

## Death Penalty Issues Following *Atkins*

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In light of the U.S. Supreme Court's 2002 landmark decision in *Atkins v. Virginia*, a diagnosis of mild mental retardation has taken on a life and death significance for people who are the most deeply involved in criminal justice. As such, each aspect of the mental retardation definition (American Association on Mental Retardation, 2002) is a vital factor to the proper evaluation of individuals being tried for or convicted of a capital crime and who may (or may not) be legitimately diagnosed as having mental retardation. Various professionals who are working in, or are peripheral to, the field of mental retardation must understand how their work continues to play an important role in this process. This article identifies and highlights those factors that help illuminate the courts, the juries, the attorneys, and the public at large to fully comprehend the significance of this disability and its related characteristics.

The involvement of individuals with mental retardation in the criminal justice system in the United States has been an important interest of professionals for years. Classic works such as *Mentally Retarded Criminal Defendants* (Ellis & Luckasson, 1985), *The Criminal Justice System and Mental Retardation* (Conley, Luckasson, & Bouthilet, 1992), and *Unequal Justice* (Perske, 1991) exemplify the serious attention that this topic has received in the past. However, the Supreme Court decision in *Atkins v. Virginia* in June 2002, provided the impetus for even more intense attention to this crucial topic.

Although vulnerable individuals may encounter the criminal justice system for a range of reasons, few are more vulnerable than individuals who are suspected of having mental retardation and for whom the death penalty is being considered. For those of us who have become involved in legal cases, it is evident that individuals with mental retardation who are the focus of such attention are those whom we have historically referred to as persons with mild mental retardation. Although cases exist in which

individuals whose level of retardation might be close to, if not within, the moderate range have been executed (Keyes, Edwards, & Perske, 1997; 2002), almost all capital cases with an *Atkins* claim involve individuals whose levels of intellectual and adaptive functioning fall in, at, or near the mild range.

Criminal activities that warrant capital punishment are indeed serious offenses, and the criminal codes of each state exact serious punishment options if convicted—including the death penalty. However, it is important to point out that not every state has a death penalty, and some states with a death penalty statute do not use it. Other states, such as Texas, Virginia, and Florida, not only have it but impose it with relative frequency (Death Penalty Information Center, 2005). Those states that do have a capital punishment statute typically have one or two options for relevant cases: life without parole or life with parole. The actual statistics related to states and the death penalty are presented in Table 1.

The purpose of this article is to highlight key issues related to persons with mild retardation who have been charged with or found guilty of crimes for which the death penalty may be imposed. The article identifies many of the feature characteristics typically associated with mild mental retardation that may become problematic within the context of the criminal justice system. Background information regarding the Supreme Court decision and its emerging implications is provided. The main emphasis is on key issues related to definition and assessment in determining whether an individual truly has mental retardation. Attention is also given to some barriers that those who have served as “mental retardation experts” have faced in establishing a case that someone has mental retardation.

It seems appropriate to note why we were asked to write this article. A small corps of professionals who have been recognized (i.e., appointed) by the courts as mental retardation experts has arisen in recent years. Both of the authors of this article have been working in this capacity for several years and have been independently involved in a total of approximately 100 death penalty cases. We have “lived through” the issues that we describe in this article.

TABLE 1  
Death Penalty Statistics Since *Gregg v. Georgia* in 1976

Number of states currently prohibiting capital punishment	12 (AK, HI, IA, ME, MS, MI, MN, ND, RI, VT, WV, WI)	DC does not have a death statute
States with a death penalty but have not used it	5 (KS, NH, NJ, NY, SD)	The death penalty statutes in KS and NY have been declared unconstitutional
Number of states with an active death penalty	Currently, 33 states have executed 1,003 people since 1977 (as of January 2006)	The death penalty was reinstated in 1976
Number of people with mental retardation executed since 1977	Keyes et al. (2002) indicated that more than 44 people with mental retardation have been executed	Since 2002, at least 2 other men with mental retardation have been executed

*Note.* Data from Death Penalty Information Center, 2005, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)

One last point needs to be made before critical substantive topics are addressed. Some of us who are now involved in death penalty cases also have worked in the field of special education, human services, or both. Having this type of background creates conflicts for most of us on professional and philosophical levels in a number of areas. The conflict arises due to the forced integration of two distinct communities or cultures: a disability community and a legal community (Ellis, 2005). Some select examples are offered to illustrate this point. First, those of us who work in special education maintain an orientation and mindset of empowerment, capacity building, and self-determination. The reality of the legal world, especially when it is about capital cases, is that the total focus is on deficits. A second example is that the special education community attempts to downplay labels and their pejorative connotations. The legal world, however, is all about labels and their less-than-positive implications. Those of us with special education and human service backgrounds must recognize and become comfortable in this legal venue if we are going to be effective in writing reports, declarations, and affidavits, participating in depositions, or offering expert testimony in open court.

## INDIVIDUALS WITH MILD MENTAL RETARDATION AND THE CRIMINAL JUSTICE SYSTEM

Two major points are made in this section of the article. First, a significant amount of ignorance and misconception exists throughout all stages of the criminal justice system (arrest and detention, pretrial, trial, conviction and sentencing, incarceration) about mental retardation in general and about mild mental retardation in particular. Second, certain characteristic features of individuals with mild retardation can become significant problems when these individuals encounter law enforcement officials, lawyers, judges, juries, and correctional staff. The purpose of this section is to highlight these salient issues as they relate to capital cases.

As noted previously, the real battles associated with determining whether an accused or convicted person has mental retardation involves arguments that include a range of issues related to being in, at, or near the mild range of retardation. Judges, attorneys, and juries, not unlike most of the general population, often have difficulty understanding what mild retardation is and how it manifests itself in behavior, particularly adaptive functioning.

### Misconceptions

Stereotypes of individuals with mental retardation continue to confound the reality that a person with mild mental retardation may often display certain behaviors that are seemingly inconsistent with the typical representation and images that the media and other sources perpetuate. Also, the public's limited exposure to and experience with someone who has mild retardation may also cause people to question the existence of such a serious disability, particularly in legal proceedings that may be gruesome. The

most difficult image to overcome, when trying to establish a case for mild retardation, is the overgeneralization that all individuals with mental retardation have the features and behaviors of someone with Down syndrome. The reality that a person has to “look retarded” to be considered to have mental retardation has been expressed by jurors, judges, and even defense lawyers (Keyes, Edwards, & Dering, 1998).

Another misconception that may cause one to question if a person has mild retardation is the fact that people who function at a lower level of mental retardation are often referred to as “childlike,” thus implying that his or her behavior is comparable to those of a much younger child. Unfortunately, this is often not the case for a person who functions in the upper levels of the mental retardation continuum. The level of cognitive and adaptive functioning of a person with mild mental retardation, although in general significantly different from most individuals, can include specific areas in which he or she may show some strength, particularly in areas in which skill acquisition can occur through systematic training and instruction (American Association on Mental Retardation [AAMR], 2002).

The question of exactly who the Supreme Court had in mind when they ruled in the *Atkins* case has been raised in recent court cases. The primary argument prosecutors have made is that the Court intended *Atkins* protections to be for individuals who clearly have intellectual and adaptive functioning deficits. Their implication is that the Supreme Court did not intend their ruling to apply to individuals who were in the upper range or had mild mental retardation. The logical and correct defense rebuttal to this erroneous assertion has been that, regardless of an individual’s functioning capacity, mental retardation is always a serious disability and that the defendant’s level of intelligence (approximately the lowest 2% of the population) is completely disproportionate to the level of culpability required to impose a death sentence (Ellis & Luckasson, 1985).

### Potentially Problematic Characteristic Features

Certain characteristic features of individuals who have mental retardation can be poignantly problematic when these individuals encounter the criminal justice system. Although these characteristics have been identified elsewhere, their importance in the context of specific legal actions needs further explanation. Some of the more salient characteristics and the potential problems that can arise from them are presented in Table 2. The characteristics highlighted in Table 2 manifest in significant, sometimes even profound, ways within a system that is too often not aware of, or sensitive to, how these features can become problematic for individuals with mental retardation.

## OVERVIEW AND IMPLICATIONS OF *ATKINS V. VIRGINIA*

### Historical Perspective

In June, 2002, in a 6 to 3 decision, the U.S. Supreme Court banned the execution of people who have mental retardation. The decision in *Atkins v. Virginia* (2002) was the

TABLE 2  
 Characteristic Features of Individuals With Mental Retardation  
 and the Potential Problems in the Criminal Justice System

<i>Characteristic Feature</i>	<i>Description</i>	<i>Examples of Potential Problems</i>
Gullibility	Phenomenon of being duped or lied to and often involving some degree of victimization or failure (Greenspan, 2004)	Taken advantage of Made fun of Talked into doing things for which one does not understand potential consequences (e.g., holding someone else's drugs or weapon)
Acquiescence	Tendency to give in when in stressful situations or under pressure	Talked into confessing to crime that one did not commit Gives in to repeated questions when under interrogation
Naiveté or suggestibility	State of being inexperienced, credulous	Accepts what someone says without question Does not catch subtlety of situations and behaviors
Desire to please	Interest in pleasing another person	Will do what someone else wants in an effort to be friendly or accepted
Concrete thinking	Inability to understand abstract concepts or language	Could agree to something he or she did not do May say what he or she thinks police want to hear Does not understand rights (e.g., Miranda)
Memory issues	Difficulty with short-term memory	Not likely to recognize seriousness of what he or she is being accused of or adversarial nature of being arrested
Language problems	Difficulty with receptive and expressive language	Likely to get confused as to complexities of a crime Not likely to understand implications of a plea bargain Does not remember details of a situation (e.g., offense)
Certain affectations	Displays certain emotions or feelings	Clearly does not understand what is being said Cannot articulate what one is thinking or feeling Cannot respond appropriately to critical questions during an interrogation
Cloak of competence	Attempt to pass as normal	May display a behavior (e.g., smiling or laughing) that suggests a lack of remorse (e.g., happiness) at an inappropriate time (e.g., during trial) May go to great lengths to deny or hide limitations Major effort to appear competent May cover for codefendants in an effort to appear strong

final outcome of a controversial issue that had begun its trek to the Court more than 13 years before in the original *Penry v. Lynaugh* case in 1989. In *Penry*, the Court effectively acknowledged that the majority of the U.S. population did not favor the death penalty for people who had mental retardation but that polls were insufficient support for what was viewed at the time as a radical decision. In effect, the Court made it clear that individual states had to pass legislation that would support such a ban.

More than any other single factor, one man made a colossal contribution to this effort: James Ellis of the School of Law at the University of New Mexico. Professor

Ellis's tireless lobbying and remarkable skills at crafting legislation were paramount in the passing of 18 state laws that finally convinced the Court to reconsider the issue. Originally, it was another death penalty case that challenged the constitutionality of executing people who had mental retardation (see *McCarver v. North Carolina* [2004]), but when North Carolina became the 18th state to pass a law that prohibited such executions, *Atkins* became the benchmark case.

The Supreme Court heard oral arguments on February 20, 2002. Professor Ellis argued on behalf of the petitioner, Daryl Renard Atkins, who was convicted in 1999 of murdering Airman 1st Class Eric Nesbitt in 1996. The Court's majority opinion, delivered by Justice Stevens, cited the Eighth Amendment to the Constitution, which prohibits "cruel and unusual punishment," and noted that there was serious concern whether justification underpinning capital punishment, retribution, and deterrence applies to such offenders because of their perceived reduced level of culpability. "Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender," wrote Justice Stevens. The decision continued that, since the 1989 *Penry* decision, there was substantial legislative support for their decision to extend this to all persons who have mental retardation and are convicted of a capital crime.

### Implications of the *Atkins* Decision

Though the Court made no stipulation in its decision as to the retroactive nature of the ruling (despite Justice Scalia's admonition during oral arguments that such a decision could potentially bind lower courts for years), legally, Death Row inmates who used mental retardation as a mitigating factor at trial or sentencing and who were, on several occasions, stipulated on the record either by states' experts or attorneys as having the condition, either have been or will be granted new sentencing hearings (see American Psychiatric Association [APA], 2000; *Florida v. Kight*, 2002).

Although *Atkins* was a welcome decision for the members of the death penalty defense community, what could not have been imagined at the time were the widely disparate responses that individual state prosecutors, district attorneys, and attorneys general developed as a result of this ruling. State legislators, correction officials, and justice personnel were soon hard at work on efforts to derail, or at least minimize, the actual level of compliance in their own states' Death Rows. Some state attorneys general supported legislation to alter definitions of mental retardation in their laws. One state, Mississippi, anticipated that attorneys for Death Row inmates would file appeals based on bogus claims of mental retardation and that these same inmates would attempt to malingering mental retardation as a result (*Foster v. State*, 2003; *Goodin v. State*, 2003). To identify such malingerers, the Mississippi Supreme Court ruled that the Minnesota Multiphasic Personality Inventory-2 (MMPI-2; Butcher, Dahlstrom, Graham, Tellegen, & Kaemmer, 1989; Hathaway & McKinley, 1989) be administered to anyone claiming mental retardation as a legal remedy. The problem with this solution is that the

MMPI-2 manual states clearly that individuals who have significant brain damage or dysfunction, as virtually all people with mental retardation do, should not be administered the scale. People with mental retardation are simply unable to consistently comprehend 567 questions that require accurate “like me” or “not like me” responses, even when someone else reads these items to the defendant (Keyes, 2004). The MMPI-2 did not include a sampling of people with mental retardation, and no other instrument has specifically been designed to detect malingering. However, Baroff (2003) has suggested that the Test of Memory Malingering (Tombaugh, 1996) may be of limited use for this purpose, due to its brevity and simple recall tasks.

## KEY DEFINITIONAL AND ASSESSMENT ISSUES

The most critical issues associated with individuals who are suspected of having mental retardation and who have been accused or convicted of committing a capital offense involve the validity of procedures to determine that mental retardation actually does exist. More specifically, the issues focus on definitional interpretations, assessment practices, and results that address the major criteria of mental retardation. These issues typically align according to the three prongs found in all definitions of mental retardation: subaverage general intellectual functioning, deficits in adaptive behavior, and onset prior to age 18.

### Interstate Variation on Definition

In deciding *Atkins*, the Supreme Court did not specify that a particular definition of mental retardation be used to determine whether a person meets the criteria of mental retardation, although the AAMR's (2002) definitional perspective is evidenced in the decision. The Court left it up to the individual states to either cite existing statute or enact new ones that define the condition in such a way as to comply with this landmark decision. For those states that have enacted any legislation that includes a definition of mental retardation, *Atkins* claims must be decided using that specific definition (Keyes & Edwards, 1997).

Virtually all states hold statutes that include some kind of definition of mental retardation in either their civil or criminal code. Most states that have a death penalty statute exempting offenders who have mental retardation have developed their own uniquely worded definitions. Some states (e.g., Texas) have been unable to pass legislation that addresses a definition. As a result, different definitions may be used from one case to another; in some instances, reference to a definition of mental retardation from another part of the Administrative Code is used (e.g., in Texas, the Health and Safety Code). More important, given the differences in statutes, a defendant could be considered eligible for diagnosis in one state but not in another. A list of death penalty states and a brief description of the definitional perspective used for mental retardation is provided in Table 3.

TABLE 3  
Definitional Perspective of States Having Death Penalty Statutes

State Statute	AAMR	Definitional Perspective		
		DSM-IV-TR	Other	No
AL				X
AZ			X	
AR			X	
CA			X	
CO			X	
CT			X	
DE		X		
FL			X	
GA	1983			
ID		X		
IL		X		
IN			X	
KS			X	
KY			X	
LA	2002			
MD			X	
MS				X
MO			X	
MT				X
NE			X	
NV			X	
NH				X
NJ				X
NM			X	
NY			X	
NC	1992			
OH				X
OK				X
OR				X
PA				X
SC				X
SD			X	
TN			X	
TX				X
UT			X	
VA	2002			
WA			X	
WY				X

*Note.* AAMR = American Association on Mental Retardation; DSM-IV-TR = *Diagnostic and Statistical Manual of Mental Disorders* (fourth edition, text revision).



Concerns about potential confusion in the defining criteria are magnified by insufficient background experiences of so-called experts in assessing and diagnosing mental retardation, because the learned behaviors of people with mild mental retardation are often designed to evade detection of their disabilities (Edgerton, 1967). Surely clinical psychologists and psychiatrists are highly regarded as qualified professionals; however, their lack of training in, exposure to, and understanding of mental retardation may result in false negatives in diagnosis, particularly if they rely solely on standard clinical interviews to rule out the need for specific assessment and diagnosis of any condition. Such methods are clearly insufficient for the purpose but have regrettably happened before, sometimes with tragic consequences (*Fairchild v. Lockhart*, 1989; Keyes, Edwards, & Derning, 1998). Equally as disturbing, many experts who lack training and experience in the nature of mental retardation include the MMPI-2 (Butcher et al., 1989). As noted previously, results of the MMPI-2's so-called validity scales may suggest the responses of individuals who have mental retardation are lies, whereas more knowledgeable experts know better than to use such lengthy self-report scales with these defendants (Keyes, 2004).

### Subaverage General Intellectual Functioning

To the lay public, the defining feature of mental retardation is probably the deficit in "normal" intellectual functioning. The AAMR (2002) definition cites mental retardation as, "a disability characterized by *significant limitations both in intellectual functioning and in adaptive behavior* as expressed in conceptual, social, and practical adaptive skills ... and originates before age 18" (p. 1, italics added). It is important to note that several states cite the *Diagnostic and Statistical Manual of Mental Disorders* (fourth edition, text revision [*DSM-IV-TR*]; APA, 2000) as the authority, though the APA has essentially adopted this part of the 1992 definition. Of the three prongs identified in this definition (IQ, adaptive behavior, age of onset), the measured intelligence factor often has been more controversial than the others in courts, and battles over the validity and reliability of intelligence scores have raged almost since Alfred Binet's work in 1905 (Anastasi, Urbina, & Anastasi, 1997).

Intelligence testing is inherently controversial, because the concept itself is hypothetical. Measurement of any hypothetical construct is always going to be based on definitions that some people will decry as little more than biased quackery. The theories on which most widely used intelligence tests are based (e.g., Horn & Cattell, 1967; Spearman, 1927; Thorndike, 1927) are often broad and complex, but research conducted over many years has often supported crucial aspects of their usefulness (Sattler, 2004). For instance, factor analyses over the past 50 years have supported the concept that certain subtests of the Wechsler scales are better indicators of intelligence than others (Kaufman, 1994; Sattler, 2004; Wechsler, 1980).

When one considers that the outcome of proceedings based on an *Atkins* claim can mean life or death to accused or convicted persons, there are inevitably going to be serious concerns about the legitimacy, accuracy, and reproducibility of intelligence test results. Intelligence test records and reports from schools and various service areas, including medical, psychological, social, and even military, may shed vital information

on an inmate's intellectual and adaptive functioning, and, as such, testifying experts must thoroughly review these data as a part of accurately determining a concrete diagnosis. In examining these data, reasonable consistency in results is expected, and, despite some variation in skill levels across the years, IQ scores should not fluctuate more than about 10 points in either direction throughout one's lifespan. An important exception to this general rule considers the crucial nature of the test instruments used in any assessment of the individual's intelligence (Anastasi et al., 1997).

The adult participant with mental retardation will often illustrate a response profile that is uncommon in intelligence testing. These individuals will typically miss some of the easier items at the beginning of subtests but may get more difficult questions correct at the end of the subtests. This "aces and spaces" response profile is a factor of the examinee's lengthy background experiences combined with their deficient memory skills. As a result, adult examinees with mental retardation, though incorrectly answering many question items, may complete or nearly complete several of the verbal subtest items (Vocabulary, Similarities, Information, and even Comprehension) before reaching a ceiling (Keyes, 2004).

In death penalty cases in which a determination of mental retardation is being argued, certain issues related to the measurement of intellectual functioning arise. Some of the more common issues are presented in the following.

- In some cases, little or no viable data on intellectual functioning exist prior to age 18. As a result, IQ data must be generated, which means a contemporary assessment must be conducted. In most instances, both the prosecution and the defense will have their experts administer an IQ test. In several cases, this has resulted in the same test being administered, despite the existence of several other good tests, to the individual in a relatively short span of time, sometimes only days apart. Given testing guidelines, the obvious issue of practice effects becomes a legitimate concern (Sattler, 2004; Wechsler, 1980).
- As might be expected, many arguments during hearings or at trial focus on IQ scores at, or just above, 70. Both *DSM-IV-TR* and the AAMR allow for some flexibility in considering IQ scores, due to the fact that all testing instruments have inherent flaws, or error, and thus all standardized instruments provide guidelines for considering the standard error of measurement. The actual wording found in the respective manuals of the major defining authorities underscores the importance of considering scores that may fall above the 2 *SD* marker. For example, consider the following:

*DSM-IV-TR* (APA, 2000): "Significantly subaverage intellectual functioning is defined as an IQ of *about* [italics added] 70 or below (approximately 2 standard deviations below the mean)" (p. 41).

AAMR (2002): "The criterion for diagnosis is *approximately* [italics added] two standard deviations below the mean, considering the standard error of measurement of the specific assessment instruments used" (p. 14).

- Intellectual functioning must be determined by the valid administration of an individualized, comprehensive standardized instrument. Many individuals who enter the correctional system may be administered a short-form measure of intelligence

or a group-administered scale, such as the Slosson (Nicholson & Hibpsman, 1998) or the Revised Beta (Kellogg & Morton, 1978). Results from either of such screening techniques should never be used to make a diagnosis of mental retardation (Sattler, 2002).

- Controversy has arisen in regard to the use of new versus older editions of various instruments. Professionally, it is best practice to use the most recent edition of an instrument, as this new edition should include updated norms, among other improvements to the technical adequacy of the instrument. Although not forbidden, the use of an older test edition does not reflect best practice and indicates that the examiner is not using the most current instruments. According to Standard 3.25 of *Standards for Educational and Psychological Testing* (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999), “if an older version of a test is used when a newer version has been published or made available, test users are responsible for providing evidence that the older version is as appropriate as the new version for that particular test use” (p. 48). In court, this poor practice has been the downfall of several experts and a turning factor in several cases.
- Much discussion has been given to the phenomenon referred to as the Flynn effect (Flynn, 1998; Kanaya, Scullin, & Ceci, 2003). Although this issue requires more discussion than can be provided here, it basically refers to the fact that IQ scores of individuals in any population will increase over time, with an estimated gain of about 3 points per decade. This effect, although not accepted by all professionals, is frequently raised in death penalty cases when analyzing IQ test results. The most crucial implication in regard to diagnosing mental retardation is that any examinee is generally more likely to achieve a lower score on a recently published test instrument than he or she would on an older edition. To his credit, Dr. James Flynn, a New Zealander, has been active in death penalty cases across the United States.

### Deficits in Adaptive Functioning

Issues related to the assessment of adaptive behavior in the context of applying the death penalty have become as controversial as those associated with the determination of subaverage intellectual functioning. These issues add to the fundamental issues that have historically been raised in regard to the measurement of adaptive behavior by various professionals (see Clausen, 1972; Zigler, Balla, & Hodapp, 1984).

Adaptive behavior can be thought of as those skills necessary to function successfully in everyday life. The construct includes a range of behaviors that a person needs to possess to deal with the demands encountered on a daily basis. According to *DSM-IV-TR* (APA, 2000), adaptive behavior is composed of 11 adaptive skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The most recent AAMR (2002) definition of mental retardation views adaptive behavior as composed of three general adaptive skill areas: conceptual, social, and practical.

To adequately assess levels of an individual's adaptive skills, certain important assumptions must be understood. The most recent AAMR (2002) manual on definition,

classification, and systems of support identified 11 assumptions that are relevant to diagnosis of mental retardation. Five of these assumptions are as follows.

- Adaptive behavior is a multidomain construct.
- No existing measure of adaptive behavior completely measures all adaptive behavior domains.
- It is unlikely that a single standardized measure of adaptive behavior can adequately represent an individual's ability to adapt to the everyday demands of living independently.
- Problem behavior that is "maladaptive" is not a characteristic or dimension of adaptive behavior.
- Adaptive behavior scores must be examined in the context of the individual's own culture, which may influence opportunities, motivation, and performance of adaptive skills. (pp. 74–75)

To meet this adaptive behavior prong of the definition, certain conditions must be met. These conditions vary according to definitional perspective. The specific requirements of the two most frequently cited definitional perspectives are provided in the following excerpt. It should be noted that the specific requirements that must be met are dictated by the definition of mental retardation, and related specific criteria, contained in a given state's statute.

*DSM-IV-TR* (APA, 2000): "significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." (p. 41)

AAMR (2002): "significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations below the mean of either (a) one of the following three types of behavior: conceptual, social, practical; or (b) and overall score on a standardized measure of conceptual, social, and practical skills." (p. 14)

As seemingly straightforward as these criteria appear, many issues contaminate the process for determining deficits in adaptive functioning. The most salient issues from a lengthy list of critical points include the following.

- Adaptive behavior information should be gathered from a number of different sources, including interviews, review of records, and formal assessment.
- Very often adaptive behavior data prior to age 18 do not exist. This situation can result from the fact that data were never collected or historical data on a student have been destroyed under provisions of the Family Educational Rights and Privacy Act (1974). This reality requires that adaptive behavior information be determined retrospectively to establish a pre-18 determination of mental retardation.

- No former or existing instrument of adaptive behavior measures all facets of adaptive functioning. For instance, standardized instruments inadequately measure certain key areas such as gullibility (Fowler & Patton, 2005).
- To obtain scores on a standardized instrument, information must be gathered from credible respondents. Harrison and Oakland (2003) suggested that respondents meet the following qualifications: “frequent contact with the individual; contacts of long duration; recent contact; and opportunities to observe the variety of skills covered on an instrument” (p. 15). Often respondents meeting these qualifications are not available.
- The issue of malingering, frequently raised in regard to contemporary assessments of intellectual functioning, is also applicable to the assessment of adaptive behavior. It is important to have respondents provide accurate information about adaptive functioning whether this information is being gathered through structured interviews or the administration of a standardized instrument. Although family members are often good respondents, teachers and friends should also be interviewed when possible.
- For some individuals who have been on Death Row for an extended period of time or who were older when they were convicted of a capital crime, some credible nonfamily respondents are no longer available due to retirement, memory issues, or death. It is also not unusual for prospective respondents to refuse an interview, preferring “not to get involved.”
- Sometimes it is necessary to administer a standardized instrument retrospectively. Although this is not a preferred or recommended way of administration, it may be the only option. In so doing, the qualification noted previously of recent contact cannot be met; however, all of the other three qualifications still can and should be maintained.
- Self-report administrations (i.e., in which the individuals themselves complete an adaptive behavior inventory) of instruments such as the Adaptive Behavior Assessment System (second edition) must always be considered suspect for two key reasons: (a) the cloak of competence factor (Edgerton, 1967; see the following), whereby individuals rate themselves in elevated ways; or (b) the malingering factor, whereby individuals intentionally underestimate their levels of functioning knowing that a low score may spare their life.
- Prison is a highly structured and regulated environment. Assessing current levels of adaptive behavior functioning of an individual who resides on Death Row should be avoided. Four reasons can be provided for arguing against such assessment: (a) Many “real-world” adaptive behaviors (e.g., transportation skills) are not possible in this setting and therefore cannot be measured; (b) certain adaptive behaviors (e.g., grooming) may appear better due to the structure inherent in this setting; (c) some adaptive behavior deficits (e.g., inability to read) can be masked by the appearance of reading (i.e., looking at reading material such as a newspaper but instead of actually reading merely looking at the pictures or sports scores); (d) no credible respondent is available to complete a comprehensive assessment.
- Prosecution and state experts frequently use prison guards as respondents to identify an inmate’s adaptive abilities. This practice is deceptive and disingenuous and

borders on unethical. This is because higher levels of structure in a person's environment and routine may help people with mental retardation to function more accurately and appropriately. As prison is perhaps the most structured environment on the planet, most inmates appear to readily adapt (Everington & Keyes, 1999).

- All professional definitions of mental retardation stress that relative strengths can coexist with deficits in adaptive behavior, as indicated by the fact that deficits do not have to be found in all adaptive skill areas. Nevertheless, certain strengths (e.g., reading at the sixth-grade level, driving a car, or having a girlfriend) are often used to discredit the claim that a person has mental retardation.
- An adaptive behavior evaluation must be questioned if data on functioning are not obtained from at least one respondent who comes from the accused or convicted person's cultural background.

### Developmental Period and Beyond

Most definitions of mental retardation require that mental retardation manifest before the age of 18. However, some professional organizations such as the APA extend the developmental period through age 21 (Jacobson & Mulick, 1996). To meet the third prong of the definition of mental retardation, one must provide evidence that this condition existed prior to the end of the developmental period. Two key issues that have arisen with regard to this criterion are as follows.

- Many individuals for whom an *Atkins* claim is made were not formally identified prior to age 18. As a result, this determination must be made retrospectively.
- Even when clear evidence of mental retardation existed (e.g., identified as fetal alcohol syndrome and determined eligible for special education under the category of mental retardation), prosecutors will challenge this evidence (*Missouri v. Parkus*, 2004).

The fact that professional resources, including manuals on definition (e.g., AAMR, 2002) and textbooks on mental retardation (e.g., Beirne-Smith, Patton, & Kim, 2006) state clearly that mental retardation is not necessarily a lifelong condition provides a basis for an argument that one must continue to show that a person has mental retardation after the age of 18. In particular, in arguing an *Atkins* claim, the defense team may need to provide evidence that the accused or convicted person had mental retardation not only prior to age 18 but also at the following points in time: time of crime, time of trial, time of incarceration after conviction, and time when an *Atkins* claim is made in a postconviction phase. Clearly, this burden on the defense team exceeds the pre-18 age requirement typically required to make a mental retardation determination.

## BARRIERS TO MAKING AN MR ARGUMENT

Mild mental retardation is a difficult concept to convey in cordial settings; doing so in an adversarial venue is even more demanding. Making a case for mental retardation can be

accomplished if one is aware of the limitations in the assessment process (e.g., no one instrument or technique is adequate) and the realities with which one has to deal (e.g., building a case retrospectively). It is also true that, even when all practices are utilized and implemented properly, the data may not support a finding of mental retardation.

In addition to the definitional and assessment issues noted in the previous section, a number of practical issues often exist that pose barriers to presenting a finding of mental retardation. Some of the issues that we have encountered in many death penalty cases in which we have been involved are discussed in the following. These issues must be recognized, understood, and explained when the presence of other data exist suggesting that an individual has mental retardation. These issues are organized according to lifespan perspective: school years and adult years.

### School Years

*Identification.* A significant number of individuals who would have met the criteria of mental retardation were never formally identified by the schools as having this condition. Many reasons may be offered for why this happened; however, one of the more reasonable explanations is that many of these students were receiving other school-based services such as Title I services (formerly called Chapter I services) and thus special education services were not pursued. In addition, in older cases, special services may not have existed prior to 1975.

*Placement.* Some students who were identified as needing special education services and who displayed the characteristics of mental retardation (i.e., would have met the criteria for this category) qualified under another category—most often “learning disabilities.” The idea that a person who has mental retardation could also have a learning disability is possible and has been discussed elsewhere (Polloway, Patton, Smith, & Buck, 1997). However, a more apt explanation for why this occurred is that the label of learning disabled was less stigmatizing and more acceptable to parents. Moreover, after a series of lawsuits that were filed in the early 1970s, a more conservative approach to labeling students from ethnic and racially different backgrounds as having mental retardation was instituted.

*Performance.* Grades and “high stakes” test scores may be the only tangible data available on many students. Failing grades can be attributed to many different factors such as lack of motivation, absences, and other learning-related difficulties. The point that needs to be made is that poor grades, especially if the student was in general education classes, may contribute to a mental retardation performance profile, but they do not singularly guarantee it. In regard to the standardized achievement tests that states traditionally administer to students every year, and now intensified via the No Child Left Behind Act (2002), scores must always be interpreted cautiously. These tests are group-administered achievement instruments, not intelligence tests, and the actual performance of an individual student cannot be validated.

*Records.* Students who were seriously considered for, or who qualified for, special education should have been given a comprehensive evaluation. If mental retardation

was being considered as the category of disability, then a measure of intellectual functioning and some type of adaptive behavior assessment should have been conducted. Unfortunately, as has been noted previously, the data from this evaluation will not exist after a number of years, as schools are now required to destroy this information. Periodically parents may still have a copy of this evaluation or it may turn up in other records (e.g., juvenile justice records); however, these very useful data are usually unavailable and, lacking the raw data of test protocols and psychologist's notes, will often be ruled inadmissible.

### Adult Years

*Intraindividual differences in adaptive functioning.* Although this point has been made before, the emphasis that is placed on it in hearings and trial proceedings warrants further attention. The AAMR (2002) clearly stated that, as one of five overriding assumptions in regard to the application of definition, "within an individual, limitations often coexist with strengths" (p. 1). The *DSM-IV-TR* manual (APA, 2000), in explaining mild mental retardation, stated that, "By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support" (p. 43). There is no question that, from a variety of sources—manuals on definition as well as professionals in the field—an individual can exhibit some strengths and that these strengths do not exclude him or her from meeting the criteria of mental retardation.

*Cloak of competence.* This term was originally used by Robert Edgerton as the title of his 1967 book describing "the ways in which mentally retarded persons manage their lives and perceive themselves when left to their own devices in a large city" (p. 9). The term has often been cited to convey the reality that many individuals with mental retardation, when given the chance, want to "pass" as normal and shed the label of mental retardation. To accomplish this goal, these individuals will often try to hide their deficiencies and come across as much more competent than they actually are. The implications of this "cloaking" behavior can be dramatic when these individuals are interviewed or asked to complete a standardized instrument of adaptive behavior (i.e., self-report format). Thorough examination of a person's life and levels of functioning typically reveal accurate levels of functioning; however, the words and actions of an individual who is trying to look as good as he or she can sometimes can become a complicating factor in explaining adaptive functioning deficits. On the other hand, the issue of malingering should not be an issue.

*Use of supports.* It is important to realize, as Edgerton (1967) found, that many individuals may appear to function at reasonably acceptable levels when certain supports are in place in their lives. Edgerton found that many of his participants had "benefactors" in their lives to assist them with the demands of everyday life. As *DSM-IV-TR* (APA, 2000) stated, "With appropriate supports, individuals with mild mental retardation can usually live successfully in the community, either independently or in supervised settings" (p. 43). This fact can be a barrier because the actual level of functioning



can be masked by the support systems that are operative in a person's life and thus give the inaccurate impression that a person can function better than is really the case.

### WHAT HAPPENS NEXT?

What is interesting is that the concept of mild mental retardation—a concept given so little attention in the field of special education in recent years—has resurfaced as a primary area of professional focus. The salient issues and controversies associated with eligibility are now being raised on a level that has far more serious consequences than whether someone gets services. The issue is now about life or death. For those who have become involved in death penalty cases, the seriousness of these issues is professionally and personally challenging.

We have worked on numerous cases, and it has become apparent that we must find better ways to convey to judges, juries, and attorneys, on both sides of the bar, just what mild retardation is and how it looks to the nonprofessional. As a result, experts in mental retardation are going to be badly needed in professional areas that they never could have even imagined. People whose backgrounds include extensive experience working with individuals who have mental retardation can play a variety of critical roles in this most important work. Not everyone needs to become a mental retardation expert in these cases; however, a great need exists to educate the key professionals who are more and more a vital part of the criminal justice system and the public in general about mental retardation. As long as the United States continues to impose a death penalty for capital offenses, a need will remain for determining whether certain individuals meet the criteria of mental retardation in judicial proceedings.

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