir. 2021), the U.S. Court of Appeals for the Eighth Circuit affirmed the federal district court ruling that defendant Alvin Bernal Jackson was intellectually disabled and thus was ineligible for the death penalty. The Eighth Circuit found that the district court's ruling, which did not credit Mr. Jackson's adaptive functioning strengths, was consistent with Arkansas' statutory requirements and U.S. Supreme Court precedent.

Facts of the Case

In 1989, when Mr. Jackson was 19 years old, he killed Charles Colclasure. Mr. Jackson was convicted of capital murder and sentenced to life in prison. In 1996, while in prison, Mr. Jackson killed Scott Grimes, a prison guard. Mr. Jackson was convicted of a second capital murder and this time was sentenced to death. The Arkansas Supreme Court affirmed the conviction and death sentence. Mr. Jackson appealed his conviction of the second murder, but the Arkansas Supreme court denied his petition.

In 2003, Mr. Jackson filed a habeas corpus petition in federal court asking that the court find him intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment and under the recent U.S. Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The federal district court denied his petition. Mr. Jackson appealed, and in 2007, the Eighth Circuit reversed and remanded the district court's decision. The district court again denied Mr. Jackson's petition, and in 2010 the

district court decision was reversed and remanded by the Eighth Circuit, with the finding that Mr. Jackson was entitled to an *Atkins* hearing.

In 2011, the federal district court held an evidentiary hearing on Mr. Jackson's *Atkins* claim. The district court heard from one expert witness who testified in support of Mr. Jackson's petition, while another expert testified against. Mr. Jackson also gave testimony and presented records documenting serious behavioral and learning problems in his early childhood. Diagnoses of antisocial personality disorder and attention deficit hyperactivity disorder were given to Mr. Jackson in his childhood. Throughout his schooling, Mr. Jackson was violent, disruptive, consistently performed below his age and grade level, and required special education. He eventually dropped out of school in the tenth grade due to failing grades. Mr. Jackson presented test scores of 72, 73, 74, and 81, from multiple Intelligence Quotient (I.Q.) tests administered during his childhood.

In 2016, the district court ruled that Mr. Jackson had not met the burden of proof demonstrating that he was intellectually disabled. The court found Mr. Jackson's most recent I.Q. tests, conducted in prison, were unreliable because of indications of malingering. The court referred to Mr. Jackson's childhood I.Q. scores, which did not preclude a finding of intellectual disability but did not apply any standard error of measurement (SEM) to the scores. The court's analysis of Mr. Jackson's adaptive functioning focused on his adaptive strengths and improvements in prison. The court did not find that Mr. Jackson's adaptive deficits were due to his intellectual deficits.

Mr. Jackson appealed again, and the Eighth Circuit reversed and remanded the case, in consideration of the U.S. Supreme Court ruling in *Moore v. Texas (Moore I)*, 137 S. Ct. 1039 (2017). The Eighth Circuit ordered the district court to reconsider its ruling as to whether Mr. Jackson was intellectually disabled by applying a standard error of measurement of ± 5 points to the I.Q. tests administered in Mr. Jackson's childhood. The district court was also ordered to consider whether Mr. Jackson's adaptive deficits were related to his intellectual deficits without requiring a specific link between the two, and to focus on his adaptive functioning deficits, instead of adaptive strengths.

On remand, the district court applied the SEM as directed by the Eighth Circuit and found the lower range of three of Mr. Jackson's four childhood

IQ scores fell below 70. They found his intellectual deficits were related to his subaverage intellectual functioning and assigned no weight to his adaptive functioning strengths or improvements in prison. The district court found that Mr. Jackson had successfully demonstrated that he was intellectually disabled. They granted his petition and vacated his death sentence.

The Arkansas Department of Correction appealed the decision, arguing that Mr. Jackson had failed to prove that he had intellectual functioning or adaptive functioning deficits and thus had failed to demonstrate that he was intellectually disabled.

Ruling and Reasoning

The Eighth Circuit reviewed the Arkansas Department of Correction's appeal *de novo*, and finding no clear error, affirmed the district court's ruling. In deciding Mr. Jackson's case, the Eighth Circuit Court reviewed the Arkansas statute, Ark. Code Ann. § 5-4-618(a) (2020), barring a death sentence for defendants with an intellectual disability. Mr. Jackson had to prove, by a preponderance of the evidence, that he had met all four requirements of the statute to establish his ineligibility for the death sentence. The requirements included showing that he was significantly below average in general intellectual functioning, had significant deficit or impairment in adaptive functioning, that both manifested no later than age 18, and that he has deficits in adaptive behavior. The Eighth Circuit noted that the district court's finding that Mr. Jackson was intellectually disabled under this statute was "a pure question of fact," and they reviewed it for clear error.

The Eighth Circuit rejected the state of Arkansas' contention that Mr. Jackson's childhood I.Q. test scores were unreliable and invalid. The Eighth Circuit determined that the district court did not err in considering these scores to show that Mr. Jackson had below average intellectual functioning. This decision was based on the testimony of the state's expert witness who indicated that since all four I.Q. test scores fell in the same approximate range, there was less chance for an error as they showed consistency across multiple administrations. Based on the Supreme Court's precedent in *Hall v. Florida*, 572 U.S. 701 (2014), the Eighth Circuit rejected the state's argument that the district court had erred in applying an SEM of ± 5 points to Mr. Jackson's I.Q. test scores.

The Eighth Circuit found that the district court did not err in finding that Mr. Jackson exhibited adaptive functioning deficits. The district court's decision was based on Mr. Jackson's educational and related mental health records from his childhood, which the state contended were of questionable validity because Mr. Jackson did not use standardized measures to demonstrate adaptive functioning deficits. The Eighth Circuit noted that although the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5) recommends the use of standardized testing for the purpose of assessment of adaptive functioning deficits, it anticipated that this is not always an available option, as in the case of Mr. Jackson, who had been incarcerated most of his adult life. Using guidance from the Supreme Court cases, *Moore I* and *Moore v. Texas (Moore II)*, 139 S. Ct. 666 (2019), the Eighth Circuit found that the district court did not need to consider Mr. Jackson's adaptive functioning strengths, as neither the DSM-5 nor the Arkansas statute mandate its use in diagnosing intellectual disability.

Discussion

In *Atkins v. Virginia*, the U.S. Supreme Court determined that it is unconstitutional to execute people with intellectual disability based on the Eighth Amendment's ban on cruel and unusual punishment. But they left it for the states to decide who has an intellectual disability. Most states define intellectual disability based on three criteria: whether an individual has deficits in intellectual functioning as determined by a standardized, scientifically valid, I.Q. test; deficits in at least one of three domains (conceptual, social, and practical) of adaptive functioning; and whether these deficits were present since the developmental period, i.e., prior to reaching 18 years of age. These criteria are based on American Association on the Intellectual and Developmental Disabilities (AAIDD) Clinical Manual and the DSM-5.

The present case highlights challenges in the assessment of adaptive functioning deficits to establish whether defendants have an intellectual disability and are thus ineligible for the death penalty. In its arguments, the state relied on adaptive functioning strengths acquired by Mr. Jackson in a prison setting during his years of incarceration to establish that he did not meet the second prong of the Arkansas statute for defendants with intellectual

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disability. But in *Moore I* and *II*, the U.S. Supreme Court set a precedent that adaptive functioning strengths cannot offset adaptive functioning deficits. The Court's decisions in these cases specifically advised lower courts to use caution against reliance on adaptive strengths developed in a controlled setting such as prison. The Court did not explicitly prohibit a case-by-case analysis of adaptive functioning strengths and weaknesses.

The U.S. Supreme Court has given freedom to state legislatures to develop appropriate ways to enforce the Eighth Amendment ban against executing defendants with intellectual disability if they do not deviate from the consensus of the medical community. Further litigation is likely if states adopt statutes that include an analysis of strengths and weaknesses to determine adaptive functioning deficits to identify defendants with intellectual disability in death penalty cases.