

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

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

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In *Ybarra v. Gittere*, 69 F.4th 1077 (9th 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

“severe distress” during participation (*Ybarra*, p 1081). Dr. Schmidt also acknowledged that he “could not ‘express an opinion about the validity of [Mr. Ybarra’s 1981 IQ] test’” and that, when multiple IQ tests are performed, “the higher score generally controls because it is not possible to fake a higher score” (*Ybarra*, p 1082).

The second defense expert, Dr. Mitchell Young, a psychiatrist, initially opined that Mr. Ybarra’s intellectual functioning was in the “mild to borderline mentally retarded range” and that he exhibited adaptive deficits based on the results of another test (*Ybarra*, p 1082). But, “after listening to Dr. Schmidt’s testimony,” Dr. Young revised his opinion to categorize Mr. Ybarra as “intellectually disabled” (*Ybarra*, p 1083). Notably, despite his overall conclusion, “Dr. M. Young conceded that he had considered the possibility that [Mr.] Ybarra was faking his symptoms” (*Ybarra*, p 1083).

The state’s expert, Dr. Theodore Young, reported that the results of his testing of Mr. Ybarra’s cognitive ability were “bizarre.” Mr. Ybarra performed worse than Alzheimer patients and, moreover, Dr. Young described Mr. Ybarra’s performance on tests as inconsistent with collateral information, such as samples of his writing. Dr. Young concluded that the results of his IQ testing of Mr. Ybarra were “‘not even close to valid’ because of [Mr.] Ybarra’s malingering” (*Ybarra*, p 1083).

At the conclusion of Mr. Ybarra’s *Atkins* hearing, Judge Dobrescu ruled that Mr. Ybarra had not proven that he was intellectually disabled by a preponderance of the evidence. The court thus denied *Atkins* relief to Mr. Ybarra. Rather than Mr. Ybarra meeting the Nevada standard for intellectual disability, the court found that Mr. Ybarra exhibited below-average (i.e., “‘dull normal’ or ‘borderline’”) intelligence but was “not intellectually disabled” (*Ybarra*, p 1084–5). In his ruling, Judge Dobrescu “cited various medical records and opinions which supported [Mr.] Ybarra’s history of malingering” mental health symptoms (*Ybarra*, p 1085).

Mr. Ybarra appealed Judge Dobrescu’s ruling to the Nevada Supreme Court, claiming that Judge Dobrescu had improperly focused on the 1981 IQ testing results and erred in allowing into evidence testimony by Dr. Young about his administration of the Test of Malingered Memory (TOMM). The Nevada Supreme Court sustained the lower court’s decision, concluding that not only was there reason to give weight to the 1981 IQ score but also reason

to believe that Mr. Ybarra exaggerated his intellectual impairment on other tests.

Mr. Ybarra then filed a motion to reconsider and submitted a new expert report written by Dr. Stephen Greenspan. The Nevada high court denied the motion and declined to consider the new report.

Mr. Ybarra subsequently requested *habeas* relief in Federal District Court. This was denied by the district court, and Mr. Ybarra appealed the denial to the Ninth Circuit Court of Appeals. The Ninth Circuit vacated the district court’s order denying relief. The circuit court of appeals remanded the case to the district court with instructions to determine whether a “lay perception that [he] did not ‘look like’ a disabled person” had overly influenced the district court’s decision (*Ybarra*, p 1088). It further ordered that the district court consider Dr. Greenspan’s report as a part of the state court record.

On remand, the district court again determined that the Nevada Supreme Court was reasonable in its conclusions and again denied *habeas* relief because “the only sub-75 IQ scores in the record were invalid” even with Flynn effect adjustments, and Dr. Greenspan’s analysis was deemed doubtful (*Ybarra*, p 1089). Mr. Ybarra once again appealed to the Ninth Circuit.

Ruling and Reasoning

The Ninth Circuit Court of Appeals ruled that Mr. Ybarra “fail[ed] to make a showing that he had significantly subaverage intellectual functioning. This is dispositive and defeats the basis of his *habeas* claim” (*Ybarra*, p 1090). In other words, Mr. Ybarra did not establish that he met the first of Nevada’s three required prongs for a claim of intellectual disability in an *Atkins* hearing. Furthermore, in reaching this conclusion, the circuit court of appeals reviewed and rejected several arguments put forward by Mr. Ybarra.

The Ninth Circuit rejected Mr. Ybarra’s argument that the Nevada court was required to accept the lower score put forward by Dr. Schmidt and reject the 1981 IQ test. Instead, the Ninth Circuit found that Nevada courts had properly weighed the credibility of expert testimony about the validity of the 1981 IQ test as well as the credibility of expert testimony about whether an adjustment should be made to the 1981 IQ score, and, separately, whether such an adjustment would in fact render an IQ score consistent with intellectual disability.

The Ninth Circuit also rejected Mr. Ybarra’s contention that Nevada courts had based their determination on a lay perception of intellectual disability. The circuit

court of appeals instead concluded that Nevada Courts had based their determination on expert testimony as well as collateral information, such as evidence of his intellectual performance outside of the testing environment and “his 1991 statement about ‘having to act crazy’ in prison, and the conclusions of other doctors that [Mr.] Ybarra was faking psychological symptoms” (*Ybarra*, p 1091).

Discussion

Based on Nevada law, when a capital defendant seeks death penalty relief in an *Atkins* hearing, the burden of proving intellectual disability lies with the defendant. Nevada established a three-pronged test of intellectual disability that includes evidence of deficits in intellectual and adaptive functioning occurring over the developmental period. When an individual who was not diagnosed with intellectual disability during the development period seeks to prove that these deficits existed, mental health experts are required to extrapolate and interpolate from available data. When doing so, mental health experts may disagree on the crucial question of intellectual disability. The Ninth Circuit’s ruling underscores that it is the trier of fact’s role to critically assess the persuasiveness of conflicting expert testimony, i.e., “to ‘credit one expert over another’” (*Ybarra*, p 1091).

Revocation of Conditional Release of Federal Insanity Acquittees

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Insanity Acquittees Must Overcome Presumption of Dangerousness

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In *United States v. Williams*, 70 F.4th 359 (6th Cir. 2023), the U.S. Court of Appeals for the Sixth

Circuit affirmed that after the court establishes that a not guilty by reason of insanity acquittee has violated a condition of release according to 18 U.S.C. § 4243 (g) (2018), the burden is on the acquittee to prove by clear and convincing evidence that release would not be a substantial risk to the public.

Facts of the Case

In 1997, Richard Williams threatened to send a bomb to a brush company, Boucherie, if they did not properly compensate him for a toothbrush he designed. Mr. Williams had a history of schizoaffective disorder, bipolar type. A prominent component of his illness was delusional thinking about a toothbrush he created in the 1980s. He provided samples to Boucherie, but the company declined to purchase the product. Mr. Williams believed that they stole his work without giving him the credit he deserved.

The threat Mr. Williams made in 1997 resulted in a felony charge for sending a threatening message in interstate commerce. The district court found him not guilty by reason of insanity, then civilly committed him for mental health treatment. With this treatment, his mental status improved, resulting in release two years after the initial commitment.

The conditions of his release included taking prescribed medications and refraining from contact with Boucherie. Mr. Williams failed to meet both conditions on multiple occasions. A communication with Boucherie in 2021 led the court to order a mental health evaluation.

The report stated that Mr. Williams experienced “psychosis and manic behavior.” In addition, it highlighted a history of aggressive and threatening acts. The report concluded that his release would endanger others and that he would “likely” violate conditions in the future.

The U.S. District Court for the Eastern District of Tennessee at Knoxville determined that releasing him would “pose a significant risk to the community, revoked his release, and committed him for treatment” (*Williams*, p 362). The court allocated the burden of proof to Mr. Williams to show clear and convincing evidence that he was not a substantial risk to the public to obtain release.

Mr. Williams appealed, arguing that the court improperly placed the burden of proof according to 18 U.S.C. § 4243(g) (2018) and misapprehended the evidence.