

subaverage intellectual functioning and deficits in adaptive functioning must currently be exhibited, as well as having been present before age 18.

The Eleventh Circuit reasoned that Mr. Ferguson had no history of subaverage intellectual function prior to age 18, and thus met neither *Atkins's* nor Alabama's standard for ID. The appeals court reviewed his IQ scores, including the Flynn Effect and SEM. They reasoned that all of Mr. Ferguson's scores were above 70 except for two, which the court discounted "based on evidence that [Mr.] Ferguson did not put forth his best effort on those tests" (*Ferguson*, p 1255). The court thus chose not to address whether Alabama's standard for determining ID conflicts with *Atkins*.

Second, Mr. Ferguson argued that the district court erred in omitting the two sub-70 scores and finding him not to be intellectually disabled. He pointed to his other tests, which documented appropriate effort. The appeals court concluded that there was no error in the district court's selection of which scores to consider, and thus no error in the finding of no ID.

Last, the Eleventh Circuit reviewed the presentencing and penalty phases to rule on Mr. Ferguson's claim of ineffective counsel. They did not find reasonable probability of deficient performance undermining confidence in the outcome.

#### Discussion

This case raises important considerations for reconciling the psychiatric diagnosis of ID with legal standards. There is an evolving clinical understanding of ID. Although deficits in intellectual functioning "confirmed by both clinical assessment and individualized, standardized intelligence testing" (Criterion A) and deficits in adaptive functioning (Criterion B) with onset of both during the developmental period (Criterion C) remain defining elements of ID, specifiers of severity are no longer based on IQ scores. Rather, mention of IQ score is made in the text description with the caveat that "IQ measures are less valid in the lower end of the IQ range" (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision; 2022. (DSM), p 37–38). Moreover, the clinical assessment of ID incorporates sex-, gender-, and culture-related diagnostic nuances.

The greater emphasis on adaptive functioning presents challenges for identifying and categorizing the heterogeneous presentation of ID. Psychiatrists may be in the position to interpret an individual's IQ

test scores in the context of that individual's social and conceptual adaptive skills, especially when they appear incongruent across the various domains. Furthermore, in this case, the court declined to address whether deficits in intellectual function need be presently demonstrable for an individual to be covered by *Atkins* in Alabama. This raises the question of how durable a diagnosis of ID is by legal standards if IQ score thresholds are to be used in courts. It is foreseeable that the matter may be raised in future cases in which an individual has demonstrably deficient mental capacity during childhood, but an IQ score over 70 with adequate functioning in the community as an adult. Test scores change over time for reasons not limited to the Flynn and practice effects. It is important to consider individuals' developmental background (e.g., special education classes, grade attained) to understand the deficits that manifested early, as well as relate how this affected their adult trajectory. Psychiatric evaluations should strive to distinguish between individuals' independent functioning and their functioning when supported by family and community, since this reliance may contribute to a falsely overestimated determination of ability.

## Legal Standards for Admissibility of Evidence in Insanity Defense Cases

**Harshit Sharma, MD**  
*Fellow in Forensic Psychiatry*

**Reena Kapoor, MD**  
*Associate Professor of Psychiatry*

*Law and Psychiatry Division*  
*Department of Psychiatry*  
*Yale University School of Medicine*  
*New Haven, Connecticut*

### Expanding the Scope of Access to Evidence in the Insanity Defense

DOI:10.29158/JAAPL.230122L4-23

**Key words:** insanity defense; admissibility of evidence; *Miranda* violation; privileged communication waiver; forensic ethics

In *Liggett v. People*, 529 P.3d 113 (Colo. 2023), the Supreme Court of Colorado made two key rulings. First, when a defendant claims an insanity defense, it allows for the introduction of rebuttal

evidence in the form of the defendant's own voluntary statements, even if they weren't made in compliance with *Miranda* rights. Second, the court ruled that the state statute allowing for a waiver of privileged communication to a physician or psychologist during an insanity trial also covers communications to their representatives, like nurses and counselors.

#### Facts of the Case

Ari Misha Liggett was charged with the first-degree murder of his mother after his mother's remains were found in his car. Following his arrest, Mr. Liggett was interviewed at the sheriff's office and made several spontaneous, voluntary statements before his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) were read to him. During this portion of the interview, Mr. Liggett denied killing his mother. "He also volunteered information about his mental health, saying that other people could 'shape-change,' that he was God, and that his psychiatrist could prove he had 'a completely inculpable state of mind'" (*Liggett*, p 117).

Mr. Liggett pleaded not guilty by reason of insanity (NGRI), which resulted in a court-ordered sanity evaluation by Dr. Hal Wortzel, a forensic psychiatrist. In his assessment, Dr. Wortzel highlighted details from Mr. Liggett's conversation with law enforcement, including that Mr. Liggett had initially claimed to have paid two friends to assist in disposing of his mother's remains. During his psychiatric evaluation with Dr. Wortzel, however, Mr. Liggett admitted to making up the detail about two other men dismembering the body. Dr. Wortzel considered this inconsistency noteworthy because it indicated an effort to avoid criminal responsibility. Ultimately, Dr. Wortzel concluded that Mr. Liggett could form a culpable mental state and that he understood the wrongfulness of his actions when killing his mother.

Initially, Mr. Liggett moved to suppress evidence derived from his police statements based on the *Miranda* violation, and the trial court agreed. This decision was overturned on interlocutory appeal (an appeal that occurs within the trial proceedings), leading to a revised order barring Dr. Wortzel's testimony in the prosecution's case-in-chief but allowing the testimony as rebuttal if Mr. Liggett presented evidence supporting his insanity plea.

Concurrently, the state sought to subpoena all of Mr. Liggett's prior mental health records. Mr.

Liggett challenged the subpoenas, arguing that the information was privileged. He acknowledged that, under state statute, a defendant who pleads NGRI "waives any claim of privilege as to communications made to a physician or psychologist in the course of an examination or treatment" (Colo. Rev. Stat. § 16-8-103.6 (2012)). He argued, however, that this waiver applies only to a physician or psychologist, meaning that the observations of other medical providers (e.g., nurses and counselors) remained privileged. The trial court disagreed, ruling that the statutory waiver provision allowed for full disclosure of records concerning the mental condition that Mr. Liggett had placed at issue in his criminal case.

During the trial, two of Mr. Liggett's nonphysician medical providers testified, a professional counselor and a nurse who had worked with him before the alleged offense. Mr. Liggett chose not to present any evidence to avoid having Dr. Wortzel testify in rebuttal. The jury ultimately found Mr. Liggett guilty of first-degree murder.

On appeal, Mr. Liggett argued that the trial court had impeded his right to present an insanity defense by allowing his unwarned, voluntary statements to be used in rebuttal. Furthermore, he contested the court's interpretation of the privilege waiver, stating that it applied only to physicians and psychologists. The appellate court rejected both arguments and affirmed Mr. Liggett's conviction. Mr. Liggett then appealed his case to the Supreme Court of Colorado.

#### Ruling and Reasoning

The court first grappled with the question of whether a defendant's voluntary but non-*Miranda*-compliant statements can be admitted as evidence to rebut an insanity defense. The court's decision was guided by the precedent set in *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007). In that case, the defendant, Mr. Dunlap, sought postconviction relief, arguing that his trial counsel had provided ineffective assistance by abandoning a mental health defense. Mr. Dunlap introduced the testimony of four physicians to show that a mental health defense would have been viable. The postconviction court then allowed the prosecution to present evidence from Mr. Dunlap's competency evaluation to rebut the testimony of the physicians, even though Mr. Dunlap's statements during the evaluation had been made without *Miranda* warnings.

The court reasoned that Mr. Liggett's case was similar to *Dunlap* in that he had chosen to put his

mental state at issue by pleading NGRI, and therefore the holding in *Dunlap* should apply in *Liggett*. The court emphasized that the truth-seeking function of a trial would be frustrated if medical experts were required to render opinions on complicated matters like mental illness without knowing essential facts such as those Mr. Liggett had admitted to the police. Thus, the court held that Mr. Liggett's Fifth Amendment rights were not violated by allowing the prosecution to present his voluntary but unwarned statements as rebuttal evidence to his NGRI defense.

Next, the court evaluated Mr. Liggett's argument that the privilege waiver articulated in Colo. Rev. Stat. § 16-8-103.6 applied only to a physician or psychologist. The court again found guidance in its precedents, specifically *Gray v. Dist. Court of the Eleventh Judicial Dist.*, 884 P.2d 286 (Colo. 1994). In that case, a defendant who pleaded NGRI argued that records from a previous psychiatric hospitalization should have been suppressed because they were written records, not communications made to a physician or psychologist. The Colorado Supreme Court rejected this interpretation of Colo. Rev. Stat. § 16-8-103.6, stating that the legislature had created a statutory waiver to any claim of confidentiality or privilege, including the attorney-client and physician- and psychologist-patient privileges. It therefore reasoned that the privilege waiver was meant to be interpreted broadly.

The court noted that collaboration between physicians, psychologists, and nonphysician medical providers occurs routinely and plays an essential role in diagnosis and treatment. Because of this collaborative relationship, the court reasoned that the same rules of evidence in an NGRI trial should apply to nonphysicians who are working as part of a treatment team. The court held that Colo. Rev. Stat. § 16-8-103.6's waiver of privilege includes communications made to a physician's or psychologist's agents, such as the nurse and counselor who testified at Mr. Liggett's trial.

In the dissenting opinion, two justices disagreed with the majority's decision to expand the circumstances under which illegally obtained evidence can be admitted into trial proceedings. They noted that the exclusionary rule generally prohibits the government from using illegally obtained evidence in its case-in-chief but that the impeachment exception allows the prosecution to introduce such evidence in rebuttal of an insanity defense. The dissenting

justices reasoned that the impeachment exception should be limited to rebuttal of the defendant's own testimony, not the testimony of others, such as psychiatric experts. The dissenters argued that the majority's decision significantly broadens the scope of the impeachment exception by allowing unconstitutionally obtained statements to rebut the defendants' insanity defense regardless of whether they testify. The justices argued that this decision undermines the protections of the Fifth Amendment and deters defendants from presenting a potentially successful (or sometimes the only) defense.

#### Discussion

The decision in *Liggett* affects two important sources of collateral evidence that forensic psychiatrists rely upon routinely in NGRI evaluations: defendants' statements to police and clinical assessments of prior treatment providers. The court's holding supports the idea that a psychiatric evaluator, and ultimately the trial court, should have access to comprehensive information. The court even goes so far as to allow illegally obtained evidence to be presented at trial under certain circumstances, including to rebut an insanity defense.

Deciding whether to review illegally obtained information creates an ethics tension for forensic psychiatrists. On the one hand, evaluators adhere to the ethics principles of honesty and striving for objectivity, so they want to review all relevant information. Statements made to police, often proximate in time to the offense, may offer invaluable insights into an individual's psychological state. One could argue that even statements procured under outright custodial pressure may shed light on a defendant's cognitive abilities and susceptibility to influence. On the other hand, the ethics principle of respect for persons may lead a forensic psychiatrist to conclude that only evidence obtained in accordance with a defendant's Constitutional rights should be considered in the evaluation. The majority opinion in *Liggett* weighs truth-seeking more heavily than protecting a defendant from harm, but some forensic psychiatrists may think (and practice) differently.

Additionally, although the court in *Liggett* decided that a defendant pleading insanity waives privilege as to all communications with health care professionals acting as a physician or psychologist's agent, it leaves open the question of whether those professionals'

communications would remain privileged if providing care independent of a team. For example, if a defendant had been seeing a social worker for psychotherapy in a solo private practice, would his statements in therapy remain privileged during an NGRI trial? Perhaps future court decisions will address this question, especially as more nondoctoral professionals provide mental health care independently.

## Intellectual Disability in Capital Murder Cases

**Jeffrey M. Sanders, MD**

*Fellow in Forensic Psychiatry*

**Matthew W. Motley, MD, PhD**

*Clinical Assistant Professor of Psychiatry*

*Department of Psychiatry and Behavioral Sciences  
Keck School of Medicine of USC  
University of Southern California  
Los Angeles, California*

### Court Considers Whether to Accept the Lowest IQ Score Presented by an Expert at an Atkins Hearing

DOI:10.29158/JAAPL.230123-23

**Key words:** intellectual disability; expert testimony; capital punishment; Eighth Amendment

In *Ybarra v. Gittere*, 69 F.4th 1077 (9<sup>th</sup> Cir. 2023), the U.S. Court of Appeals for the Ninth Circuit examined whether lower courts had fairly and sufficiently analyzed the expert testimony regarding IQ testing presented at a hearing to establish if Robert Ybarra was intellectually disabled and thus prohibited from being executed under *Atkins v. Virginia*, 536 U.S. 304 (2002).

#### Facts of the Case

In 1979, after unsuccessfully raising an insanity defense at trial, Mr. Ybarra was found guilty of the first-degree murder, first-degree kidnapping, battery with intent to commit sexual assault, and sexual assault of 19-year-old Nancy Griffith in Nevada. He was sentenced to death; he also received multiple life sentences.

Mr. Ybarra remained on Nevada's death row when the U.S. Supreme Court ruled, in *Atkins*, that executing individuals with intellectual disability violates the Eighth Amendment's prohibition of cruel and

unusual punishment. In response to the *Atkins* decision, states created procedures for individuals on death row to contest their execution on the basis of intellectual disability; hearings governing such claims widely became known as "*Atkins* hearings."

Nevada's state legislature revised its statutes in 2003 to codify the procedure for *Atkins* hearings in the state. At an *Atkins* hearing in Nevada, the defense holds the burden of proving that the defendant is intellectually disabled by a preponderance of the evidence (Nev. Rev. Stat. § 174.098(5)(b) (2013)). Furthermore, according to Nevada statute, the trier of fact must apply a three-pronged test to a claim of intellectual disability at an *Atkins* hearing: the defendant must show "(1) 'significant subaverage general intellectual functioning[;]' (2) 'which exists concurrently with deficits in adaptive behavior[;]' and (3) 'which manifested during the developmental period'" (*Ybarra*, p 1080). This test closely mirrors the criteria specified by the contemporaneous edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders: DSM-5 Fifth Edition.

Mr. Ybarra petitioned for so-called *Atkins* relief; in other words, he sought to have his execution barred based on a claim of intellectual disability. During a two-day *Atkins* hearing presided over by Judge Steve L. Dobrescu, both defense and prosecution presented expert testimony.

Testifying for the defense, Dr. David Schmidt, a licensed clinical psychologist, opined that Mr. Ybarra was intellectually disabled. Regarding the first prong of Nevada's test of intellectual disability, Dr. Schmidt concluded that Mr. Ybarra's IQ was 60 based on his performance on the Wechsler Adult Intelligence Scale III test. Regarding the second and third prongs, Dr. Schmidt testified that Mr. Ybarra experienced adaptive deficits which began in early life, citing his historical difficulties in school, where he was noted to have "peer problems and academic failure" prior to dropping out at age 15 (of note, Mr. Ybarra received an "adult education diploma" at age 18). Dr. Schmidt disagreed with the conclusion of the United States Marine Corp's cognitive testing, that Mr. Ybarra was of "dull normal" intelligence (i.e., less intelligent than average but not intellectually disabled). Dr. Schmidt further opined that Mr. Ybarra's 1981 IQ score of 86 "could have been artificially inflated" (*Ybarra*, p 1081). Under cross-examination, Dr. Schmidt conceded that the testing he performed was "problematic [. . .] at best" due to Mr. Ybarra's