not guarantee either man would never reoffend; rather, Dr. Gehle concluded that the rate of reoffending was 15.8 percent in the next five years and 24.3 percent in the next ten years, which was average for sex offenders. The state argued in both re-cross-examination and closing arguments that Dr. Gehle had been wrong and that, as a result, another woman had presumably been raped, and therefore Mr. Campbell was bound to hurt another child. Finally, the court found that the last statement during closing argument, "You heard the testimony. What do you think is going to happen?" (*Campbell*, p 18) was unfairly prejudicial and clouded jurors' ability to weigh the evidence clearly.

Discussion

This case underscores the importance of a response to the question as to whether the expert has ever been wrong. The court points out that if the expert had denied being wrong, the state would have been bound by the expert's answer and the arrest warrant or other evidence would not have been admissible. The court relied on *State v. DuBose*, 341 S. E.2d 785 (S.C.1986), which held that, where a witness denies an act involving a matter collateral to a party's case-in-chief, the inquiring party is not permitted to introduce evidence in contradiction or impeachment. In this case, if the expert witness had denied ever being wrong rather than say that she did not know, the state could not have introduced evidence to impeach her.

Additionally, this case illustrates the importance of experts acknowledging the difference between risk estimation and risk prediction in violence risk assessments. Although Dr. Gehle had not recommended civil commitment in the prior case, she had not characterized the offender as having no risk of reoffending. In risk assessment, there is never a guarantee that a low-risk offender will not reoffend or that a high-risk offender will reoffend. An expert can offer only risk estimates, not predictions.

Fetal Alcohol Spectrum Disorder and the Death Penalty

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Fifth Circuit Denied Rehearing on Whether Fetal Alcohol Spectrum Disorder is Equivalent to Intellectual Disability under Atkins

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In *In re Soliz*, 938 F.3d 200 (5th Cir. 2019), Mark Soliz motioned the federal court of appeals to consider a successive *habeas* application and stay of execution. Mr. Soliz argued that his diagnosis of Fetal Alcohol Spectrum Disorder (FASD) should exempt him from the death penalty and that his case was eligible to be reconsidered according to *Atkins v. Virginia,* 536 U.S. 304 (2002). The Court of Appeals for the Fifth Circuit denied his motion, stating that Mr. Soliz did "not present a new claim of a retroactive constitutional right recognized by the Supreme Court that was previously unavailable to him" (*Soliz*, p 203).

Facts of the Case

Mr. Soliz was sentenced to death in Texas in 2012 for intentional murder in the course of committing or attempting to commit burglary or robbery. The Texas Court of Criminal Appeals (CCA) affirmed the conviction and sentence in 2014. In his initial state application for writ of *habeas corpus*, Mr. Soliz argued that "that the reasoning of *Atkins* should be extended to create a categorical exemption from death sentences" (*Soliz*, p 201) for individuals with FASD.

In a complex series of appeals in both state and federal courts, Mr. Soliz pressed various claims, including that FASD should be regarded as an equivalent condition to intellectual disability (ID) under *Atkins*. In all instances, his claims were denied, except for granting a certificate of appealability on the *Atkins* claim (*Soliz v. Davis*, No. 3:14-CV-4556-KM, 2017 U.S. Dist. Lexis 144283 (N.D. Tex. Sept. 6, 2017)).

Ruling and Reasoning

The Fifth Circuit ruled that 28 U.S.C. 2244(b) (1996) barred Mr. Soliz's successive applications for a writ of *habeas corpus*. The court determined that Mr. Soliz did not satisfy the requirements of 28 U.S. C. § 2244(b)(3)(C) (1996), which would have permitted further exploration of his claim. Otherwise, successive claims would not be allowed. The code specifies that the petitioner must demonstrate the presence of new information not previously considered in court.

The court examined Mr. Soliz's efforts to draw parallels with other cases in which ID was diagnosed in appellants and granted a stay of execution to pursue *Atkins* claims using Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition (DSM-5) criteria. While Mr. Soliz acknowledged that his claim was previously raised, he argued that the DSM-5 presented a new standard "for assessing whether one meets the *Atkins* threshold for intellectual function" (*Soliz*, p 202). Mr. Soliz argued that the reasoning in *In re Johnson*, 935 F.3d 284 (5th Cir. 2019), should apply. Mr. Johnson would not have been found intellectually disabled under DSM-IV-TR (IQ score approximately 70 or below). Under DSM-5, however, clinical judgment was incorporated into the assessment and Mr. Johnson claimed he met the criteria for ID. The *Soliz* court pointed out that DSM-5 was published in May 2013, only 17 days before Mr. Johnson's application was denied, thus precluding timely amendment. Therefore, Mr. Johnson's appeal was granted.

Mr. Soliz additionally referenced the case of *In re Cathey*, 857 F.3d 221 (5th Cir. 2017). The *Cathey* court applied the reasoning in *Johnson*, whose claim was granted four months before the court denied Mr. Soliz's initial application. The court granted Mr. Cathey's *habeas* petition for an *Atkins* claim, due to concerns about flaws in methodology associated with evaluating for intellectual disability. Mr. Soliz argued that changes to the approach in assessing for ID demonstrated that there was new information to present to the court.

He reasoned that his already-diagnosed FASD should be "medically equated to intellectual disability as defined in *Atkins*" (*Soliz*, p 203).

The appellate court considered Mr. Soliz's arguments and distinguished them from the *Johnson* and *Cathey* decisions. Mr. Soliz failed to amend his application in February 2016, after the DSM-5 was available, which negated Mr. Soliz's claim that there was information previously unavailable to him. The court, therefore, dismissed Mr. Soliz's claims. His stay of execution was also denied. Mr. Soliz was executed on September 10, 2019.

Discussion

Whereas *Atkins* bars the application of capital punishment to individuals with ID, it is not explicit as to the manner in which ID was acquired. In the case of *Soliz*, the arguments to extend the *Atkins* exemption to FASD failed. Mr. Soliz raised concerns about partial FASD at trial but did not persuade jurors to sentence him to life in prison rather than execution. On appeal, his attempt to promote FASD as the functional equivalent of ID was rejected. Consequently, by law, Mr. Soliz had exhausted the *Atkins* avenue of appeal, as the court ruled that new evidence was not presented.

FASD is diagnosed in the context of a cluster of alcohol-associated birth defects and subsequent disabilities. Notably, FASD as a specific diagnosis does not appear in DSM-5 (or in ICD-10). Prenatal alcohol exposure, *per se*, is not informative as to the functional criteria of ID. The phenotype of a person with fetal alcohol exposure could include an array of adaptive deficits and intellectual impairment. Still, ID should not be inferred from the diagnosis of FASD and its downstream consequences. This is especially true since the condition itself has variable presentations and cannot legally or clinically be equated with ID, only that it may cause ID.

It is not known from this decision what the arguments were, or the extent to which Mr. Soliz may have met the criteria for ID. Although court records reveal that he had a recent IQ score of 75, the methodology and analyses of his evaluation were not detailed in the court opinion. It was stated that jurors weighed the evidence of Mr. Soliz's reported partial FASD and brain damage but concluded that he did not deserve a life sentence.

The DSM-5 criteria for ID allow for specifiers that permit clinicians to document etiology. This includes "fetal alcohol exposure (even in the absence of stigmata of fetal alcohol syndrome)" (DSM-5, p 33). The DSM-5 elsewhere acknowledges that prenatal alcohol exposure can result in intellectual impairment and other deficits. For example, the diagnosis of neurobehavioral disorder associated with prenatal alcohol exposure (ND-PAE) is applicable to those

who, as a result of "more than minimal exposure to alcohol during gestation," have impairments in self-regulation, and neurocognitive and adaptive functioning (DSM-5, p 798).

It is unclear if the term FASD or ND-PAE was most applicable for Mr. Soliz. Either way, throughout the course of the case, Mr. Soliz never was classified as having ID, preventing him from successfully moving forward with an *Atkins* claim.

As it stands, then, ID remains the sole medical diagnosis exempting a criminal defendant from the death penalty. Conditions causing behavioral deficits not rising to the level required for an *Atkins* claim must be raised as mitigating factors. Diagnoses such as ND-PAE and FASD should be brought out via expert testimony for jury consideration.

Challenge to the Death Penalty

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U.S. Supreme Court Vacates Decision by the Sixth Circuit for Death Row Inmate Who Sought Habeas Relief

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In *Shoop v. Hill*, 139 S. Ct. 504 (2019), the U.S. Supreme Court vacated and remanded a Sixth Circuit appellate court's decision to grant *habeas* relief for a respondent who argued that his death penalty sentence was contrary to clearly established federal law due to his intellectual disability. In reaching its decision, the Court rejected the respondent's assertion that lower courts' decisions overemphasized his adaptive strengths in a controlled environment in finding that he was not intellectually disabled. Further, the Court held that the Sixth Circuit appellate court erred in relying on case law that had not been established at the time relevant to the respondent's claim.

Facts of the Case

In September 1985, Raymond Fife, a 12-year-old boy, left home on his bicycle to visit a friend. When Raymond did not return home, his parents began a search, and his father eventually found him naked, beaten, and burned in a wooded field. Although he was hospitalized, Raymond died from his injuries two days later. Subsequently, Danny Hill, age 18, appeared at a local police department and inquired about a reward for information regarding the crime. Police determined that Mr. Hill knew more information than was publicly available. Eventually, Mr. Hill admitted to his involvement in the murder.

In 1986, Mr. Hill was convicted. The court opinion from the Sixth Circuit, *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002), summarizes his sentencing, which reveals that a mitigation hearing was held to determine whether he would receive the death penalty. During the mitigation hearing, three psychologists testified that Mr. Hill was intellectually disabled. The aggravating circumstances outweighed Mr. Hill's mitigating factors, and he was sentenced to death.

An intermediate appellate court and the Ohio Supreme Court affirmed his conviction and sentence, and the U.S. Supreme Court denied *certiorari* in 1993. After unsuccessful petitions to state and federal courts for postconviction relief, he petitioned the Ohio courts arguing that under *Atkins v. Virginia,* 536 U.S. 304 (2002), his death sentence should be invalidated. In 2006, the Ohio trial court found that Mr. Hill was not intellectually disabled due to his adaptive strengths and denied Mr. Hill's claim. In 2008, the Ohio Court of Appeals affirmed the denial, and in 2009, the Ohio Supreme Court denied review.

In 2010, Mr. Hill filed a new federal *habeas* petition under 28 U.S.C. § 2254 (1996), seeking review of the Ohio courts' denial of his *Atkins* claim. Following a denial by the district court, the Sixth Circuit Court of Appeals reversed and granted *habeas* relief under § 2254(d)(1), which applies to a state court's decision that was contrary to, or was an unreasonable application of, clearly established federal law at the time of the decision. In granting *habeas* relief, the Sixth Circuit stated that the Ohio courts erred by relying too heavily on Mr. Hill's adaptive strengths in the controlled environment of a death-row prison cell. In reaching its ruling, the court relied on the U.S. Supreme Court's decision in