

foreseeability of the death of Mr. Short's wife and children, finding the harm suffered by the family members fell beyond the scope of the duty owed by PNHS. There was no evidence suggesting Mr. Short's wife and children were patients of PNHS, nor were they in contact with PNHS health care providers. The court also rejected the argument that PNHS created a foreseeable risk of harm to Mr. Short's family by "fail[ing] to do more." The court emphasized foreseeability is a key factor in determining duty and found there were no warning signs or prior history of violent behavior which would have made Mr. Short's actions foreseeable. The court held that Mr. Short's familicide was unforeseeable as a matter of law.

Discussion

The *Smits* court set new precedent in Minnesota, holding mental health providers can be liable for failure to prevent a patient's death by suicide, even if the patient is not in the provider's custody.

According to Obegi, the legal standard for suicide risk assessment (SRA) and response is known to be "ambiguous." Obegi addressed this topic, outlining several crucial considerations related to information gathering, assessment, formulation, treatment, documentation, and follow-up (Obegi JH. Probable standards of care for suicide risk assessment. *J Am Acad Psychiatry Law*. 2017 Dec; 45(4):452-9).

In this case, the *Smits*' experts opined that PNHS did not follow the standard of care when treating Mr. Short. According to the facts set forth, we know Mr. Short did not respond well to his treatment. We also know his clinical interview reports regarding suicidal ideation were not consistent with his responses on the PHQ-9. The extent of assessment for suicide risk is not known.

An SRA following Obegi's framework goes beyond inquiring about suicidal ideation and includes additional information gathering related to changes in functioning, mood, and behavior, both from the patient and collateral sources. This information is then utilized to estimate suicide risk based on a constellation of factors, which informs treatment planning and monitoring, all of which is documented, and later reviewed and updated during subsequent patient encounters. Collateral information gathering may not be practicable in all cases, but a comprehensive approach and documentation of efforts in complex or ambiguous cases is well-advised.

One of the greatest challenges for mental health providers is making judgments about future behavioral risks. This process is complex, multifaceted, and imperfect, but begins with following risk assessment strategies which are in accordance with the standards of care in one's jurisdiction, and thoroughly documenting that one has done so.

In addition to the obvious treatment and liability concerns, as Justice Anderson noted, problems related to foreseeability need to be carefully considered so as not to allow mental health stigma to influence standards or judgment. There is a risk that patient care will be dictated by liability concerns and biases regarding mental illness, instead of patient needs, which can increase mental health stigma and deter help seeking.

Considerations in Determining Intellectual Disability

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Review of IQ Scores Remains Part of Alabama's Standard for Determining Intellectual Disability

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In *Ferguson v. Commissioner*, 69 F.4th 1243 (11th Cir. 2023), the U.S. Court of Appeals for the Eleventh Circuit considered Thomas Dale Ferguson's *habeas corpus* petition to overturn his death sentence, claiming ineffective assistance of counsel and intellectual disability (ID). After reviewing the record, including psychological testing and Mr. Ferguson's IQ scores from childhood and adulthood, the Eleventh Circuit found that neither claim was supported and affirmed the lower court's denial of the *habeas* petition.

Facts of the Case

In July 1997, Thomas Dale Ferguson and four codefendants stole a truck to use as a getaway vehicle

for their bank robbery. The truck belonged to Harold Pugh, whom Mr. Ferguson shot. One of Mr. Ferguson's codefendants shot Mr. Pugh's 11-year-old son. Both Mr. Pugh and his son died. An Alabama grand jury indicted Mr. Ferguson on four counts of capital murder based on the circumstances of the killing and the age of the younger victim (Ala. Code § 13A-5-40 (a)(2), (10), (15) (1994)). Mr. Ferguson was found guilty on all counts.

During the sentencing phase, Mr. Ferguson presented his low IQ as one of five mitigating circumstances. He called Dr. James Chudy, a clinical psychologist who testified to Mr. Ferguson's borderline intelligence and personality disorder with borderline features. Mr. Ferguson's wife also testified that Mr. Ferguson was "mentally slow, and that she made all the decisions in their marriage" (*Ferguson*, p 1246). Dr. Stephen Rosen, a clinical psychologist called by the state, testified that Mr. Ferguson "was not intellectually disabled despite his IQ score of 69, but [Mr.] Ferguson's IQ was likely in the borderline range" (*Ferguson*, p 1247). He also noted Mr. Ferguson to have a personality disorder. The jury recommended a sentence of life in prison without parole. The trial court judge overruled the jury's vote and sentenced Mr. Ferguson to death.

Mr. Ferguson appealed to the Alabama Court of Criminal Appeals (ACCA) (*Ferguson v. State*, 814 So. 2d 925 (Ala. Crim. App. 2000)) and to the Alabama Supreme Court (*Ex parte Ferguson*, 814 So. 2d 970 (Ala. 2001)). Both courts affirmed the ruling.

In 2003, Mr. Ferguson petitioned for a writ of *habeas corpus*, arguing that as an individual with ID, his death sentence was unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002). He cited his full-scale IQ scores of 71 in sixth grade and 69 when awaiting trial, as well as details established at trial regarding his limited adaptive functioning. He also raised the concern of ineffective assistance of counsel during pretrial and sentencing. In 2006, the state trial court denied his petition. Mr. Ferguson filed an appeal to the ACCA, which affirmed the denial in 2008. In 2009, the Alabama Supreme Court denied *certiorari* review. Subsequently, Mr. Ferguson filed a federal *habeas* petition in the Northern District of Alabama on the above-mentioned grounds; the petition was denied in 2014.

Mr. Ferguson requested amendment of judgment regarding the *Atkins* claim, and the federal district court held an evidentiary hearing on this matter in 2019. Dr. Robert Shaffer, a clinical psychologist,

was called after administering the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) to Mr. Ferguson, who received a full-scale IQ score of 77. Adjusting for the Flynn Effect and applying the standard error of measurement (SEM), the score was determined to be between "69.4 and 78.4 with 95 percent probability, or between 67.9 and 78.9 with a confidence level of 99 percent" (*Ferguson*, p 1252). The Flynn Effect refers to the phenomenon of upward drift in IQ scores at a rate of approximately .3 points annually (Flynn JR. The mean IQ of Americans: massive gains 1932–1978. *Psychological Bulletin*. 1984 Jan; 95(1):29–51). Dr. Schaffer used the Vineland Adaptive Behavior Scales Test with Mr. Ferguson's mother to assess Mr. Ferguson's adaptive functioning at age 18. Dr. Schaffer concluded that Mr. Ferguson had an ID. Dr. Glen King, a clinical psychologist, was called by the state. On Dr. King's administration of the WAIS-IV, Mr. Ferguson scored an 85 (range of 81–89, including SEM; the court reduced this score by seven points due to practice effect from readministration of the same test within a five-month period); on administration of the Stanford-Binet Intelligence Test, Fifth Edition (SB-5), he scored 84; on administration of the self-rated Adaptive Behavior Assessment System, Mr. Ferguson rated his ability highly. Based on these and the Independent Living Scales, Dr. King concluded that Mr. Ferguson had neither subaverage intellectual function nor poor adaptive functioning. Upon review of all these findings, the district court denied Mr. Ferguson's *habeas* request.

Mr. Ferguson appealed the court's denial to the U.S. Court of Appeals for the Eleventh Circuit.

Ruling and Reasoning

Mr. Ferguson brought two arguments related to ID and a claim of ineffective counsel before the Eleventh Circuit. Regarding his ID claim, he first raised that Alabama's standard, which requires demonstration of present substantial deficits in adaptive function, is at odds with *Atkins*, and therefore unconstitutional. In *Atkins*, the Supreme Court referenced the "clinical definitions of [intellectual disability requiring] not only subaverage intellectual function, but also significant limitations in adaptive skills" before age 18 (*Atkins*, p 318). But, individual states were tasked with determining how to uphold and enact these criteria during sentencing. The Alabama Supreme Court interpreted ID broadly in *Smith v. State*, 213 So. 3d 239 (Ala. 2007), finding that both

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

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Expanding the Scope of Access to Evidence in the Insanity Defense

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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