AREA REVIEW

State Supreme Court Responses to *Atkins v. Virginia*: Adaptive Functioning Assessment in Light of Purposeful Planning, Premeditation, and the Behavioral Context of the Homicide

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ABSTRACT. In 2002, the U.S. Supreme Court heard *Atkins v. Virginia* and held that it was unconstitutional to execute a mentally retarded individual in violation of the Eighth Amendment. Since then, state supreme courts are entertaining arguments concerning adaptive functioning assessment in the context of the defendant's criminal history and role in the homicide. This article will outline the reasoning in some of these post-*Atkins* state supreme court cases, and briefly address the antisocial personality disorder/mental retardation distinction pursuant specifically

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to adaptive functioning abilities in light of the defendant's behavior within the context of the homicide.

Although this debate leaves an argument that may not be able to be answered by forensic mental health professional experts in *Atkins* type claims, a recent U.S. Supreme Court case (*Tennard v. Dretke,* 2004) may shed some light and offer direction to attorney arguments in this area. This case will be briefly discussed, which addressed in part the issue of whether a jury should consider if a capital defendant committed a homicide deliberately with a reasonable expectation that death would ensue and whether the U.S. Supreme Court's prohibition of executing the mentally retarded in *Atkins* applies if the crime cannot be attributed to mental retardation. doi:10.1300/J158v06n04_01

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INTRODUCTION TO AN ATKINS CLAIM

In 2002, the U.S. Supreme Court heard *Atkins v. Virginia* and held that it was unconstitutional to execute a mentally retarded individual in violation of the Eighth Amendment and the Cruel and Unusual Punishment standard of the U.S. Constitution (*Atkins v. Virginia,* 2003). The Court cited that current societal standards do not support the execution of mentally retarded individuals due to their conduct and behavioral impairments.

Since the decision in *Atkins*, there have been state Supreme Court cases including (*Ex Parte Jose Briseno*, 2004) that essentially hold that since the depth of assessment pursuant to a mild mental retardation diagnosis is exceedingly subjective, other evidence relevant to the diagnosis of mild metal retardation should include facts surrounding the commission of the offense, primarily, the defendant's aforethought, planning and complex execution of purpose.

Consequently, some state experts will argue that the defendant's homicide was based on antisocial personality characteristics including aggressiveness, irresponsibility, lack of remorse and propensity to break the law rather than mental retardation. Further issues the state experts

may explore include the defendant's background history of violence and whether there is a pattern of past violent behavior, similar to the nature of the homicide, as well as an examination of the defendant's ability to plan and design the homicide. These experts will likely use subjective judgment concerning the defendant's execution of the offense.

In contrast, defense experts will present facts that the defendant qualifies for mental retardation based on problems with impulsivity, poor planning ability, naiveté, inability to appreciate consequences and low frustration tolerance, for example. These experts will focus more on objective and scientific adaptive functioning instruments to measure and assess the defendant's adaptive functioning.

Historically, there was a debate in the United States whether mentally retarded individuals should be put to death or not. Research indicates between 5 and 10% of death row inmates in the United States are mentally retarded (Cunningham & Vigen, 1998; Ellis & Luckasson, 1985; Everington & Luckasson, 1989; Talbot, 2003). Many individuals on death row are mentally impaired and have low IQs; however, often they qualify for borderline range of intelligence and learning disabilities but are not mentally retarded. Nonetheless, death row inmates throughout the country with a history of learning disabilities and/or retardation are making motions and petitions claiming that their death sentences are voidable and must be nullified due to relevant law outlined in *Atkins.*

Traditionally, forensic psychologists and psychiatrists have been called upon to perform death penalty mitigation in capital cases. Death penalty mitigation would include consideration and presentation of various psychological/sociological data pursuant to the defendant's life and character, presented to a jury to help assist them in understanding the defendant's character before they decide an appropriate penalty. Ideally, the expert can communicate to the jury a nexus between the mitigating factors and the homicide, i.e., such as a mental disorder that caused the defendant to commit the crime (Fabian, 2003; Stetler, 1999; Stebbins & Kenney, 1996; McCoy, 1999; Tomes, 1997). There is no requirement that mitigating evidence be causally linked to the homicide.

Until *Atkins*, mental retardation could be presented as part of death penalty mitigation as a means to prevent the defendant from being sentenced to death. The mitigation claim would include presenting evidence that the defendant was less morally culpable for his offense due to cognitive and behavioral deficits including, but not limited to, low frustration tolerance, poor social/interpersonal skills, susceptibility, heightened anger and hostility, and inability to anticipate consequences.

The traditional mental retardation examinations pursuant to capital mitigation claims were often not significantly contested as any evidence of serious cognitive functioning deficits could be perceived as mitigating, even if the defendant did not qualify for mental retardation.

The assessment of mild metal retardation pursuant to an *Atkins* claim is quite complex and extremely contested in court. They are intricate in nature and clinical procedure, requiring much expertise and investigation of collateral information (Fabian, 2005). Certain factors hinder an accurate assessment of mental retardation including, but not limited to, insufficient records, discrepancies of IQ administrations, lack of data indicating that a defendant experienced mental retardation before 18, and differential diagnostic considerations. Other problems include trends of increasing IQ scores over time for death row inmates, desire by the defendant to not be diagnosed as mentally retarded as to avoid ridicule and abuse in prison, and poor motivation by the defendant during IQ testing.

The specific evaluative procedure for a mental retardation claim is beyond the scope of this article; however, in summary the expert should administer a standard IQ test, academic achievement tests, and an objective adaptive functioning testing instrument and gather as much collateral evidence as possible pertaining to the defendant's adaptive and intellectual functioning.

Forensic psychologists must adhere to the standards pursuant to a mental retardation diagnosis as described in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (DSM-IV-TR, 2000) and the American Association on Mental Retardation (AAMR, 2002). Pursuant to these resources, the expert must address primarily three issues when addressing mental retardation including current intellectual functioning as measured by IQ, current adaptive functioning deficits, and presence of deficits in IQ and adaptive functioning before the age of 18. In essence, a defendant must have a current IQ of about 70 or below as well as deficient adaptive functioning skills, which include such features as impairments in self-care, communication, home living, social/interpersonal skills, use of community resources, self-direction, functional academic abilities, work, leisure, health and safety, for example. The individual must also have a history of adaptive functioning and intellectual deficits before adulthood as mental retardation is a developmental disorder. Consequently, the forensic psychologist expert is asked to make a definitive diagnosis of a developmental disorder when he often lacks sufficient data, which some may argue is an unethical dilemma if life and death are at stake.

Forensic psychologists have to distinguish differential diagnoses when addressing mental retardation, which is a considerable problem in the assessment of the disorder. Specifically in the area of capital litigation and *Atkins* claims, diagnoses of conduct disorder, which is a precursor to antisocial personality, and later, antisocial personality disorder in adulthood, can include problems with impulsivity and low frustration tolerance, volition, recklessness, aggression or assaults to others, irresponsibility and poor work history, and poor judgment. Similarly, these are all factors that are related to features of mild mental retardation in children, adolescents, and adults. Therefore, as a child, youth, adolescent, teenager or an adult, the features of conduct disorder and antisocial personality disorder versus mental retardation can be developmental in nature and difficult to distinguish. Imperatively, the expert must be prepared to discuss the diagnostic dilemmas of antisocial personality disorder and mental retardation in *Atkins* claims. The examiner must be equipped to explain the context and motivation of the homicide and prior antisocial acts as well as to testify to differential diagnoses (Blume & Voisin, 2000).

STATE SUPREME COURT DECISIONS CONCERNING ADAPTIVE FUNCTIONING IN ATKINS CLAIMS

State courts are now hearing these diagnostic dilemma arguments between mental retardation and antisocial personality disorder in *Atkins* type claims. For example, in *Ex parte Jose Briseno*, the Texas Supreme Court held that adaptive functioning skills are subjective and forensic experts will offer opinions of both sides of the issue in most cases. The Texas Court of Criminal Appeals stated that it had to define the level and degree of mental retardation in which the consensus of Texas citizens would agree that a person should be spared from the death penalty. For example, the court indicated that most of their state's citizens would agree that John Steinbeck's character, Lenny, in the book *Of Mice and Men,* would be spared due to the lack of reasoning and adaptive skills. However, the court asked the question of whether most Texas citizens agreed that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? In essence, the court questioned whether there was a state or national consensus concerning whether all persons who mental health professionals might diagnose as meeting the criteria for mental retardation, become automatically less morally culpable for their crimes than those who just barely missed those crite-

ria. The court asked whether there was a mental retardation bright line exception from the state's maximum statutory punishment.

Briefly, the facts in *Briseno* included the defendant and a cohort appeared at a sheriff's home under the guise to sell rings, but with a goal of robbing him. Once inside the home, a struggle began and they stabbed the sheriff and Briseno grabbed the sheriff's pistol and shot him. The sheriff died from the assaults. The jury convicted the defendant of capital murder and the trial court sentenced him to death.

The Texas Court of Criminal Appeals cited their belief that adaptive behavior criteria pursuant to the assessment of mental retardation is extremely subjective and experts will usually offer different opinions on both sides. The court believed that there should be evidentiary factors, which fact finders in a criminal trial consider, when weighing the evidence pursuant to diagnoses of mental retardation and antisocial personality disorder. For example, they believed that relevant evidence concerning the defendant's level of functioning and issues of mental retardation should be considered. Such information could include data from individuals who knew the defendant during his developmental stages including family, friends, teachers, employees and authorities. Specifically, the court cited their approval on the appropriateness of these parties' beliefs on whether they thought he was mentally retarded at the time of the offense, and if they did believe he was mentally retarded, whether he acted in accordance with that diagnosis.

Other questions the court wanted to be considered concerning the etiology of the homicide included whether the defendant formulated a plan and carried it through and whether his conduct was impulsive in nature. Another question incorporated whether the defendant's conduct showed leadership or in contrast, was he naive and led around by others? Was his conduct in response to external stimuli rational and appropriate regardless of whether it was socially acceptable? Did the defendant coherently and rationally answer on point to oral or written questions or did his responses wander from subject to subject? Can the defendant relate facts effectively in his own or others' interests? Finally, putting aside any heinousness or gruesomeness surrounding the capital homicide, did the commission of that offense require aforethought, planning and complex execution of purpose?

The court cited the fact that although many experts will offer insightful opinions on the questions of whether a defendant meets the criteria for mild mental retardation, the court also holds its place at being the trier of fact and the ultimate issue of whether a person is mentally retarded for Eighth Amendment criteria is one for the finder of fact to

decide based upon all the evidence and their determinations of credibility. Therefore, the court believed it is equally important to hear opinions about the subjective adaptive functioning of the defendant in the behavioral context of the murder in addition to the objective experts' opinions pursuant to adaptive functioning.

In this case, there were two experts, one for the state and one for the defense. The defense expert's background included the treatment of mental illness and mental retardation and his overall opinion included the analysis of a person's adaptive deficits and limitations putting aside positive adaptive skills. In contrast, the state expert's background was in statistical methodology and forensic diagnosis. His perception was that an expert must look at one's positive adaptive abilities and coping skills. Specifically, his focus was on whether the person exhibited a rational response to external stimulation despite whether those responses were lawful or not. As the court indicated, "the defense expert sees the glass half empty, the state's expert sees the glass half full" (p. 33).

The experts relied upon the same evidence and objective data, yet the defense expert diagnosed mental retardation while the state's expert did not. In fact, the state's expert opined that Briseno had antisocial personality disorder. The defendant had an IQ of about 72 in 2002 as tested by the defense expert and then a score of 74 about a year later when tested by the state's expert. In reference to other IQ tests that the applicant had taken as a child, his scores ranged from 67 to 88. However, both experts indicated that the two most recent tests most accurately assessed the defendant's level of intellectual ability. Concerning IQ, the court based its opinion on the facts that there was not enough data to prove by a preponderance of the evidence, the applicant's true IQ was lower than 72 to 74 rather than higher than 72 to 74.

Concerning adaptive behaviors, the experts disagreed mostly. The facts indicated that Briseno was physically abused by his great-grandmother at about the age of 10 and he would never talk about the beatings but rather would run away, often for days at a time. To the defense experts, this behavior was an example of adaptive behavior because running away shows poor decision-making and a better-adapted individual would look for assistance from family members or other authority figures. The state's expert believed that these were good survival skills and viewed these symptoms as indicating evidence of conduct disorder, which is a precursor to antisocial personality disorder as an adult. For example, the state's expert cited running away as a feature of conduct disorder. Juvenile authorities in Illinois indicated that the defendant would run away from home because it was fun to stay out all night and

he hated school, suggesting a more antisocial perspective, rather than getting away from an unpleasant home or family life. Records indicate that the defendant did not know why he left home. He said he would leave and then feel remorse about it the next day.

The defense expert believed Briseno was impulsive, signifying a trait of mental retardation, whereas the state's expert saw this as impulsive behavior consistent with conduct disorder and antisocial behavior. The defendant was placed in a school for problem children because of disruptive behavior in class. His schoolwork was entirely unsatisfactory and he improved somewhat after being retained during the early school years. At the ages of 14 to 18 years, he was under the care of the Illinois Juvenile Authorities because of repeated acts of delinquency and five runaway violations, as well as truancy, aggravated battery and two burglaries. Briseno told his juvenile probation officer that he burglarized places to obtain things that his family could not afford to buy. His stepfather had stated that the defendant was very easily influenced by other delinquents. The defense expert believed the defendant would steal and commit forgery to obtain food or other items and he showed a lack of adaptive behavior because a better well-adapted individual would ask for assistance for basic necessities. On the other hand, the state's expert believed that the defendant knew what he wanted and found ways to manipulate other people including theft and ultimately developed sophisticated plans to steal and get his needs met.

Other records indicated that Briseno was involved in many physical fights. The defense expert testified that those with mental retardation are constantly running afoul with family members and even law enforcement because they lack conceptual abstract abilities to think before they act and often display impulsivity. He was said to lack the ability to discern cause and effect relationships between himself and others. The records indicated that Briseno barely succeeded through the Texas school system and was tested in the normal or low average intelligence range, eventually earning an eighth grade diploma. The defendant's work performance was very positive and he did not continue his education. He wanted to be a mechanic and pump gas.

The defendant argued that there were records of a truck driving course he took in prison, which indicated that although he had followed through with the course and gained enough knowledge and skills to drive a truck, he was not suited to work as a truck driver and would become careless and try too hard to correct mistakes. The defense expert explained that people with mental retardation may be able to learn certain specific skills of a global behavior but not be able to put it all

together in a functional way. On the contrary, the state's expert believed that Briseno was simply not a careful driver.

The experts analyzed written answers to questions that the defendant offered as a juvenile and the defense expert believed that his responses included superficiality and simplistic thinking with no insight. The state's expert believed that although there were grammatical and spelling errors, his answers were appropriate to the specifics of each question and that the defendant showed understanding of what the questions were asking. Both experts cited the defendant's use of illegal drugs including marijuana, glue, LSD, amphetamines and barbiturates and both believed this could have impaired his brain functioning as well as academic skills and social/interpersonal skills.

Facts also included that the defendant burglarized a jewelry store, had been arrested for assault with a knife, had another burglary charge and car theft, and escaped during a prison furlough. While he escaped, Briseno committed an aggravated assault and was sentenced to more time in prison. The defense expert indicated that this pattern of criminality showed the defendant was unable to learn from experience and would continue to repeat these antisocial acts; however, the state's expert believed that his criminal conduct was consistent with antisocial personality disorder which included his inability to hold a job, a propensity to break the law, evidence of lying and reckless disregard for the safety of himself and others, and a propensity for aggression. The state's expert believed that after reviewing records and the nature of the criminal offense, the defendant's ability to locate victims and to use society to better his impulsive needs were significant issues for the court to consider. The expert believed that there are indeed mentally retarded criminals but that they tend to commit simplistic and primitive offenses such as impulsive shoplifting, robbery and sudden acts of violence. A mentally retarded offender will have a difficult time finding victims, manipulating others in a scamful or conning way and escaping from a correctional facility for example. Simply, the state expert indicated that the more complex a crime, the less likely the individual would qualify for mental retardation. The state expert believed that the examination of the type of criminal conduct and the circumstances involved in the conduct were relevant in determining whether a person was mentally retarded.

When considering the defendant's disciplinary record in prison, the defense expert believed that the defendant had numerous prison disciplinary infractions for refusing to work and arriving late for work, which would be consistent with deficits in adaptive behavior surrounding voca-

tional tasks. On the other hand, the state's expert believed that his conduct indicated antisocial personality traits and, essentially, laziness.

Both experts interpreted the defendant's lifestyles and behavioral histories pursuant to their own belief systems on mental retardation symptoms and classifications. The court cited the significance that none of the records indicated any clinician diagnosing the defendant with mental retardation. The court believed that based on the facts presented, the defendant did not show by a preponderance of the evidence that he had adaptive deficits meeting the criteria for mental retardation. The Texas Court of Criminal Appeals agreed with the trial court's findings.

In another case (*Rondon v. State,* 1999), the Supreme Court of Indiana held that testimony of lay witnesses was admissible on the issue of mental retardation since adaptive functioning can be determined by the defendant's everyday activities and ultimately lay testimony may be useful in determining various elements of adaptability. The post-conviction court heard testimony from psychologist experts on both the state and defense sides. They refused to hear two other psychologist experts who were to provide additional testimony about adaptive functioning because they believed that the probative value of the testimony was substantially outweighed by the time-consuming presentation of cumulative evidence. However, they did hear lay witness testimony specifically addressing defendant's adaptive functioning. The post-conviction court saw expert testimony concerning adaptive functioning as cumulative, yet believed that the testimony of lay witnesses could be quite useful in determining the defendant's everyday activities.

Finally, in another case (*Ex parte Jerry Jerome Smith,* 2003), the Supreme Court of Alabama was confronted with the question of whether the defendant who was sentenced to death prior to the *Atkins* decision was mentally retarded. The court held that based on the facts presented in the defendant's trial, under even the broadest definition of mental retardation, the defendant was not mentally retarded. The defense expert indicated that the defendant was mild mentally retarded with a full-scale IQ of 72 and that the defendant suffered from an adjustment disorder with mixed disturbance of emotions as well as substance dependence. He cited a full-scale IQ of 66 when the defendant was 12 years of age. He also concluded that the defendant read and spelled on a first grade level, his math skills were on a third grade level and his ability to form intent was at a 10- to 12-year-old level. The state's expert indicated that he was living independently at a level higher than a mentally retarded individual would be living. He believed the defendant was "streetwise"

and that a score of 72 would place him in the borderline to mild mentally retarded range.

The court did not believe that the defendant had significant or substantial deficits in adaptive behavior, as the defendant had a one year ongoing relationship with his girlfriend and was employed at the time of the murder. Additionally, the court cited the fact from the evidence of the murder that before the defendant shot the first victim, he told his girlfriend to move out of harm's way. The court also believed it was pertinent to consider the fact that pursuant to his adaptive behavior abilities, the defendant was involved in an interstate illegal drug enterprise. Smith testified that at the time of the murders he was under stress because he owed money to another drug dealer. The defendant also indicated that at the time of the murders he was addicted to crack cocaine and in order to maintain a $400 a day habit, he had to sell drugs.

In addition, the court paid close attention to factors including the fact that the defendant gave the police officer a false name two days before the murders when he was stopped for a traffic violation; the circumstances surrounding the murders; and his actions after the murder in which he obtained the help of a friend to dispose of the gun and to hide from the police. Smith bragged about the murders and made a statement about "getting off " using the mental disease or defect defense. Further, he stated that he had shot two individuals in the house to eliminate witnesses. The court believed that these facts indicated that the defendant did not suffer from a deficit in adaptive behavior. Because the evidence did not support the defendant's belief that he suffered from subaverage intellectual functioning and significant deficits in adaptive behavior, the court did not believe that they had to decide or distinguish that these problems manifested themselves before he was age 18.

STATE AND DEFENSE ATTORNEYS' LEGAL ARGUMENTS PERTAINING TO ADAPTIVE FUNCTIONING

The above cases definitely have substantial impact on how lawyers will argue their *Atkins* claims. Prosecutors have cited these cases in arguing that the context of the offense, the conduct related to the homicide, the patterns of the defendant's past criminal behaviors and the opinions of lay witnesses pursuant to the defendant's adaptive behavior should be considered in addition to the expert witness testimony concerning mental retardation. State attorneys will endorse that it is equally fair to consider the defendant's adaptive functioning abilities that are

objectively measured by an expert psychologist as it is to consider a layman's or expert's subjective testimony pertaining to the defendant's everyday adaptive functioning skills, before, during and after the homicide. Conversely, defense counsel may argue that recreating the crime and its elements, including the heinousness or gruesomeness of the offense, for example, will prejudice the defendant.

Prosecutors will also become creative citing the defendant's other offenses (violent and even non-violent criminal acts) and analyzing them in light of adaptive functioning, such as the context of the assaults. Other criminal acts with the motive of financial gain such as robbery, burglary or drug trafficking will be considered as there may be planning and premeditation involved. They will analyze any of the defendant's prior offenses as a juvenile or adult and will argue that they were based on aforethought, planning and an antisocial personality rather than impulsivity and low frustration tolerance pursuant to mental retardation. There will be endless arguments to consider pertaining to patterns of past criminal behavior and their relation to the homicide, and some of the contributions of psychological/psychiatric experts pursuant to objective adaptive functioning abilities may be minimized if not ignored.

To combat the state's position on the facts of the murder and the defendant's prior criminal behavior, defense counsel will likely cite that the decision in *Atkins* simply states that a mentally retarded individual cannot be put to death because it is cruel and unusual punishment. Simply, the U.S. Supreme Court did not discuss the necessity of considering the context of the crime and distinguishing etiological features of the homicide based on antisocial personality disorder and mild mental retardation. Although the Court cited inherent differences that mentally retarded individuals have from average individuals in society such as impulsivity and gullibility, there was no mention about a specific/direct requirement that there be a nexus between mild mental retardation and the homicide. The state attorneys will likely acknowledge the findings in *Atkins,* yet suggest that this is one more piece of information relevant to the defendant's true adaptive functioning in the "real world," rather than data from a test. In fact, the lone purpose of the adaptive prong for the criminal justice system is to determine that the measured intellectual impairment has had real-life consequences (Ellis, 2004).

Judges are the triers of fact and need as much evidence to consider as possible when making a decision. Pursuant to some post-conviction relief statutes, such as in Ohio (O.R.C. 2953.21 (C)), judges shall consider whether there are substantive grounds for relief by reviewing *all* documentary evidence, even facts of the crime. However, more evidence by

experts and lay witnesses may create heightened confusion. In addition, there will likely be bias based on layperson opinions. For example, the homicide victim's family may know the defendant and offer evidence suggesting the defendant was able to exhibit well-developed adaptive functioning skills. They may have an agenda of seeing the defendant executed since they lost a loved one.

On the other hand, a defendant's family will very well be able to offer lay testimony about the defendant's adaptive skills and will also have an agenda of keeping their loved one alive. The defendant's family may produce subjective testimony of adaptive functioning based on anecdotal evidence, or through providing responses to objective assessments by the experts pertaining to the defendant's adaptive functioning. Concerning the latter assessments, the family members often provide information as collateral informants pursuant to adaptive functioning instruments that the experts administer. However, an inherent problem in these evaluations includes the accuracy in their recollection and bias of data provided by family members relating to their perceptions of the defendant's adaptive behaviors during his life.

The direction trial courts are going is to consider evidence from both psychological expert witnesses and layperson fact witnesses when making their rulings.

CONSIDERING ADAPTIVE FUNCTIONING IN LIGHT OF PURPOSEFUL PLANNING, PREMEDITATION AND THE BEHAVIORAL CONTEXT OF THE HOMICIDE

There is a tendency in human nature to be fascinated and intrigued with how a criminal mind ticks. Lawyers, judges and obviously forensic psychological/psychiatric experts are often interested in this topic. In a murder case, it is especially interesting to dissect the etiology of the offense. Although this may be a fascinating exploration, it may be extremely difficult to offer objective data concerning the etiology of the offense when committed by a mentally retarded and/or antisocial individual.

It is this author's opinion that some of the court cases reviewed in this paper are suggesting that the trier of fact must consider the context of the homicide and whether the defendant's cognitive and behavioral functioning, personality and potentially bio-psycho-social makeup was a part of the offense. Consequently, the psychologist experts may be

encouraged to evaluate the context of the homicide when assessing for mental retardation.

In the *Smith* case, the court not only considered the defendant's prior drug trafficking behaviors, but they also considered statements the defendant made after the offense, and the context of the murders. They believed that some of these facts insinuated that this individual was not mentally retarded. It is difficult if not impossible to objectively dissect the homicide and to offer expert testimony concerning the etiology of this offense. In fact, some offenders may have both antisocial personality traits and mild mental retardation and it is unrealistic to definitively discuss the etiology of the offense in an *Atkins* claim.

If courts admit all evidence concerning contextual and behavioral components of the homicide, then issues of premeditation, impulsivity, aforethought and purposeful planning will have to be admissible. When considering this evidence in connection with the context of the homicide, factors such as the defendant's motives and the heinousness of the act would be relevant. Consequently, there would have to be an assessment of the facts of the murder. If the defendant used a gun, it would be vital to determine how and when he obtained the gun to discern premeditation, planning ability and use of resources. Did he obtain it legally after obtaining a gun permit? Toxicology reports concerning substance abuse and intoxication by the defendant at the time of the offense would be relevant. In fact, many individuals with mental retardation and others with antisocial personality disorder abuse substances for various reasons. Therefore, issues such as substance abuse, intoxication, antisocial personality disorder and mental retardation would have to be analyzed concerning the etiology of the violence, which strays from the scope of the specific assessment of mental retardation in an *Atkins* claim.

Differential diagnoses of other psychiatric disorders from mental retardation would also have to be considered. Issues of naivety and being a follower versus having a leadership role in the crime would be pertinent to a finding of mild mental retardation. Judges would likely encourage testimony from other codefendants and witnesses concerning the defendant's initiation and role in the offense. A contextual analysis of the homicide including the possibility that a mentally retarded person would engage in a more disorganized killing versus a higher level of functioning individual typically engaging in a more organized killing style would be appropriate to consider (Ressler et al., 1988). Discerning the defendant's level of formulated plan making versus impulsive behavior would be a necessity to examine.

If courts followed the reasoning in *Smith,* a defendant would likely have to take the stand and testify about his role in the offense, and his thoughts, feelings and behaviors before, during and after the homicide in an *Atkins* claim. This testimony may essentially violate his Fifth Amendment self-incrimination right. Whether the defendant lied to witnesses or attempted to hide evidence or even eliminate witnesses after the offense would be germane.

The prosecutor may believe that all of this data is relevant in order to tie a defendant's level of functioning to the etiology of the homicide. Unfortunately, however, there is no bright line distinction in this data. In essence, there is no objectivity or "rule of thumb" indicating that an individual who functions within the 2nd percentile of cognitive and adaptive abilities pursuant to mild mental retardation, also lacked a substantial capacity to purposely plan and premeditate the homicide. This evidence pursuant to the behavioral, psycho-bio-social context of the homicide may be too subjective and a state's attorney could make any argument relating that the offense was planned and purposeful.

In *Atkins* claims, defense counsel will contest that discussing the nature of the context of the homicide and linking mental retardation to whether an individual is able to plan and premeditate his homicide will resemble too closely another trial. In contrast, the prosecutor will simply present that this mental defect does not affect the criminal's responsibility, rather, the defendant's adaptive functioning abilities were adequately developed to assist in committing the crime, and that antisocial personality characteristics were more significantly related to the offense than features of mental retardation. Prosecutors may question both lay and expert witnesses whether they essentially believe that the defendant was morally culpable for the crime and this question is likely to be unanswerable.

TENNARD V. DRETKE

Recently, the Supreme Court of the United States heard a case, *Tennard v. Dretke* which considered issues of mental retardation and its nexus to the homicide. Although it did not consider the specific issue pertaining to adaptive functioning and its relation to the crime, the Court was asked whether the prohibition of executing the mentally retarded in *Atkins* applies if the crime cannot be attributed to mental retardation.

The facts in *Tennard* briefly include that the defendant presented evidence that he had an IQ of 67 and the jury was instructed to determine the appropriate punishment by considering two "special issues," which focused on whether the crime was committed deliberately and whether the defendant posed a risk of future dangerousness. The jury answered affirmatively to both questions and he was sentenced to death. The Texas Fifth Circuit Court applied a threshold test to the defendant's mitigating evidence and asked whether it was constitutionally relevant evidence of a "uniquely severe permanent handicap" that bore a "nexus" to the crime. The Fifth Circuit Court concluded that Tennard failed to show both that his evidence of low IQ met the criteria of mental retardation and that his condition of mental retardation was responsible for the crime.

After the U.S. Supreme Court heard *Atkins,* the Fifth Circuit Court reconsidered their opinion and affirmed their holding on the grounds that execution was only unconstitutional if the defendant could show that his mental retardation had actually caused the crime. Being mentally retarded in and of itself did not excuse someone from the death penalty.

The Texas Court of Criminal Appeals (*Ex parte Tennard*, 1997) held that Tennard did not satisfy the state's three prong criteria for mental retardation as he only presented evidence of a low IQ score. The court believed there was no evidence suggesting that the defendant's low IQ caused him to be unable to appreciate the wrongfulness of his conduct when he committed the offense or that it rendered him unable to learn from his mistakes or control his impulses.

The U.S. Supreme Court eventually granted certiorari. The Court cited their (*Penry v. Lynaugh,* 1989) decision, which included that constitutionally relevant evidence must show uniquely severe permanent handicaps which the defendant was burdened of through no fault of his own and that the criminal act was attributed to the severe permanent condition. The Court disagreed with the Fifth Circuit's conclusion that there needed to be a showing by the defendant that his low IQ had an association or nexus to the crime.

Of critical importance to the substance of this article, was the Court's referral to their decision in *Atkins* in which they explained that impaired intellectual functioning is inherently mitigating, citing the trend that society views mentally retarded offenders as categorically less culpable than the average criminal. The Court never suggested that a mentally retarded individual must establish a nexus between his mental capacity and the crime. In summary, the *Tennard* and *Atkins* decisions do not

communicate a requirement that there be an association between the condition of mental retardation and the crime.

CONCLUSION

State attorneys are making legal arguments to state supreme courts suggesting that there should be both lay witness and expert witness testimony focusing on the defendant's adaptive functioning abilities in light of the etiology of the crime and its nexus to a diagnosis of mental retardation. Defense counsel will highlight the holdings in *Tennard* and *Atkins,* expressing the fact that society perceives mentally retarded individuals as being different and less blameworthy than non-mentally retarded defendants and essentially less morally culpable; therefore, it could be reasoned that the issue concerning the association between mental retardation and the homicide is not relevant. State attorneys will suggest that subjective data pursuant to the defendant's adaptive functioning focusing on his functioning surrounding the crime, or his past criminal behavior for that matter, is simply evidence of practical adaptive functioning skills. They will debate that purposeful planning, premeditation and moral culpability of the defendant pursuant to the homicide are more relevant factors to consider regarding adaptive functioning abilities than items on an objective adaptive functioning test such as whether the defendant "rides safely in a car."

Other questions to consider include whether experts can offer definitive evidence relevant to the etiology of a capital crime such as leadership role versus naivety and impulsivity versus planning? A mentally retarded individual may struggle with issues such as poor judgment and problem solving skills; difficulty in recognizing dangerous situations; perseverative and impulsive behaviors and a tendency toward repetitive behaviors; and poor planning and coping skills with limited ability to determine cause/effect relationships (Keyes, Edwards, & Derning, 1998). An antisocial personality disordered offender may simply have an impulsive pattern of offending. Unfortunately, many of the low functioning offenders being evaluated in *Atkins* claims function between the borderline intellectual functioning and mild mental retardation ranges, yet also qualify for antisocial personality disorder.

Other questions to consider include when is the defendant's adaptive functioning at issue, before, during or after the homicide? Do testing procedures pursuant to mental retardation diagnoses in capital defendants meet ethical standards? Not only are the objective adaptive func-

tioning instruments not normed and validated on death row inmates, but many of the test items are inapplicable as the defendant cannot perform such activities due to a lack of opportunity as he is residing on death row. Further, these assessment instruments were developed to examine special needs of mentally retarded individuals and the normative data were often obtained from residents residing in institutions designed for people with mental retardation, ultimately limiting their utility in other settings, such as maximum security prisons (Everington & Keyes, 1998). In contrast, there is no substantial data telling us that these instruments cannot be used on this specific population.

It is this author's opinion that the field of forensic psychology/psychiatry may be too "vague, uncertain and gray" to distinguish these issues in light of differential diagnoses of antisocial personality disorder and mental retardation. The forensic expert simply may not be definitive and exact enough in performing a crime autopsy concerning the etiological aspects of a homicide when considering diagnostic criteria of antisocial personality disorder, mental retardation (intellectual and adaptive abilities), substance intoxication and bio-psycho-social factors leading to the crime. Consequently, courts may have to eliminate these adaptive behavior-contextual homicide arguments to mitigate confusion. Finally, the holdings in *Atkins* and *Tennard* appear to preclude such arguments.

IMPLICATIONS FOR FORENSIC PSYCHOLOGY AND LAW

The case law addressing the issue of the defendant's role/context/behaviors pertaining to the homicide has serious implications for the fields of forensic psychology and law. It is this author's opinion that a forensic psychologist expert must focus on the legal referral. Specifically, does the defendant qualify for mental retardation? When addressing the legal referral question in an *Atkins* claim, distinctively, whether the defendant qualifies for mental retardation by history pursuant to that particular jurisdiction's definition of mental retardation in a capital case, the expert must answer the ultimate legal issue. In doing so, he should concentrate on objective criteria for intellectual and IQ abilities (IQ testing), as well as subjective and objective data pursuant to adaptive functioning skills. The expert should administer adaptive functioning tests both with the defendant and collateral informants, and seek out as much collateral data as possible.

The assessment of mental retardation with a capital defendant should follow the diagnostic criteria and classification systems set forth by both the standards of the AAMR and the APA (DSM-IV-TR). Although the expert should be prepared to be examined in court pursuant to the defendant's criminal behavior and the facts of the crime, he should also realize that even if this information is considered as evidence of adaptive functioning, one cannot generalize an entire diagnosis on the defendant's isolated behavior in the context of an event. Nonetheless, the court will likely consider all data including the facts of the crime in making its decision.

The psychologist functioning in an *Atkins* claim may be forensically trained, or he may be an expert on mental retardation. In the latter example, the expert may be functioning in an academic role who has little experience working with maximum security antisocial personality disordered individuals. Accurate evaluation of mental retardation within offender populations is problematic as many court-appointed examiners lack specific training and experience with this population (Everington & Luckasson, 1989).

In either case, an *Atkins* claim includes a forensic assessment of mental retardation. It is critical to distinguish a traditional assessment of mental retardation based on evaluating needs and supports within the community versus an *Atkins* claim which evaluates for a condition with consequences of life and death. AAMR goals for supports for the mentally retarded include enhancing personal outcomes related to relationships, independence, community, employment and school participation, as well as to contributions and personal well-being (AAMR, 2002). There may be some debate, confusion and system resistance by a community agency in granting an individual certain needs and supports in the community if he has an IQ of 72 (missing the IQ cutoff of 70 for mild mental retardation). However, the judicial overturning of a capital conviction for an individual with an IQ score of 72 will likely meet heightened resistance and scrutiny by the public. Nonetheless, in either situation, the individual must be evaluated by competent professionals.

The forensic examiner in an *Atkins* case must evaluate for mental retardation as he would in traditional cases, yet be aware of various capital case contextual factors including, but not limited to, issues such as increasing IQ scores on death row; the result of "practice effects" (repeated IQ evaluations will elevate scores); evaluating offenders in prison who have various emotional/psychological problems that may affect motivation and performance; lacking solid records substantiating a developmental history of mental retardation; considering differential

diagnoses concerning antisocial personality disorder; and possible malingering of cognitive functioning.

The expert should keep in mind the legal referral question and the limitations of his data. He should be aware that the legal decision in *Atkins* did not formally set forth procedures to be utilized when making legal determinations of whether a capital offender is mentally retarded. Rather, most state supreme courts have heard cases, written opinions and have outlined some procedures to consider (*State of Ohio v. Stallings*, 2004). In addition to knowing the specific state requirements that provide a psycho-legal basis for such an evaluation, the expert should be able to conduct an assessment of mental retardation with traditional IQ testing and objective adaptive assessment. These assessments will usually be encumbered by spuriousness of testing procedures. As stated elsewhere (Fabian, 2005; Drogin, 1999; Koocher, 2003; Kane, 2003, Ceci et al., 2003), IQ testing with the Wecshler Adult Intelligence Scale-Third Edition (WAIS-III) exhibits standard errors of measurement which fluctuate about five points above and below each measured score which can be tremendous differential gaps in capital cases. Further, there are other areas of concern including analyzing former IQ testing data for 16-year-olds who were administered versions of the WAIS and WISC (Wecshler Intelligence Scale for Children), as the former is noted to reveal higher scores than the latter.

Likely the most troubling diagnostic dilemma the examiner will encounter is the lack of records available substantiating a diagnosis of mental retardation prior to age 18. Mental retardation is a developmental psychiatric disorder and DSM-IV-TR and AAMR criteria require prior to age 18 onset. Many of these offenders have never been formally diagnosed with mental retardation because of lack of community and/or academic resources concerning proper assessment and provisions of needs and supports. Other capital offenders experienced multiple psycho-social detriments during childhood, and mental retardation was ruled out because a "true" or accurate assessment was deemed impossible due to differential diagnoses and consideration of lifestyle contexts, such as posttraumatic stress disorder, abuse, depression and oppositional defiant disorder.

The forensic examiner must respond to defense attorneys inquiring into what time period the defendant should be assessed for mental retardation, namely, was he retarded at the time of the homicide, time of trial, during his incarceration on death row or at execution? These time frames may span over twenty years and standards from the APA and

AAMR may indicate different diagnostic requirements for mental retardation.

When considering the thesis of this paper, formal adaptive functioning assessment pursuant to a diagnosis of mental retardation in a traditional needs/supports/clinical referral is similar but yet different to evaluation in a capital offender forensic context. The latter evaluation should be, yet likely is not, subject to a higher standard since it is information presented as evidence in a legal proceeding in a capital hearing. When considering adaptive functioning assessment strategies (Everington & Keyes, 1998), consider that limitations in adaptive functioning occur within the community context typical of the individual's age peers and classification must be related to individualized needs and supports. These issues present as a dilemma when evaluating the capital offender as he is in an artificial setting. In fact, standardized instruments and informal questionnaires are often deemed inappropriate for use with offenders subject to long-term incarceration as they do not have opportunity to perform these skills in their environment (Taylor, 1997).

Traditional adaptive functioning behavioral rating scales measure an individual's performance in a natural environment rather than an estimated ability to perform behaviors. The problem of differential contexts between prison and community setting arises. Prosecutors may argue that the defendant is well adjusted on death row and can take care of many everyday living needs. It is impossible to evaluate the defendant in the "natural environment" community context where the normative samples are assessed pursuant to the specific adaptive functioning instruments. In fact, many capital offenders have resided in institutional settings as a juvenile and adult; yet, these adaptive scales are not normed on offender populations.

Objective adaptive functioning instruments often require collateral informants who will provide historical information concerning the offender's adaptive behaviors in various environments. These informants will be asked to provide a retrospective assessment of adaptive functioning years after they had contact with the offender. In addition, the context of a capital proceeding including test setting and unavailability of collateral informants and information may leave an examiner administering adaptive instruments in a faulty or non-standardized manner. Finally, the diagnostic issues of mental retardation, conduct disorder and antisocial personality disorder cloud the assessment of adaptive behaviors.

In light of some of the aforementioned problems regarding the assessment of mental retardation in *Atkins* claims, some critics may argue that forensic psychology cannot survive the standards outlined in

Daubert v. Merrell Dow Pharmaceuticals (1993); *Kuhmo Tire Company, LTD., v. Carmichael* (1999); or even *Frye v. United States* (1923). In *Daubert,* the U.S. Supreme Court held that scientific and expert testimony should be judged on the basis of whether it is scientifically valid and whether the reasoning or methodology can be applied to the facts of the case. The Court considered whether the methodology was testable; whether is was subject to peer review and publication; whether the known or potential error rate is acceptable; and whether the underlying principles have gained general acceptance in the scientific community (Goldstein, 2003). In *Atkins* claims, there may be some validity and reliability studies, instruments and practices that are generally accepted in the traditional assessment of mental retardation; however, there are likely no studies related to the assessment of mental retardation for capital offenders. There are no formal adaptive functioning or intellectual assessment instruments normed on capital defendants; and no acceptable error rates concerning standard error of measurements as an error rate of 5 points could mean life or death.

In *Kuhmo,* the Court held that their decision in *Daubert* emphasized the trial court's gatekeeping of evidence role to protect evidentiary reliability and relevancy within expert testimony proceedings. In particular, the expert must exhibit in the courtroom, the same intellectual vigor concerning his experience or research. This decision may affect forensic psychologists because it expanded *Daubert* criteria to specialized knowledge, rather than only scientific knowledge.

Finally, in *Frye* (later replaced in some states by the holding in *Daubert),* expert testimony is admissible if based on generally accepted scientific theories and methods. There are some new articles addressing ethical practices in *Atkins* cases and inconsistencies in practices among professionals in their assessments (Brodsky & Galloway, 2003). There are likely some accepted theories and methods amongst forensic psychologists when assessing *Atkins* cases; yet this data is yet to be consistently revealed in peer review studies.

Concerning the problems and pitfalls in *Atkins* assessments in light of their admissibility in the courtroom, forensic psychologists must continue to evaluate for mental retardation pursuant to traditional clinical assessments with knowledge and consideration for the capital offender context as highlighted throughout this article. There must be heightened practice standards in the assessment of mental retardation with this unique population (Cunningham & Reidy, 2001). Forensic examiners must concede that there is a subjective clinical judgment component in their expert opinions in *Atkins* cases, as there are in most any other type of forensic

psychological evaluation. Their evaluations must forfeit weaknesses in diagnostic procedures, especially in relation to mental retardation and antisocial personality disorder. The examiner may wish to acknowledge the diagnostic flaws and utilized a descriptive approach in addressing individual behaviors, personality traits and cognitive impairments (Cunningham & Reidy, 1998). Unfortunately, if that stance is taken, the expert may be subject to assessing the behavioral context of the homicide and patterns of past criminal conduct.

As practicing forensic psychologists in *Atkins* cases may heighten their standards, future research should emphasize the development of normative data for correctional populations in general, and capital offenders specifically; namely, offenders who have been charged with murder offenses, as well as those who have been sentenced to life with and without parole, for example. Mentally retarded offender groups could be compared to non-mentally retarded offender groups. Although research indicates a substantial prevalence of intellectual functioning deficits in prison populations and on death row in particular (Cunningham & Reidy, 1998), there are likely no studies addressing mentally retarded inmates' adaptive functioning abilities. There is a need for development of an adaptive functioning instrument designed for offender populations. Moreover, intellectual testing data for offender populations, and specifically capital offenders is lacking.

Although legislators and attorneys may be resolute in acquiring a single IQ cutoff score in *Atkins* cases, it is impossible to ignore other factors that require clinical judgment and examination (Ellis, 2003). Further, ranges of adaptive functioning as measured by various objective instruments will not offer clean cutoff score criteria for legal counsel. The utilization of the 2002 AAMR definition may characterize limitations in adaptive and intellectual functioning that meet the demands of the criminal justice system more so than past AAMR definitions that primarily address support services (Ellis, 2003). Despite what definitions legislators require and experts utilize pursuant to adaptive functioning, clinical judgment will continue to be present in expert opinions.

In conclusion, *Atkins* cases reflect a moral decision by a judge affecting life and death. The issue of how much one has to be impaired cognitively and adaptively is in large part determined on legal, moral and social judgment grounds despite expert opinion (Grisso, 2003). However, unlike other forensic psychological evaluations such as sanity and competency to stand trial which require an expert opinion that answers a legal question, in *Atkins* cases, the legal question is a clinical

one–that of a diagnosis of mental retardation as defined by a state legislature or case law.

Judges will often opine that the evidence as a whole does not prove mental retardation. Due to many of the aforementioned factors that necessitate diagnostic requirements (primarily lack of records substantiating a pre-eighteen years of age onset and IQ scores that are in the low- to mid-70s range), numerous petitions for relief in *Atkins* claims will fail. Further, judges must remember that the lone purpose of the adaptive prong for the criminal justice system is to determine that the measured intellectual/cognitive impairment has reflected real-life experiences (Ellis, 2003). Yet, consistent with the premise of this paper, judges will consider all documentary evidence including lay witness testimony and the facts and context of the homicide when considering real-life experiences.

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