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CHALLENGES OF CONVEYING INTELLECTUAL DISABILITIES TO JUDGE AND JURY

Caroline Everington*

The issue of defendants with intellectual disabilities (mental retardation)¹ and the criminal justice system is not new. The difficulties encountered by individuals with intellectual disabilities (ID) in the criminal justice system was brought to the attention of the forensic and disability communities over thirty years ago.² Broad issues facing defendants with ID entailed difficulties at every stage of the process, from arrest to parole.³ Defendants with ID served longer sentences and had difficulty attaining parole.⁴ Issues regarding defendants' understanding of and participation in trial proceedings (competence to stand trial) were raised.⁵ Lack of identification of the disability by criminal justice personnel and clinicians was cited as a primary concern, and a call was made for more accurate ID diagnosis and better training of criminal justice personnel on the characteristics and needs of defendants with ID.⁶

The specific issues around capital cases and ID were brought to the attention of the disability and forensic communities 25 years ago in *Penry v. Lynaugh*.⁷ While the

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¹ The American Association on Intellectual and Developmental Disabilities (AAIDD) replaced the phrase "mental retardation" with "intellectual disability" due to evolutionary changes in perspectives on this disability. *See* AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, *INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* xvi (11th ed. 2010) [hereinafter AAIDD].

² For the first text that provides a detailed analysis of the issues facing criminal defendants with ID, see generally *THE RETARDED OFFENDER* (Miles B. Santamour & Patricia S. Watson eds., 1982). *See also* James K. McAfee & Michele Gural, *Individuals with Mental Retardation and the Criminal Justice System: The View from States' Attorneys General*, 26 *MENTAL RETARDATION* 5, 5 (1988) (providing a history of attitudes about mental retardation and a summary of issues facing the mentally retarded in the criminal justice system); Wilbert Rideau & Billy Sinclair, *The Mentally Retarded Offender*, 3 *J. PRISON & JAIL HEALTH* 101 (1983).

³ *See* McAfee & Gural, *supra* note 2, at 5–7 (describing difficulties mentally retarded defendants often face).

⁴ *Id.* at 10.

⁵ *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 *GEO. WASH. L. REV.* 414, 455–57 (1985) (providing a comprehensive overview of legal issues facing defendants with ID).

⁶ *See id.*; *see also* Caroline Everington & Ruth A. Luckasson, *Addressing the Needs of the Criminal Defendant with Mental Retardation: The Special Educator as a Resource to the Criminal Justice System*, 24 *EDUC. & TRAINING MENTAL RETARDATION* 193, 194–97 (1989) (providing suggestions for evaluation of persons with ID—including competence to stand trial—and suggestions for training of criminal justice personnel).

⁷ 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

Court declined to find an exemption from the death penalty for ID, it continued to be a mitigating factor in post-conviction sentencing hearings.⁸ In the intervening years before *Atkins*, disability professionals called for more accuracy in forensic evaluations for capital cases involving defendants with ID.⁹ However, the topic received little attention in the forensic community until *Atkins*.¹⁰

While *Atkins* gave the necessary procedural protections for defendants with ID,¹¹ it also introduced an area of mental health for which the psychological and legal communities were unprepared. This Article approaches the *Atkins* hearing primarily through the role of the expert, as the clinical evidence presented is a significant determinant of accurate judge and jury findings. It begins with an overview of the type of evidence needed to prove a claim of ID followed by a discussion of the difficulties in presenting this claim. The issues include (a) court reliance on experts who use diagnostic approaches that are inconsistent with clinical standards for defining and diagnosing ID, (b) legislative and court procedures for *Atkins* cases that are based on stereotypes and inaccurate information about ID, and (c) unique evaluation challenges posed by the *Atkins* claimant and the challenges in presenting that claim to judges and juries.

I. EVIDENCE NEEDED FOR THE *ATKINS* CLAIM

For the last 50 years, the definition of ID has contained three essential elements: (a) limitations in intellectual functioning; (b) deficits in adaptive skills; and (c) early age of onset.¹² While there have been wording changes over the years, the core elements have remained the same.¹³ Contemporary definitions by the American Association on Intellectual and Developmental Disabilities (AAIDD)¹⁴ and the American Psychiatric Association (e.g., Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5)) define deficits in intellectual functioning (or general mental abilities as

⁸ *Id.* at 340.

⁹ See Caroline Everington & Denis Keyes, *Diagnosing Mental Retardation in Criminal Proceedings: The Critical Importance of Documenting Adaptive Behavior*, 8 FORENSIC EXAM’R 31, 31 (1999) (calling for better methods and procedures to investigate the functioning of potentially mentally retarded individuals); Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant*, 22 PHYSICAL DISABILITY L. REP. 529, 532–34 (1998) (discussing detailed tests for assessing ID in defendants).

¹⁰ See *Atkins*, 536 U.S. at 304.

¹¹ See *id.* at 317–18.

¹² For a review of previous definitions of ID, see Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 119 (2007).

¹³ *Id.* at 119.

¹⁴ See AAIDD, *supra* note 1, at 1 (“Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”).

referred to in the DSM-5)¹⁵ similarly and articulate common diagnostic features in their classification manuals. For example, intellectual limitations are defined as a full-scale IQ score that is two standard deviations below the mean on an individualized, psychometrically sound test of intelligence.¹⁶ To increase test validity, both associations endorse (a) IQ score adjustments to compensate for out-of-date test norms and (b) avoidance of repeated testing (practice effect).¹⁷ For adaptive skill deficits, individuals must display a significant deficit in one of these three areas: conceptual, social, and practical skills.¹⁸ Both manuals suggest that reliability is increased by using a combination of informal clinical assessments and standardized assessments of adaptive functioning.¹⁹ Developmental onset is documented through interviews and records review.²⁰ There are noted differences between the two definitions, with the DSM-5 placing less emphasis on the IQ ceiling and providing a richer description of key attributes of intellectual and adaptive functioning.²¹

The objective of the expert is to provide an opinion to the court that is accurate, unbiased, and based on current scientific knowledge and standards of practice in the discipline, which in this case is intellectual disabilities. While both diagnostic manuals provide standards for clinical evaluation of intellectual disability, accurate decisions in these cases require a deep understanding of (a) uses and psychometric properties of assessments of intelligence, academics, and adaptive behavior, (b) characteristics and outcomes for individuals functioning in the mild ID range, and (c) the typical trajectory of the disability, particularly prior to age eighteen. The purpose of this section is to provide the reader with a brief overview of the standard of practice for the diagnosis of ID in any setting. This will be followed by a discussion of deviations from these standards by evaluators and courts and the resulting consequences for the *Atkins* claimant.

The first prong in the diagnosis is the determination of significant limitations in intellectual functioning.²² Assessment of intellectual functioning is much more complex than merely administering an individualized intelligence test.²³ Scores must

¹⁵ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 33 (5th ed. 2013) [hereinafter DSM-5] (“Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.”).

¹⁶ See AAIDD, *supra* note 1, at 10; DSM-5, *supra* note 15, at 37.

¹⁷ See AAIDD, *supra* note 1, at 38; DSM-5, *supra* note 15, at 37.

¹⁸ E.g., DSM-5, *supra* note 15, at 33–38.

¹⁹ See AAIDD, *supra* note 1, at 47–48; DSM-5, *supra* note 15, at 37–38.

²⁰ See AAIDD, *supra* note 1, at 47–48.

²¹ Nancy Haydt et al., *Advantages of DSM-V in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. REV. 359, 367 (2014) (contesting the AAIDD and DSM-5’s conceptualizations of ID).

²² See Gilbert S. Macvaugh, III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 143–44 (2009).

²³ The two primary global IQ tests are the *Stanford-Binet Intelligence Scale-Fifth Edition* (SB-5) and the *Wechsler Adult Intelligence Scale-Fourth Edition* (WAIS-IV). See *id.* at 144–45 (describing the two tests as the “gold standard” in assessments of mental retardation).

be interpreted in light of age, validity, and circumstances of administration.²⁴ The evaluator must understand the relative imprecision of these scores and inherent errors in measurement.²⁵

Historical records for *Atkins* claimants frequently display several IQ scores derived from different tests given at different points in time. Of critical importance is an understanding of the importance of interpreting these historical IQ scores and the impact of score obsolescence (e.g., the Flynn Effect²⁶). The ID expert must be able to provide the court with the most accurate estimate of intellectual functioning, which includes employing Flynn Effect calculations when displaying IQ scores,²⁷ and educate the court on the scientific findings.²⁸

Adaptive behavior, the second prong in the diagnosis, is “the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.”²⁹ The diagnosis of significant limitations in adaptive functioning is defined as a score that is at least two standard deviations below the mean in conceptual, social, or practical skill domains on a standardized measure of adaptive behavior that has been normed on the general population.³⁰ The choice of assessment is critical,³¹ as is the diagnostic procedures used and interpretation of findings.

²⁴ Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. FORENSIC PSYCHOL. PRACTICE 1, 8 (2008).

²⁵ See Haydt et al., *supra* note 21, at 388 (discussing the difficulties in diagnosing ID).

²⁶ The Flynn Effect, first introduced by psychometrician James R. Flynn, refers to the observed gain in IQ scores over time. Norms for IQ scores are set at the time of standardization of the test. However, the IQ of the general population increases .03 points per year. Therefore, a person taking an IQ test 3.3 years after the norming of the test will score 1 point higher than if they took the test the year it was normed. See James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 PSYCHOL. BULL. 171, 187–88 (1987); James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 PSYCHOL. BULL. 29, 32 (1984). For Flynn’s discussion of the IQ scores in capital cases, see James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 PSYCHOL., PUB. POL’Y, & L. 170 (2006). Mingroni speculates that the cause of this general increase in IQ in the population is due to heterosis—matings between members of genetically distinct subpopulations. See Michael A. Mingroni, *Resolving the IQ Paradox: Heterosis as a Cause of the Flynn Effect and Other Trends*, 114 PSYCHOL. REV. 806 (2007).

²⁷ See Geraldine W. Young, Note, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 VAND. L. REV. 615, 661–63 (2012) (calling for mandatory adjustments of all IQ scores in all *Atkins* proceedings).

²⁸ See Mark D. Cunningham & Marc Tassé, *Looking to Science Rather Than Convention in Adjusting IQ Scores When Death Is at Issue*, 41 PROF. PSYCHOL. RES. & PRAC. 413, 418 (2010) (recommending explanations of the IQ score, the impact of the Flynn effect, and the corrected IQ score in capital mental retardation hearings).

²⁹ AAIDD, *supra* note 1, at 43.

³⁰ *Id.*

³¹ “There are at present perhaps four well-known and often-used standardized adaptive behavior scales for the purpose of making or ruling out a diagnosis of mental retardation: Scales of Independent Behavior-Revised [SIB-R], Adaptive Behavior Assessment System—2nd

An accurate diagnosis requires an in-depth understanding of the construct of adaptive behavior³² and its manifestation in defendants with ID. Key to this is the context of adaptive skill assessment—the individual’s actual performance in community settings. It is not based on a hypothesis of what the person has the potential to do.³³ Assessment standards require the use of interviews with credible informants who are able to provide examples of the defendant’s independent functioning (or difficulties in functioning) in the particular context.³⁴

Interpretation of these findings requires an understanding of typical behavioral expectations of individuals who function in the mild range of ID. For example, the presence of a defendant’s strengths in some areas, such as having a history of steady employment or possessing academic skills in the fourth to sixth grade range, is to be expected and does not preclude a diagnosis of ID.³⁵ Diagnosis requires synthesizing information from standardized assessments with social histories, records, psychological assessments, interviews, and academic assessments. Because this area can be confusing to lay population, the ID expert must often assume a teaching role, educating the court on the cognitive and reasoning issues inherent in the disability and explaining how those interfere with functioning effectively. This is particularly true when explaining difficulties in application of conceptual skills (e.g., money management) and social skills (e.g., gullibility and acquiescence).

Standards for the final prong, developmental onset, require documentation that the disability was present prior to the age of eighteen.³⁶ This information is typically

Edition [ABAS-Z], Vineland Adaptive Behavior Scales-2nd Edition [Vineland-II], and Adaptive Behavior Scale-School Edition [ABS-S:2].” Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 118 (2009) [hereinafter Tassé, *Adaptive Behavior Assessment*].

³² Marc J. Tassé et al., *The Construct of Adaptive Behavior: Its Conceptualization, Measurement, and Use in the Field of Intellectual Disability*, 117 AM. J. INTELL. & DEVELOPMENTAL DISABILITIES 291, 292–93 (2012) [hereinafter Tassé, *Construct of Adaptive Behavior*] (discussing the history of the construct of adaptive behavior and its analytical framework).

³³ See Caroline Everington et al., *Challenges in Assessment of Adaptive Behavior in Capital Cases*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY: A GUIDE* (Edward Polloway ed., 2014).

³⁴ See Patricia L. Harrison & Gina Rainer, *Best Practices in the Assessment of Adaptive Behavior*, in *BEST PRACTICES IN SCHOOL PSYCHOLOGY V 605*, 610–11 (Alex Thomas & Jeff Grimes eds., 2d ed. 2008) (describing research about, and examples of, the importance of interviews with people that know a child in different settings). For guidelines on assessment of adaptive behavior in any context, see generally TERRY OVERTON, *ASSESSING LEARNERS WITH SPECIAL NEEDS: AN APPLIED APPROACH* (6th ed. 2009); RONALD L. TAYLOR, *ASSESSMENT OF EXCEPTIONAL STUDENTS: EDUCATIONAL AND PSYCHOLOGICAL PROCEDURES* (8th ed. 2009).

³⁵ See Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 APPLIED NEUROPSYCHOLOGY 124, 133 (2009) (noting that many individuals with ID are employed, though they may need significant support over time in those settings or their job may be very simple).

³⁶ See Stephen Greenspan & George W. Woods, *Intellectual Disability as a Disorder of Reasoning and Judgment: The Gradual Move Away From Intelligence Quotient Ceilings*, 27

gathered from interviews, social histories, and medical or educational records.³⁷ An understanding of the typical trajectory of the disability is important here. For example, many defendants in the mild ID range may not have been diagnosed during the developmental period. Generally, school records will display evidence of academic difficulties and often special education placement. However, special education placement may not have been in a setting for students with ID.³⁸

Understanding the multifactorial nature of the etiology of ID (biomedical, genetic, and environmental) and the impact of these causes and risk factors on the development of the individual is an important part of the diagnosis.³⁹ Many ID disorders display typical phenotypical, medical, or behavioral characteristics.⁴⁰ For example, understanding of personality and behavioral characteristics of genetic disorders (e.g., Fragile X)⁴¹ and syndromes (e.g., Fetal Alcohol Syndrome)⁴² is important in interpreting a defendant's past and present performance. In short, the role of the expert is to interpret all information for the court in light of scientific findings on characteristics and development of individuals with ID.

II. SELECTION OF THE EXPERT

A singular feature of *Atkins* is that it articulated a constitutional rule that relies entirely on a clinical diagnosis.⁴³ One of the most significant issues in this post-*Atkins* era is the emergence of the instant expert or, as Brodsky and Galloway term, the "professional immigrant."⁴⁴ In the years following *Atkins*, a significant number of

CURRENT OPINIONS PSYCHIATRY 110, 114 (2014). In contrast to AAIDD, the DSM-5 does not specify a ceiling age (e.g., 18) in defining the developmental period. *See id.*

³⁷ *See* Reschly, *supra* note 35, at 131–32.

³⁸ *See* Edward A. Polloway et al., *Mild Intellectual Disabilities: Legacies and Trends in Concepts and Educational Practices*, 45 EDUC. & TRAINING AUTISM & DEVELOPMENTAL DISABILITIES 54, 56–57 (2010) (discussing the political motivations for not diagnosing mental retardation and the use of alternative labels such as learning disabilities).

³⁹ ROBERT L. SCHALOCK & RUTH LUCKASSON, CLINICAL JUDGMENT 21 (2d ed. 2014).

⁴⁰ For a comprehensive review of etiological causes, see A COMPREHENSIVE GUIDE TO INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 87-334 (Ivan Brown & Maire Percy eds., 2007) [hereinafter COMPREHENSIVE GUIDE].

⁴¹ Michele M.M. Mazzocco & Jeanette Jeltje Anne Holden, *Fragile X Syndrome*, in COMPREHENSIVE GUIDE, *supra* note 40, at 173–87.

⁴² Irene Nulman et al., *Fetal Alcohol Spectrum Disorder*, in COMPREHENSIVE GUIDE, *supra* note 40, at 213–27.

⁴³ *See* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 813 (2007) (contrasting the rule in *Atkins* with the typical role of clinical diagnosis in constitutional cases).

⁴⁴ Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 ETHICS & BEHAV. 3, 5 (2003).

cases, many of which were post-conviction reviews, came before the courts.⁴⁵ Of immediate concern in the field was the obvious lack of preparation of forensic psychiatrists and psychologists in this area, which was reflected in inaccurate opinions based on a lack of scientific evidence and stereotypical beliefs about individuals with intellectual disabilities.⁴⁶ Misunderstandings included a lack of a basic understanding of (a) the definition and diagnostic criteria for ID, (b) assessment of IQ and interpretation of IQ test results, and (c) assessment of adaptive behavior.⁴⁷ Because of court reliance on clinical expertise and the lack of general knowledge thereof, these opinions have been considered in many cases.⁴⁸

One can look at the *Atkins* case itself to see a striking example of the lack of reliance on standard assessment protocol and the employment of stereotypical notions. The psychologist for the prosecution, Dr. Samenow, conducted no assessments of intellectual or adaptive functioning, relying instead on two interviews with Atkins and interviews with corrections officers.⁴⁹ His conclusion was that Atkins was of “average intelligence, at least.”⁵⁰ It is likely that he came to this conclusion because of a lack of understanding of the characteristics of individuals who function within the mild disability range. A superficial interview will not uncover the significant issues in comprehension and social judgment that are present in individuals who function within this IQ range.⁵¹ An accurate diagnosis can only be obtained through standardized assessment and consideration of information from multiple sources.

Further, Dr. Samenow opined that Atkins’s problems in school were due to lack of attention and motivation.⁵² This misinterpretation of educational records provides an example of a lack of understanding of the developmental trajectory of this disability. Poor grades and grade retention are common for individuals with mild ID.⁵³ Lack of motivation is a common characteristic as well.⁵⁴ Many individuals with ID

⁴⁵ For a review of cases where defendants with ID have been inappropriately excluded from the protection of *Atkins*, see John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 691–94 (2009).

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *Atkins v. Virginia*, 536 U.S. 304, 309 n.6 (2002).

⁵⁰ *Id.* at 309.

⁵¹ *See* Martha E. Snell et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 220–21 (2009) (describing general characteristics of individuals with an intellectual disability and higher IQs and how individuals in this group are typically identified).

⁵² *Atkins*, 536 U.S. at 310 n.6.

⁵³ Reschly, *supra* note 35, at 129–30 (discussing the increased likelihood of grade retention and poor grades for minors with mild mental retardation).

⁵⁴ *See* David A. Ball & Edward Zigler, *Personality Development in Retarded Persons*, in HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY AND RESEARCH 143, 149–51 (Norman R. Ellis ed., 2d ed. 1979) (describing lessened motivation for those with ID).

develop an expectancy of failure, which results in setting lower aspirations and goals,⁵⁵ as well as learned helplessness, which results in failure to exhibit any actions to improve one's situation.⁵⁶ These can appear as a lack of motivation unless the issues are probed further with the individual and others who have worked closely with him.

A commonly observed error is the reliance on screening or group-administered intelligence tests that do not provide accurate measures of IQ. In *Green v. Johnson*,⁵⁷ the expert used the *Ammons Quick Test*, which resulted in a score that was 10 points higher than the score obtained by the Wechsler batteries given by other experts.⁵⁸ The Ammons test is designed as a quick screening tool and is very limited in scope, primarily measuring vocabulary,⁵⁹ which is only one component of intellectual functioning. Group-administered paper and pencil tests, such as the *Beta III*, used in correctional settings, are also inappropriate for diagnosis as they do not yield accurate scores.⁶⁰ In the case of group-administered tests, there is the additional risk that the individual received additional help or copied the responses of others.⁶¹

Even when appropriate tests are given and accurate scores achieved, inaccurate conclusions can be reached. For claimants who have IQ scores in the 70–75 range, it is not uncommon for an evaluator to diagnose a learning disability (LD).⁶² In part, this is due to labeling found in school records and incorrectly interpreted deficits in

⁵⁵ See *id.* at 148–49 (discussing research on expectancies of success and failure in individuals with ID).

⁵⁶ See John R. Weisz, *Cognitive Performance and Learned Helplessness in Mentally Retarded Persons*, in PERSONALITY DEVELOPMENT IN INDIVIDUALS WITH MENTAL RETARDATION 17, 31–35 (Edward Zigler & Dianne Bennett-Gates eds. 1999) (examining research on the relationship between learned helplessness and low performance in persons with mental retardation).

⁵⁷ No. CIVAZ:05CVR340, 2006 WL 3746138 (E.D. Va. Dec. 15, 2006).

⁵⁸ *Id.* at *37. For an example of the use of this test in an *Atkins* proceeding, see *id.* at *1. Fortunately for Green, the court did not give strong weight to the Ammons test results. *Id.* at *60 n.8.

⁵⁹ See David A. Ward & Charles R. Tittle, *IQ and Delinquency: A Test of Two Competing Explanations*, 10 J. QUANTITATIVE CRIMINOLOGY 189, 195–96 (1994).

⁶⁰ See Macvaugh & Cunningham, *supra* note 22, at 145 (providing an overview of the use of the *Beta* test in corrections settings).

⁶¹ See *id.*

⁶² Learning disabilities are *not* the same as intellectual disabilities (formerly known as mental retardation), sensory impairments (vision or hearing) or autism spectrum disorders. People with LD are of average or above-average intelligence but still struggle to acquire skills that impact their performance in school, at home, in the community and in the workplace. Learning disabilities are lifelong, and the sooner they are recognized and identified, the sooner steps can be taken to circumvent or overcome the challenges they present.

NCLD Editorial Team, *What are Learning Disabilities?*, NAT'L CENT. FOR LEARNING DISABILITIES, <http://www.nclد.org/types-learning-disabilities/what-is-ld/what-are-learning-disabilities> (last visited Dec. 1, 2014).

adaptive skills.⁶³ As mentioned earlier, many individuals with ID receive an alternative diagnosis in school.

Perhaps the most disturbing evaluations have arisen in the area of adaptive behavior assessment. Misapplications abound. One example is the use of assessments that are not intended for this purpose such as the Street Skills Survival Questionnaire (SSSQ),⁶⁴ which has been used in some capital cases.⁶⁵ The SSSQ is a multiple choice test which presents to the examinee pictures of common objects or actions.⁶⁶ It is designed to measure the individual's knowledge of areas of adult living with an emphasis on practical skills.⁶⁷ It does not yield a valid assessment of adaptive functioning because it only measures knowledge; whereas, adaptive functioning assessment requires a rating of actual performance in community settings.⁶⁸ It is likely that a person in the mild ID range can certainly identify a picture of a hammer, but may not have ever been able to use one proficiently for repairs or construction. This is not to say that people with ID cannot be employed in construction, only that this test does not measure that. Of equal importance, this test only measures skills in the practical domain, an area where defendants in the mild disability range typically excel.⁶⁹

Even when an appropriate adaptive behavior instrument may be used, violations occur in the selection of informants, which invalidates the results. As in the case of Dr. Samenow and other evaluators, corrections officers have been used as primary informants on adaptive rating scales.⁷⁰ As stated previously, the essence of the adaptive skill assessment is independent functioning in the community settings.⁷¹ The prison setting is an artificial environment with severely limited opportunities to demonstrate any skills.⁷² Further, such officers do not have the type of continuous contact necessary for documenting skills. For example, even when skills, such as reading a newspaper, are demonstrated, inaccurate conclusions can be reached. That is, just

⁶³ See *United States v. Davis*, 611 F. Supp. 2d 472, 499–501 (D. Md. 2009). The court found that the expert had erred in assigning a diagnosis of LD instead of ID. She did not employ the correct definition and distorted information from adaptive testing. *Id.*

⁶⁴ See *Everington & Olley*, *supra* note 24, at 9. (“For example, the [SSSQ] (Lindhoker & McCarron, 1983) has been used by some psychologists in capital cases to diagnose deficits in adaptive skills.”).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Karen L. Salekin et al., *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. MENTAL HEALTH RES. INTELL. DISABILITIES 97, 99–100 (2010) (providing examples of practical versus conceptual skills).

⁷⁰ *United States v. Smith*, 790 F. Supp. 2d 482, 517–19 (E.D. La. 2011) (presenting the problems associated with a psychologist's use of corrections officers as her informants on the ABAS-II, which is used to assess adaptive functioning).

⁷¹ See Tassé, *Adaptive Behavior Assessment*, *supra* note 31, at 114, 117 (describing the challenges of assessing adaptive behavior in incarcerated individuals).

⁷² *Id.*

being observed with a book or a newspaper does not mean that the defendant is able to comprehend and explain what was read.⁷³ A careful evaluator will probe the defendant for comprehension as well as conduct collateral academic testing.⁷⁴

Finally, one of the more troubling developments has been the published recommendations by psychologists George and Kathryn Denkowski.⁷⁵ The recommendations are worth noting as they are reflective of practices used by others in *Atkins* cases. First, the authors recommend altering the scores obtained on the ABAS-II adaptive behavior assessment for what they termed sociocultural-based score suppression.⁷⁶ Second, credit can be provided for the items for which the evaluator deduces could be taught or for which he or she thinks the defendant was not motivated to perform.⁷⁷ Third, the authors suggest using the defendant as the informant for the adaptive testing, stating that the family is unreliable.⁷⁸ Fourth, and even more disturbing, is the suggestion that the defendant be given “credit” for behaviors displayed during the commission of the crime.⁷⁹

These are invalid approaches that will result in an incorrect diagnosis of adaptive limitations for several reasons. First, there is no evidence that the ABAS-II or other instruments are culturally or racially discriminatory.⁸⁰ An examination of the

⁷³ See *Green v. Johnson*, No. CIVAZ: 05CVR340, 2006 WL 3746138 (E.D. Va. Dec. 15, 2006). In this case, one of the primary pieces of evidence of adaptive skills was the fact that Green requested complex books while in prison. *Id.* at *51. The Court concluded that, although Green had some limitations, he did not prove by a preponderance of the evidence that he had significant limitations in adaptive behavior. *Id.* at *58. See also Tassé, *Adaptive Behavior Assessment*, *supra* note 31, at 121 (highlighting that there is a misconception that many people with ID cannot read, when in fact their reading comprehension can achieve a low level).

⁷⁴ See Tassé, *Adaptive Behavior Assessment*, *supra* note 31, at 121 (emphasizing that the diagnosis of ID must be made through a “rigorous and comprehensive” evaluation by a professional).

⁷⁵ See George C. Denkowski & Kathryn M. Denkowski, *Adaptive Behavior Assessment of Criminal Defendants with a Mental Retardation Claim*, 26 AM. J. FORENSIC PSYCHOL. 43 (2008).

⁷⁶ *Id.* at 54–56.

⁷⁷ *Id.* at 55.

⁷⁸ *Id.* at 57.

⁷⁹ *Id.* at 55.

⁸⁰ See Daniel J. Reschly & Susan M. Ward, *Use of Adaptive Behavior Measures and Overrepresentation of Black Students in Programs for Students with Mild Mental Retardation*, 96 AM. J. ON MENTAL RETARDATION 257, 265 (1991) (comparing adaptive performance of Black and Anglo school children, and finding that while Black children scored slightly higher on three of the eight categories, there was no overall statistical significance); see also Ellis M. Craig & Marc J. Tassé, *Cultural and Demographic Group Comparisons of Adaptive Behavior*, in ADAPTIVE BEHAVIOR AND ITS MEASUREMENT: IMPLICATIONS FOR THE FIELD OF MENTAL RETARDATION 119 (Robert L. Schalock & David L. Braddock eds., 1999). The authors provide an overview of cultural differences in child rearing and expectations for some groups as well as the research of measured differences in adaptive behavior on various instruments. The research summary shows no conclusive findings. However, the authors

validation procedures for the three major instruments recommended for use in *Atkins* cases indicates all were normed using stratified samplings representing the most recent census data at the time of validation.⁸¹

Second, in regard to poor motivation, the fact that the individual indicated he did not want to perform tasks does not lead to the conclusion that he could. Without interviewing informants across several settings, it is unknowable whether there were attempts to teach the individual, if he could perform the action competently, or even if he learned the behavior; there would not be enough information to show the learned behavior could be displayed in a community context and over time.

Third, although one scale (ABAS-II) allows for the use of the individual as an informant in certain circumstances,⁸² professional association guidelines discourage this approach as persons with ID often lack insight and have limited self-awareness.⁸³ Further, a long-established core characteristic of this disability is to minimize and deny shortcomings due to the stigma and shame associated with this label.⁸⁴ Defendants will frequently inflate accomplishments (faking good) to hide their disability.⁸⁵

Denkowski's assertion that the family is biased and therefore should not be used flies in the face of accepted standards. A competent evaluator examines the credibility of all informants.⁸⁶ If informants are regarded as biased, they are not used or minimum weight is given to the information they supply.⁸⁷ In addition, in high-stake evaluations, such as those involved in capital cases, multiple informants (people in addition to the family such as employers, friends, former teachers) are always recommended.⁸⁸

suggest evaluators have some degree of cultural competence in the population assessed because they use clinical judgment when gross discrepancies are found. This suggestion is consistent with adaptive behavior assessment guidelines in general.

⁸¹ See Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. FORENSIC PSYCHOL. PRAC. 1, 8, 10, 12 (2006) (providing an overview of the standardization and merits of the Vineland, ABAS-II, and the SIB-R).

⁸² See Harrison & Rainer, *supra* note 34, at 616.

⁸³ See AAIDD, *supra* note 1, at 51.

⁸⁴ See J. David Smith, *Speaking of Mild Mental Retardation: It's No Box of Chocolates, or Is It?*, 14 EXCEPTIONALITY 191, 200 (2006) (addressing the extreme lengths that individuals with ID will go to avoid the label); see also ROBERT EDGERTON, *THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED* 205–09 (2d ed. 1967) (describing the elaborate ways in which adults with ID worked to hide their disability); ROBERT EDGERTON, *THE CLOAK OF COMPETENCE REVISED AND UPDATED* (3d ed. 1993).

⁸⁵ See sources cited *supra* note 84.

⁸⁶ See Robert L. Schalock, *The Merging of Adaptive Behavior and Intelligence: Implications for the Field of Mental Retardation*, in *ADAPTIVE BEHAVIOR AND ITS MEASUREMENT: IMPLICATIONS FOR THE FIELD* 43, 52 (Robert L. Schalock & David L. Braddock eds., 1999) (emphasizing an evaluator's use of clinical judgment).

⁸⁷ See Macvaugh & Cunningham, *supra* note 22, at 165 (describing how best to eliminate bias, but also emphasizing this bias must be bi-directionally considered).

⁸⁸ Tassé, *Adaptive Behavior Assessment*, *supra* note 31, at 120.

Finally, it is inappropriate to use actions of the crime to evaluate adaptive behavior.⁸⁹ To determine actual functioning in any context, it is necessary to do extensive interviews to gain information on the amount of assistance and guidance the individual needed and the degree of competence he displayed in the setting.⁹⁰ Such an approach would necessitate the evaluator to become entangled in the facts of the case, which is an inappropriate role.⁹¹

The fact that the Denkwoskis published their recommendations made them accessible to the professional community. The recommendations were denounced as invalid⁹² and the Texas Board of Examiners levied a fine and banned Dr. George Denkowski from conducting assessments of ID in *Atkins* cases.⁹³ Unfortunately, he acted as an expert in at least twenty-five *Atkins* cases, the majority for the state, and at least fourteen people were on death row at the time of his sanction in 2011.⁹⁴

The preceding examples demonstrate that accurate evaluation of *Atkins* claimants requires a high level of competence in assessing and diagnosing ID. In the last twenty years, the field of forensic psychology has increased its emphasis on presenting work that is based on scientific evidence and objective measurement through practice standards promulgated by groups such as the American Psychology and Law Society (AP-LS) and American Psychological Association (APA).⁹⁵ An examination of the 2011 Specialty Guidelines for Forensic Psychology reveals standards on competence to provide services in a particular manner, gaining and maintaining this competence, and knowledge of scientific foundation for opinions and testimony.⁹⁶ Yet, with regard to *Atkins* evaluations, many evaluators have not acted in accordance with these guidelines.⁹⁷ While there is a significant body of forensic literature on the practice of presenting psychiatric and mental health information to the courts, there currently exists very little guidance for presenting evidence in an *Atkins* claim, other than the occasional law review or journal article on the topic.⁹⁸ Further, in spite of the fact

⁸⁹ Macvaugh & Cunningham, *supra* note 22, at 166.

⁹⁰ Everington & Olley, *supra* note 24, at 10.

⁹¹ *Id.*

⁹² See Keith F. Widaman & Gary N. Siperstein, *Assessing Adaptive Behavior of Criminal Defendants in Capital Cases: A Reconsideration*, 27 AM. J. FORENSIC PSYCHOL. 5, 13 (2009) (providing a comprehensive argument against Dr. Denkowski's approach).

⁹³ John H. Blume & Karen L. Salekin, *Analysis of Atkins Cases*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY: A GUIDE (Edward Polloway ed., 2014).

⁹⁴ *Id.*

⁹⁵ See Randy K. Otto & Kirk Heilbrun, *The Practice of Forensic Psychology: A Look to the Future in Light of the Past*, 57 AM. PSYCHOLOGIST 5 (2002) (describing the growth of the study of forensic psychology through the years).

⁹⁶ See Am. Psychol. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCHOL. 7, 8 (2013).

⁹⁷ See *infra* notes 98–101 and accompanying text (highlighting the lack of guidance in *Atkins* evaluations).

⁹⁸ See generally GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE

that there has been an explosion in specialty area guidelines on forensic assessment, such as with competence to stand trial⁹⁹ and the assessment of juveniles,¹⁰⁰ there are no authoritative forensic texts, or even sections of texts, on diagnosis of ID in forensic settings.¹⁰¹ Given the lack of attention to this topic by authoritative sources in the field of forensic psychology and psychiatry, it is not surprising to find invalid practices employed in some of these cases.

III. IMPLICATIONS OF PROCEDURES ARTICULATED BY COURTS AND LEGISLATURES

At the heart of the issue is wider acceptance and understanding by the courts and legislatures of the standards of practice in the field of ID.¹⁰² The lack of recognition of expertise in this area has resulted in legislation and court rulings that establish precedence or guidelines for diagnosis of ID that have little or no basis in the scientific literature on ID, making a just finding in an *Atkins* case very difficult.¹⁰³ A few of the more prominent procedures that have been promulgated since *Atkins* will be discussed.

The first issue concerns the definition of ID (mental retardation) adopted by the state. The Court in *Atkins* encouraged states to reference the guidelines established by professional associations, either the AAIDD or DSM-5, for crafting their definitions.¹⁰⁴ While many have adopted a definition that incorporates the three prongs, others have their own uniquely worded definition.¹⁰⁵ The issue of greatest contention is the states that have adopted a definition with a rigid, bright-line IQ cut-off of 70.¹⁰⁶ In addition, a few states have no provision for consideration of the accepted standard error

COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (3d ed. 2007). This leading authoritative guide does not have a section on *Atkins* evaluations.

⁹⁹ See THOMAS GRISSO, *COMPETENCE TO STAND TRIAL: JUST THE BASICS* (2013); THOMAS GRISSO ET AL., *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 69-149 (2d ed. 2003); PATRICIA ZAPH & RONALD ROESCH, *EVALUATION OF COMPETENCE TO STAND TRIAL* (2009).

¹⁰⁰ See THOMAS GRISSO, *EVALUATING JUVENILES' ADJUDICATIVE COMPETENCE: A GUIDE FOR CLINICAL PRACTICE* (2005); THOMAS GRISSO, *FORENSIC EVALUATION OF JUVENILES* (2d ed. 2013); IVAN KRUIH & THOMAS GRISSO, *EVALUATION OF JUVENILES' COMPETENCE TO STAND TRIAL* (2009).

¹⁰¹ Bonnie & Gustafson, *supra* note 43, at 815 (suggesting that ID capital cases should have specialty area forensic assessment guidelines like competence to stand trial or assessment of juveniles).

¹⁰² *Id.* at 860.

¹⁰³ See *id.* at 819.

¹⁰⁴ See *id.* (noting that the Court used these definitions in its analysis).

¹⁰⁵ James R. Patton & Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14 *EXCEPTIONALITY* 237, 243 (2006).

¹⁰⁶ *Hall v. Florida*, 134 S. Ct. 1986, 1996 (2014) (noting that Virginia, Kentucky, and Alabama have a bright line cut-off of 70; Arizona, Delaware, Kansas, North Carolina, and Washington have laws that could be interpreted as a bright line cut-off).

of measure or for other important considerations such as the Flynn Effect.¹⁰⁷ The constriction of information needed to make an accurate finding greatly increases the chances of an incorrect ruling (i.e., under-identification of ID).¹⁰⁸

The most notable case involving bright-line definitions is the recent Supreme Court decision in *Hall v. Florida*.¹⁰⁹ The Florida Supreme Court ruled against Hall because he scored above 70 on several IQ tests, and Florida law sets 70 as a strict numerical cutoff.¹¹⁰ An additional, important aspect of the Florida law is that the claimant has to show an IQ of 70 or below *before* presenting evidence of deficits in adaptive behavior or developmental on-set, a practice that is counter to diagnostic criteria promulgated by the AAIDD and DSM-5, which require concurrent consideration.¹¹¹

In *Hall*, the Court held that Florida's threshold, as interpreted by the Florida Supreme Court, was unconstitutional.¹¹² The Court upheld the Eighth Amendment prohibition of execution of persons with intellectual disabilities, noting that it is proper to consider psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores and how those scores relate to *Atkins*.¹¹³ Further, the Court held that Florida's rule disregarded established medical practice in two ways: "It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and it "relies on a purportedly scientific measurement of the defendant's abilities," while refusing to recognize that measurement's inherent imprecision.¹¹⁴

Hall is an important finding for the field for several reasons. First, the broad implication is that it affirms the role of professional standards in the diagnosis of ID in *Atkins* cases.¹¹⁵ Second, more specifically, it affirms accepted standards in intellectual assessment: the standard error of measure and the relative imprecision of IQ.¹¹⁶ Third, it affirms the role of examining concurrent deficits in adaptive behavior as an integral part of the diagnostic process.¹¹⁷ As a result, it is anticipated that many current Florida death row cases will be remanded.¹¹⁸ It will be interesting to see how broadly *Hall* will affect other jurisdictions.

¹⁰⁷ *Id.*

¹⁰⁸ See Tasse', *Adaptive Behavior Assessment*, *supra* note 31, at 120 (emphasizing the need for a comprehensive evaluation).

¹⁰⁹ *Hall*, 134 S. Ct. at 1988–89.

¹¹⁰ *Id.* at 1992.

¹¹¹ *Id.* at 1992; see AAIDD, *supra* note 1, at 45.

¹¹² *Hall*, 134 S. Ct. at 1988–89.

¹¹³ *Id.* at 1993.

¹¹⁴ *Id.* at 1995.

¹¹⁵ *Id.* at 2001 (finding Florida's law in direct opposition to views of experts in the field).

¹¹⁶ *Id.* at 2000 (highlighting that IQ scores are approximations and not "final and infallible").

¹¹⁷ *Id.* (affirming *Atkins* rule that evidence of difficulties with adaptive functioning are relevant in ID determinations).

¹¹⁸ See *id.* at 2001 (striking down Florida's rigid ban on presenting evidence of adaptive functioning for those individuals with IQs over 70).

Possibly the most controversial decision which severely restricts the diagnosis of ID is *Ex parte Briseno*, which lists diagnosis factors recommended by the Texas Court of Criminal Appeals.¹¹⁹ *Briseno* requires the court to consider seven factors when determining deficits in adaptive behavior.¹²⁰ Factor one requires a lay diagnosis of ID during development,¹²¹ which is counter to research on the developmental trajectory of mild ID, which indicates the disability often goes undetected in early years.¹²² Factors two through six (carrying out plans, responding to questions, responding appropriately to stimuli)¹²³ reflect typical capabilities for individuals who function in the mild ID range.¹²⁴ Finally, factor seven uses the facts of the crime as part of the diagnostic process,¹²⁵ a practice recognized by professionals as inappropriate for reasons stated earlier in this Paper.¹²⁶ Using these seven factors as part of a diagnosis has the potential (if strictly interpreted) to exclude anyone functioning in the mild ID range from the protection of *Atkins*. It appears that these factors are used frequently in Texas¹²⁷ and, unfortunately, there is evidence that these criteria have been used in cases in Oklahoma and Utah as well.¹²⁸

The preceding examples demonstrate the difficulty for the evaluator in presenting ID evidence to a judge or jury and the relative weight in which that evidence is

¹¹⁹ See *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

[1.] Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination? [2.] Has the person formulated plans and carried them through or is his conduct impulsive? [3.] Does his conduct show leadership or does it show that he is led around by others? [4.] Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? [5.] Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? [6.] Can the person hide facts or lie effectively in his own or others' interests? [7.] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id.

¹²⁰ *Id.*

¹²¹ *Id.* at 8.

¹²² See Reschly, *supra* note 35, at 128.

¹²³ *Briseno*, 135 S.W.3d at 8.

¹²⁴ See, e.g., Smith, *supra* note 84 (describing real and fictional accounts of those with mild intellectual disabilities).

¹²⁵ *Briseno*, 135 S.W.3d at 8–9.

¹²⁶ See *supra* notes 89–91 and accompanying text.

¹²⁷ See, e.g., *Ex parte Butler*, 416 S.W.3d 863, 874–75 (Tex. Crim. App. 2012) (describing the use of the *Briseno* factors in determining adaptive functioning).

¹²⁸ See Steven Greenspan, *Briseno Factors*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY: A GUIDE* (Edward Polloway ed., 2014).

given. If important evidence is not allowed, or not given appropriate consideration, accurate decisions cannot be reached. However, not all courts have disregarded the scientific information and diagnostic standards in regarding ID.¹²⁹ There are many examples of a growing understanding in certain jurisdictions. In regards to assessment of IQ, a California court found *Atkins* claimant Jorge Vidal as having ID in spite of the fact that his full-scale IQ scores ranged from borderline to average.¹³⁰ Because his verbal IQ was consistently in the ID range, and because he met prongs two and three, the California Supreme Court affirmed this decision, noting that because *Atkins* does not incorporate the set requirement of a specific test score, there was no error in the trial court giving greater weight to one piece of evidence (his verbal IQ) over another (his full-scale IQ).¹³¹

In a case involving battling experts, *United States v. Shields*,¹³² a district court in Tennessee found the ID experts who testified for the claimant to be substantially more credible, as they employed accepted practices in their approach, and found the opinions of the government experts to be unsubstantiated and based on stereotypical notions of ID.¹³³ The recent Court ruling in *Hall* may indeed raise the bar in many jurisdictions.

In summary, the court and legislative procedures developed in some jurisdictions in the post-*Atkins* era have limited the ability of fact finders to make accurate decisions about ID.

IV. UNIQUE CHALLENGES PRESENTED BY THE *ATKINS* CLAIMANT

Aside from the complications of legislative and court rulings that hamstring evaluators, the *Atkins* claim presents unique issues even for the most experienced evaluator. The *Atkins* claimants who have been incarcerated for years or even decades (delayed trial or post-conviction) present the greatest evaluation challenge.¹³⁴ With the passage of time, important school and medical records are lost, and parents and other key informants are deceased or may have disappeared. Further, the *Atkins* claimant may have become institutionalized and may no longer display some of the deficits that were present at the time of incarceration.¹³⁵ That is, literacy skills may have improved through years of time with print material and mathematical computation

¹²⁹ See *infra* notes 130–33.

¹³⁰ See Bruce Gross, *Gray Matter: Redefining Mental Retardation in Capital Cases*, FORENSIC EXAMINER, Fall 2007, at 57.

¹³¹ *Id.* at 59.

¹³² *United States v. Shields*, No. 04-20254, 2009 U.S. Dist. LEXIS 130612 (W.D. Tenn. May 11, 2009).

¹³³ *Id.* at 13–20.

¹³⁴ See Stevens & Price, *supra* note 81, at 15–16 (emphasizing retrospective evaluations should be approached cautiously and highlighting that no retrospective evaluation was normed for the length of time defendants are incarcerated).

¹³⁵ See Brodsky & Galloway, *supra* note 44, at 7 (highlighting the difficulties of evaluating institutionalized environments).

through calculation of canteen balances for years. As stated earlier, these behaviors do not preclude a diagnosis of ID but can be easily misinterpreted by inexperienced evaluators.¹³⁶ Additionally, the question in the *Atkins* proceeding is generally not present functioning, but rather functioning at the time of incarceration.¹³⁷

Cases with these unique challenges are exceedingly difficult and highlight the need for examiners who have a depth of knowledge in ID assessment and diagnosis. The most difficult parts of the evaluation are prongs two and three. Prong two, presence of deficits in adaptive skills, requires information on functioning in community settings.¹³⁸ The process necessitates what has been referred to as retrospective evaluation, which entails referencing the abilities and skills displayed by the defendant prior to incarceration.¹³⁹ While this process has always been used for adaptive assessment in difficult situations, *Atkins* claims have resulted in the development of refined procedures and professional guidelines.¹⁴⁰

While the time period preceding the offense is the most common reference point, it may also be necessary to investigate adaptive functioning during the developmental period.¹⁴¹ Retrospective evaluation entails locating informants who can provide information on his functioning in various settings (e.g., school, home, work).¹⁴² Locating a sufficient number of knowledgeable informants requires considerable time and effort. To insure validity, multiple informants are used and, in some cases, a stronger emphasis is placed on structured interviews.¹⁴³ A process of convergent validity is used to combine information from across a number of informants.¹⁴⁴ The importance of professional judgment of an experienced evaluator in this type of evaluation cannot be overemphasized.¹⁴⁵

¹³⁶ See Tassé, *Adaptive Behavior Assessment*, *supra* note 31, at 121.

¹³⁷ See Stevens & Price, *supra* note 81, at 15 (discussing that often times evaluations for defendants are done for a time in the past and not the present).

¹³⁸ See AAIDD, *supra* note 1, at 43 (defining adaptive behavior).

¹³⁹ See Stevens & Price, *supra* note 81, at 15–16.

¹⁴⁰ For AAIDD guidelines on retrospective assessment see ROBERT L. SCHALOCK ET AL., USER'S GUIDE: TO ACCOMPANY THE 11TH EDITION OF INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 20–21 (11th ed. 2012); ROBERT L. SCHALOCK ET AL., USERS GUIDE: MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 17–22 (10th ed. 2007).

¹⁴¹ See J. Gregory Olley, *Time in Which the Disability Must be Shown in Atkins Cases*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY: A GUIDE* (Edward Polloway ed., 2014) (reviewing the requirements of different states for the time at which ID must be proven).

¹⁴² See Stevens & Price, *supra* note 81, at 15 (describing that informants must recall the defendant's adaptive behavior functioning at an earlier time).

¹⁴³ Tassé, *Adaptive Behavior Assessment*, *supra* note 31, at 120.

¹⁴⁴ *Id.* at 109.

¹⁴⁵ See J. Gregory Olley, *Definition of Intellectual Disability in Criminal Court Cases*, 51 *INTELL. & DEVELOPMENTAL DISABILITIES* 117, 119 (2013).

In addition, the court should be reminded that strengths coexist with deficits in all individuals with ID, and that individuals with ID can acquire skills over time.¹⁴⁶ Skill acquisition in some areas does not preclude the diagnosis of ID.¹⁴⁷

V. NEW DIRECTIONS: STANDARDS OF PRACTICE FOR *ATKINS* EVALUATIONS

Cognizant of these concerns, professional disability groups have called for professional standards for *Atkins* cases.¹⁴⁸ This does not imply the development of new standards but, rather, the refinement of accepted diagnostic procedures for the unique circumstances of *Atkins* cases.¹⁴⁹ A few promising initiatives will be mentioned.

In 2005, the American Psychological Association Division 33 (Psychology in Intellectual and Developmental Disabilities) created the ad hoc Committee on Mental Retardation and the Death Penalty.¹⁵⁰ The focus of the committee has been to encourage adoption of standards of practice in *Atkins* evaluations through professional publications and presentations.¹⁵¹

In 2008, AAIDD and Arc of United States¹⁵² developed a joint position statement calling for justice and fair treatment for people with intellectual and developmental disabilities in all areas of the criminal justice system, including the right to have available to them judges, lawyers, prosecutors, court personnel and others who are educated about the effects of their disability.¹⁵³ In regard to capital cases, they must have the right to have their ID determined by state procedures that are accurate and fair.¹⁵⁴

In 2010, AAIDD convened a task force of professionals (e.g., mental health and mental disability professionals and attorneys), who have significant experience in ID and *Atkins* litigation, to focus on the implications of the *Atkins* decision.¹⁵⁵ The

¹⁴⁶ AAIDD, *supra* note 1, at 1.

¹⁴⁷ *Id.*

¹⁴⁸ *See infra* notes 149–57.

¹⁴⁹ *Id.*

¹⁵⁰ *See* J. Gregory Olley, *Update on the Committee on Mental Retardation and the Death Penalty*, 35 PSYCHOL. INTELL. & DEVELOPMENTAL DISABILITIES 5 (2009) (recommending that procedures used in *Atkins* hearings be grounded in standard practices for diagnosis of ID espoused by AAIDD, APA, and the American Psychiatric Association).

¹⁵¹ *See id.*

¹⁵² *See Mission & Values*, THE ARC, <http://www.thearc.org/who-we-are/mission-and-values> (last visited Dec. 1, 2014). The Arc is an association advocating for human rights and full inclusion for people with intellectual and developmental disabilities. *Id.*

¹⁵³ *See* AAIDD Board of Directors, *Criminal Justice Joint Position Statement of AAIDD and The Arc*, AAIDD (Aug. 2008), <http://aaid.org/news-policy/policy/position-statements/criminal-justice>.

¹⁵⁴ *Id.*

¹⁵⁵ Kevin McGrew, *AAIDD Death Penalty Task Force: ICDP Conflict of Interest Disclosure*, INTELL. COMPETENCE & DEATH PENALTY (May 5, 2010, 9:01 AM), <http://www.atkinsmrdeathpenalty.com/2010/05/aaid-death-penalty-task-force-icdp.html>.

outcome of the AAIDD task force has been the publication of a manual on best practices in forensic evaluation of individuals with ID.¹⁵⁶ The purpose of the manual is to present accurate, nonbiased information that reflects the most current views of the science of diagnostics for intellectual disabilities as related to the criminal justice system in general, but for capital cases in particular.¹⁵⁷ The publication of an authoritative guide such as this manual is an important step in meeting the goal for more just outcomes for individuals with ID. The next steps include intensifying training efforts for consumers of forensic evaluations of individuals with ID.

CONCLUSION

The implementation of *Atkins* has been more complex than the courts and professional associations probably ever imagined.¹⁵⁸ There have been battles over every aspect of the clinical diagnosis: the definition, the type of testing, the interpretation of assessment results and historical records, and the conclusions reached from this information. It has become apparent that considerable misinformation exists among clinical and legal professionals. The protection afforded by *Atkins* will not be realized for all claimants if judges and juries are not presented with accurate information that is based on scientific knowledge and professional standards. The severe consequences for the *Atkins* claimant are obvious.

These are very difficult and complex cases even for those who have spent a professional lifetime working in this area. Evaluations in *Atkins* cases are thorough and expansive and require considerable expertise. Because of the clinical nature of this type of litigation, it is incumbent upon the professional communities to ensure implementation of professional practice standards.

Finally, overcoming deeply held stereotypical notions is critical for accurate court and legislative rulings.¹⁵⁹ This calls for more vigorous efforts for education on the nature and detection of intellectual disability.

¹⁵⁶ Everington et al., *supra* note 33.

¹⁵⁷ *Id.*

¹⁵⁸ Haydt et al., *supra* note 21, at 362.

¹⁵⁹ Blume & Salekin, *supra* note 93.