

## ADAPTIVE BEHAVIOR ASSESSMENT OF CRIMINAL DEFENDANTS WITH A MENTAL RETARDATION CLAIM

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*The greatest challenge in examining criminal defendants for mental retardation is typically the adaptive behavior assessment. No standardized instrument has ever been developed for establishing the adaptive behavior of this group. Existent adaptive behavior measures focus on mainstream skills and treat skills that are not displayed for any reason as deficits. But for background and/or lifestyle reasons, persons from the criminal socioculture do not display numerous commonly assessed skills. Unless the use of available adaptive behavior instruments is modified, the scores attained by such individuals will usually have been suppressed by sociocultural factors. In this article we introduce a systematic approach for assessing the adaptive behavior of criminal defendants which generates data that are largely free of socioculturally-based score suppression. It is structured with the Adaptive Behavior Assessment System II (ABAS-II; 1). Since there is typically no one who knows such defendants adequately who will assess them reliably, our approach utilizes a self-rating format. We overview how this composite methodology has been accepted in legal contexts.*

On June 20, 2002, the United States Supreme Court ruled in *Atkins v. Virginia* that persons with mental retardation cannot be sentenced to a death penalty. Daryl Atkins is a Virginia prison inmate who petitioned the Court to set aside his death penalty because he is mentally retarded. The Court did not rule on the merits of his claim, but did bar the execution of those who are determined to be mentally retarded. In this article, criminal defendants who file a mental retardation claim with a court are referred to as *Atkins* claimants, and the diagnostic process that is used to determine if mental retardation exists is called an *Atkins* examination.

Although the Supreme Court did not set forth how mental retardation should be established, existent diagnostic schemes specify that this disability is manifested in terms of significantly subaverage general intelligence, that concurs with adaptive behavior deficits, and which was manifested in the developmental period of life (2). Most states have come to regard prior to

age eighteen as comprising the developmental period, although a few consider it to be prior to age twenty-two (e.g., Indiana, Utah, Washington). Only in Nebraska does there seem to be no onset criterion. Significantly subaverage general intelligence has come to be accepted as a total score on a general intelligence test that falls at least two standard deviations below the mean of 100, which is typically 70. To account for measurement error, some states have opted to consider that cut-off in terms of a range comprised of  $\pm 1.96$  standard error of measurement (SEM) units, which yields a 95% confidence band. In those jurisdictions, scores slightly higher than 70 can be indicative of mental retardation (e.g., Arizona, Louisiana) if adaptive behavior is deficient. Tennessee and Kentucky have held to a firm cut-off score of 70.

How adaptive behavior is conceptualized varies more among states. Some regard it as the three dimensions articulated in the American Association on Mental Retardation (AAMR) 2002 manual (3): Conceptual, Social, and Practical skills (e.g., Virginia, Pennsylvania). Many consider it in terms of the ten skill areas introduced by the 1992 AAMR manual (4): Communication, Community Use, Functional Academics, Home Living, Health and Safety, Leisure, Self-Care, Self-Direction, Social, and Work (California, Delaware, Idaho, Illinois, Mississippi, North Carolina, Ohio). And numerous states do not specify which aspects of adaptive behavior should be gauged (e.g., Arizona, Colorado, Louisiana, Nevada, Texas). Only one instrument, the *ABAS-II* (1) accommodates all three formulations since it assesses the ten 1992 AAMR areas, the three 2002 AAMR dimensions, and yields a total or composite adaptive behavior score.

When using the 1992 AAMR approach, significant limitations in at least two skill areas are considered to establish adaptive behavior deficits. With the 2002 AAMR method, functioning in at least one dimension must be impaired. In terms of the total score and dimensions method, the 2002 AAMR manual adopted the  $-2SDs$  (standard deviations) deficit index advocated previously by the American Psychological Association (APA) (5). Since the AAMR and the APA are prominent authorities on mental retardation diagnosis, the  $-2SDs$  criterion should also be applicable to the ten skill areas approach. Presently, Pennsylvania appears to be the only state that has explicitly endorsed a  $-2SDs$  cut-off for establishing the adaptive behavior of crimi-

nal defendants. But since the -2SDs criterion is viewed by the courts as the impairment index for intelligence, it seems reasonable to believe that most courts will also accept that limitations on the order of -2 or more SDs are needed to convey adaptive behavior deficits. And this has been the first author's experience in numerous *Atkins* proceedings.

It might seem that when the -2SDs cut-off is applied to both general intelligence and adaptive behavior, *Atkins* examinations should be fairly basic psychometric exercises. But psychologists have come to realize that, as is true of intelligence test scores, the low scores that criminal defendants usually attain on standardized adaptive behavior measures are not necessarily indices of disability. For example, one of Daryl Atkins' defense psychologists, Dr. Evan Nelson, said during interview:

“(W)hen you look at those [adaptive behavior] scales in the context of capital defendants, who generally have lived criminal lifestyles, the items in these scales simply don't have much relevance” (bracketed material added; 6, p. 3).

Texas psychologist Dr. George Parker testified pre-*Atkins*:

“(T)he so-called Vineland Test [an adaptive behavior measure] administered by defense expert Dr. Keyes was an inappropriate and deceptive measure of Webster's adaptive skills given Webster's lifestyle as a drug-dealer” (bracketed material added; 7, p. 13).

And noted forensic psychologist Dr. Brett Trowbridge concluded:

“(T)he vast majority of persons convicted of serious crimes have not graduated from high school, and have spotty work histories; many have usually lived with their parents, and thus have never really lived independently. An argument can easily be made that they have had a pattern of living that has been retarded” (8, p. 2).

Hands-on experience has thus shown that most criminal defendants do not display some commonly assessed adaptive skills merely due to sociocultural influences. This reality has also been recognized by the judiciary. For instance, the California court which heard Jorge Vidal's appeal of a

lower criminal court's ruling against his mental retardation claim pointed out:

“(Dr.) Widaman himself acknowledged that the test [*Vineland Adaptive Behavior Scales*] did not distinguish between whether Vidal was unable to do something and whether he chose not to do it; hence in interpreting the scores, Widaman had no idea whether a score of zero was due to choice or inability” (bracketed material added; 9, p. 49).

This appeals court went on to instruct that the suppressive impact which sociocultural factors exert on adaptive behavior scores *must* be corrected in some manner:

“(C)learly the interpretation of such results [i.e., *Vineland Adaptive Behavior Scales* scores] must take into account factors such as Vidal's cultural background and its effect on his motivation to perform the tested tasks” (bracketed material added; 9, p. 49).

But while it is known that the adaptive behavior scores of criminal defendants are typically lowered artificially by background and lifestyle influences, how to account for such socioculturally-based score suppression remains to be addressed by the professional literature.

In this article, we present a comprehensive model that structures the adaptive behavior assessment of criminal defendants with a mental retardation claim in a manner which gives reasonable assurance that the resultant data reflect only *bone fide* disability. Clarified initially is the purpose of the adaptive behavior assessment in *Atkins* examinations, and why the adaptive behavior scores of most criminal defendants are lowered artificially by sociocultural factors. We then recommend how to approach a records review and the adaptive behavior interview, and how to conduct the formal self-rated adaptive behavior assessment. Described next is a systematic method for correcting this subgroup's standardized adaptive behavior scores for socioculturally-based suppression. Finally, we summarize how this assessment model has been received in the courtroom, and offer recommendations for its refinement.

### **PURPOSE OF THE ADAPTIVE BEHAVIOR ASSESSMENT**

Conceptually, the purpose of a forensic adaptive behavior assessment is to discern whether a finding of significantly subaverage general intelligence means that the defendant is disabled or merely a poor intelligence test taker. As stated by law professor James Ellis (who argued on behalf of Daryl Atkins before the United States Supreme Court) and his colleagues in their *amicus* brief to the California Supreme Court on behalf of the AAMR:

“Cognitive impairment alone is not sufficient to support a diagnosis of mental retardation....The basic inquiry for criminal courts is whether there is a real-world impact of the intellectual impairment. If the defendant’s low IQ is merely a testing anomaly, and produces no real-life limitation, the defendant does not have mental retardation” (2; pages 11-13).

The adaptive behavior evaluation phase of an *Atkins* examination thus basically gauges the ecological validity of the defendant’s IQ(s). But for this probe of the intelligence test data to be meaningful, adaptive behavior scores must be reasonably free of the suppressive impact of non-disability factors.

### **SOCIOCULTURALLY-BASED SCORE SUPPRESSION**

Every culture and subculture encourages its members to master certain skills, while minimizing the importance of or even discouraging the display of others (10). For this reason the 2002 AAMR manual explains that:

“A person whose opportunities to learn adaptive skills have been restricted in comparison to (same-) age peers may have acquisition or performance deficits that are unrelated to mental retardation. For example...a person who has not been taught the use of money will not have this skill regardless of his or her potential to understand the concept and use the skill when needed” (bracketed material added; 3, p. 86).

The first author’s interviews of *Atkins* claimants, who usually come from impoverished, deprived family backgrounds, have revealed that these individuals were typically not taught numerous skills gauged by adaptive behavior measures (e.g., thermometer use, safety rules, basic nutrition, check-

book balancing, library use, more complex food preparation, adequate hygiene).

Adaptive behavior instruments also assess typical behavior, and what someone typically does is as contingent on their incentive for doing so as it is on their ability to act. The current AAMR manual cautions that such motivational factors can also affect the expression of learned skills, and that it is the individual's sociocultural context which determines whether an incentive exists to display many of the skills that are possessed (3; p. 86-87). For example, interviews of *Atkins* claimants by the first author have indicated that a quite a few were raised to believe that men do not perform household chores even as youth because "that's women's work." Many were not inclined to carry identification, wear a seat belt, write letters, use a dictionary or encyclopedia, read classified ads, have hobbies, cut food into bite size pieces, have good relationships with family members, attend work regularly, or concern themselves with having pleasant breath.

Since *Atkins* claimants are not unique in having the quality of their functioning understated by standardized adaptive behavior instruments, the 2002 AAMR manual warns that:

"A diagnosis of mental retardation must take into account the sociocultural context of the individual. The key challenge is to identify sociocultural circumstances that might differ from those of the norm group [i.e., the standardization sample], to examine the individual's performance in relation to others of the same age and culture, and to evaluate the expectations and opportunities of the individual's culture that might influence an adaptive behavior score. Behavioral expectations may differ across cultural groups, along with education and training in adaptive skills" (bracketed material added; 3, p. 87).

But that manual provides little guidance on how the sociocultural suppression of adaptive behavior scores should be countered. It merely states that since it is impossible to derive norms for all cultural variations that exist in the U.S., the impact of sociocultural factors should be dealt with "in the clinical interpretation of the scores" (3; p. 87). The same kind of limited guideline is provided by the American Psychiatric Association:

“In reaching a clinical judgment regarding whether the person exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the person’s history and characteristics and the context of the assessment” (11; p. 307).

Both the AAMR and American Psychiatric Association thus imply that routine face-value acceptance of *Atkins* claimants’ adaptive behavior data is contraindicated. Somehow criminal defendants’ background and lifestyle must be factored into the score interpretation process. In practical terms, this means that before this subgroup’s adaptive behavior scores can be relied upon diagnostically, some correction must be made for whatever suppression sociocultural factors imparted on them. To make that adjustment accurately, examiners must initially have solid experience with mentally retarded persons. They must then attain a good understanding of each defendant’s unique background and lifestyle. The main avenues for gaining this latter perspective is a thorough records review and a defendant-specific adaptive behavior interview.

#### **RECORDS REVIEW AND ADAPTIVE BEHAVIOR INTERVIEW**

Most information about how an *Atkins* claimant has functioned comes from the case records. Among other things, these cite the observations of lay persons and professionals who were in contact with the defendant prior to the mental retardation claim, and thus provide independent streams of information regarding his functioning prior to disability becoming an issue. Since that information was recorded contemporaneously, it is usually more accurate and less affected by bias than that provided in affidavits solicited to support the mental retardation claim. Reviewed documents should include all available school, and juvenile and adult criminal justice, records. School documents require particularly close study as they frequently reveal a relationship between onset of academic difficulties, and behavior problems and substance abuse. It is important to have police offense reports of the capital offense, and as many reports of other (i.e., extraneous) offenses as possible. Efforts should be made to obtain records from all mental health professionals who evaluated and/or treated the defendant, and from employers when applicable. Usually, no non-institutional medical records exist since *Atkins* claim-

ants seldom sought medical treatment in the community, and they were rarely in the armed services, even briefly. Some did participate in Job Corps training, and others qualified for Supplemental Social Security benefits, and documents related to such services need be secured.

Since it is usually informative to know how the defendant has spent his time when largely precluded from substance abuse and criminal behavior, consideration should be given to obtaining an inventory of personal possessions in his cell (e.g., books, artwork, letters, toiletries, extra clothing). A record of commissary purchases is usually helpful. Defense and prosecution filings regarding the mental retardation claim need to be read carefully as they may contain unique information, and are typically the vehicles for introducing lay and professional affidavits regarding the defendant's functional status.

Because even an extensive array of case records is unlikely to portray all spheres of a defendant's functioning sufficiently, it is necessary to conduct an in-depth adaptive behavior interview that is geared to filling in the blanks and to clarifying case records ambiguities. For this purpose we have found it useful to generate three to four hundred questions for semi-structuring an interview that is conducted on the day before the formal adaptive behavior assessment. Probed at that time should be how the defendant functioned in educational, vocational, interpersonal and leisure contexts. Also established should be his living arrangement history, drug/alcohol use, and experience with making purchases, preparing food, caring for himself and his belongings, and getting around on his own. Each of these areas needs to be explored in sufficient depth. For example, with respect to education, the defendant should name the schools he attended, describe his attendance, and how difficult he found the classes, and should be asked to identify any extra instruction he received, the grades he made, the substances he used before and after school, for what he was suspended/expelled, and whether his parents cared if he went to school or did homework. The defendant should be questioned directly about whether family members taught him basic skills (e.g., nail care, small appliance use, cleaning, playing games, apologizing). He should also describe how he usually spent the day prior to incarceration, and how he has been spending his days while incarcerated.



By integrating the information from such an adaptive behavior interview with that contained in the case records, the examiner should acquire sufficient knowledge to be able to decide if a rating that the defendant provides during the upcoming formal adaptive behavior assessment should be challenged for explanation. This database of background and lifestyle information will also be needed for subsequently determining which skills that the defendant has failed to display were absent due to disability versus sociocultural factors.

### **FORMAL ADAPTIVE BEHAVIOR ASSESSMENT**

#### **Respondents**

Adaptive behavior instruments employ a format in which someone who knows the examinee well, the respondent, provides a quantitative rating of how routinely each of the surveyed skills has been demonstrated by the examinee. It has been our experience that after the mental retardation claim was filed, family members' and friends' ratings tend to understate a defendant's actual functioning markedly. Such accounts typically contradict how those individuals characterized him prior to the claim, and how he is depicted by the overall informational database. Use of family members and friends as respondents for adaptive behavior assessment in *Atkins* contexts must thus be done very cautiously.

In most cases, there will exist no reliable respondent who knows the defendant well enough to establish accurately if he displayed the many adaptive skills that are addressed by standardized instruments. Thus, it is typically necessary to conduct the formal adaptive behavior assessment by having the defendant provide a self-rating, which is an approach that was introduced into forensic mental retardation examination by Dr. George Baroff (12). By the time of that assessment, the examiner should be very familiar with how the defendant functioned across his life-span, which enables the challenging of seemingly erroneous skill ratings, and thus provides a reasonable assurance of rating accuracy.

#### **Instruments**

A 1984 survey of the U.S. prison system found that no standardized instrument existed for assessing adaptive behavior in terms of the skills that

can be exhibited in those highly restrictive settings (13). Since prison-specific instruments still remain to be developed, examiners cannot use prison/jail staff as sole respondents for rating the adaptive behavior of *Atkins* claimants. Instead, reliance must continue on measures that were designed to gauge skills that are mostly community-based. Naturally, their application to incarcerated defendants requires that the quality of adaptive behavior must be established largely in terms of how they functioned prior to incarceration.

In each of many *Atkins* examinations, the first author conducted the formal adaptive behavior assessment using the *ABAS* (14) or *ABAS-II* (which are essentially identical at the adult level) in a self-rating format. While the developers of the *Scales of Independent Behavior Revised (SIB-R)*; (15) state that these can also be used in that manner, the *ABAS* series are the only instruments which have specific self-rating norms. Since the *ABAS-II* also provides scores that accommodate all three ways in which adaptive behavior deficits can be demonstrated, it is emerging as the instrument of choice in *Atkins* proceedings (e.g., both defense and prosecution psychologists relied on the *ABAS-II* in the self-rating format to establish Daryl Atkins' adaptive behavior for his 2006 mental retardation hearing).

#### **Assessment Process**

In the *ABAS-II* self-rating format, the defendant assigns himself a rating or "raw" score of 0 to 3 for each skill. A score of 3 is given if the skill is performed always or almost always when it should be, and a score of 2 is assigned if this occurs only sometimes. A score of 1 is indicated when the skill is never or almost never displayed, or if it can be performed but has not been performed, and a score of 0 means the skill cannot be performed.

Unless a defendant is found to be a fairly good reader, each skill descriptor should be read to him, and any clarifying information should be provided. If a defendant's rating of a skill appears unrealistic, he should be questioned until its proper rating is clear. For instance, if a defendant claims to have routinely changed air filters in his parents' home (a "follows maintenance schedule for home" skill) but seems to lack the requisite know-how, he should be asked to describe how and when he did so before being credited for that skill. Conversely, if the defendant says that he never planned any of his activities but strove to be at work on time, this disparity must be pointed

out to him. In addition, whenever it is concluded that the defendant did not exhibit a skill, he *must* be questioned to establish if that void was due to lack of ability or non-disability factors, especially choice. Such clarifying information should be recorded briefly by the examiner since it may have to be relied upon in affidavit and/or court testimony.

It seems best to conduct the formal assessment on the day after the interview, as it permits time to integrate information provided by the latter with that contained in the case records. The intent should be to have the defendant identify the adaptive skills that he possessed around the time of the capital offense. In this manner, a community-based adaptive behavior instrument can be applied to the prison setting. This approach seems logical since if a skill was evidenced in the past, it should be possible to manifest it presently, if the opportunity and motivation for doing so exist. We have found that instructing *Atkins* claimants to focus on the time-period “just before you got this case” enables them to provide a reasonably accurate assessment of their most recent functioning within the community as an adult.

It is important that *Atkins* claimants also identify adaptive behavior that they first displayed only after onset of the current incarceration. For example, while most of these defendants did not read books or magazines, write letters, draw pictures, make lists, use calendars, take vitamins or use ointments, wash their personal belongings, or maintain their living area while in the community, they do so now. Failure to incorporate post-incarceration skills into the assessment will lower adaptive behavior scores artificially, and invites judges/juries to characterize the expert as being biased.

### **Norms**

After assessment, the resultant ratings should be used to derive scaled scores for each of the ten skills areas, using tables in the *ABAS-II* manual. For most ages, scaled scores range from 1 to 13 in each skill area, with a mean of 10 and a standard deviation of 3. Valid scaled scores of 4 or less in two areas thus convey a deficit. The resultant scaled scores are then combined to derive standard scores for the three dimensions, and for the total or General Adaptive Composite (GAC). Standard scores range between 40 to 138, with a mean of 100 and a standard deviation of 15. A valid score of 70

or less in one domain, or on the GAC, also gives a psychometric indication of adaptive behavior deficits.

Since defendants reported adaptive skills that were exhibited before and since the current incarceration, it seems best to derive their adaptive behavior scores with current-age norms. But it can be argued that since defendants should have possessed the same aptitude at the time of the capital offense as they do now, they could have exhibited their post-incarceration skills prior to the current confinement, if they had been motivated to acquire and/or use them. It thus also seems reasonable to use defendants' age at the time of the capital offense to derive their standardized scores. Accordingly, we consider that age-norm selection should be left to the examiner's discretion. Which norms are used is unlikely to affect the outcome of most *Atkins* examinations.

#### **CORRECTING FOR SOCIOCULTURALLY-BASED SCORE SUPPRESSION**

It is important to understand that the formal adaptive behavior assessment is a semi-structured interview, and that it is well accepted among clinicians that behaviors assessed by such instruments must be rated in accord with the totality of available information, not merely the examinee's self-report (16). Specifically with respect to formal adaptive behavior assessment, noted authority Robert Bruininks explained that:

“The examiner makes the final judgment regarding the quality of information obtained about an individual using the respondent's input to guide the rating of each task [i.e., skill]” (bracketed material added; 15, p. 36).

Thus, especially since non-disability factors typically confound *Atkins* claimants' standardized adaptive behavior data, using the defendant's ratings to derive scores for the ten *ABAS-II* skill areas, the three domains, and the GAC cannot be the final step in this phase of the examination process. It must still be determined which of the absent skills were not displayed for sociocultural reasons, and some adjustment must be made to account for that suppressive impact.

We recommend that this process begin with a review of each skill that was rated less than “3,” to discern why it was not displayed routinely. If in-

formation on the defendant indicates that he could not do so due to lack of ability, the skill's rating should be retained. With skills that information provided by the defendant and/or the case records identifies as not used because they were never taught (though they could have been learned), and/or for which there existed little performance incentive, the rating should adjusted upward.

We consider it reasonable to give defendants credit for a non-displayed skill if a low functioning mild mentally retarded person (someone with a full scale IQ in the 55-65 range) can be taught and be motivated to display it at least sometimes. To be able to make such a determination on a skill by skill basis, the *Atkins* examiner must have had solid hands-on experience with mentally retarded persons. But this should be a basic requirement for anyone evaluating defendants in the high-stakes *Atkins* context.

Score adjustments also need to be made to credit most *Atkins* claimants for adaptive skills that were demonstrated during the commission of crimes. Evidenced typically through criminal activities are communication, self-direction (i.e., planning), and community use skills. For example, if the defendant used verbal ploys to gain proximity to robbery victims, it is apparent that he plans ahead, recognizes what kind of conversation is appropriate for a particular context, pays attention when people talk, and reacts adequately to the verbal demands of situations. If he used a car to drive to the victim's location, he obviously knows how to operate an automobile, obeys traffic signs at least sometimes, and gets around adequately in his community. Efforts to avoid detection and/or arrest for crimes (e.g., disposal of murder weapons, killing a witness, wiping off fingerprints, leaving town to avoid police, affixing stolen license plates to a getaway car, formulating feasible lies to police and/or during court testimony) convey social awareness, self-direction and an obvious concern for health and safety. Enticing pen pals to put money into one's prison commissary fund is also an adaptive behavior, as are attempts to appear illiterate by claiming that one's many letters were written by other inmates. With chronic substance abusers, adept but illicit community use is implicated by few arrests for the many thefts that had to be committed to pay for drugs, and by the many drug buys that must have been transacted. Failure to credit an *Atkins* claimant for such criminal and/or sub-

stance abusing lifestyle facilitating behaviors makes the expert appear naive in the eyes of judges/juries. In response, those decision-makers are inclined to focus entirely on the defendant's competent criminal acts, to the exclusion of significant adaptive behavior deficiencies.

In general, all adaptive skills which low-functioning persons with mild mental retardation have the ability to learn and use, and those that the defendant displayed at any time in his life, including in a criminal way, need to be recognized by the formal adaptive behavior assessment. Because no two defendants had exactly the same background and lifestyle, the skills that they possess can differ considerably. This reality means that the number of adjustments that need to be made to defendants' self-ratings will vary. Since some of those adjustments will be questioned during subsequent court proceedings, a rationale for each should be recorded for ready access.

#### **DATA COMPILATION AND INTERPRETATION**

Once all adjustments have been made to the defendant's ratings, these should be used to compute a second set of scaled scores for the ten basic skills areas, as well as standard scores for the three dimensions and the GAC. It is those data that should be used to determine if adaptive behavior is deficient.

Typically, the GAC will describe adaptive behavior quality most accurately since it measures 239 skills. But with defendants who function only at an elementary school level, the GAC will be pulled down somewhat by a very low score in the Functional Academics area. If a major reason for the low Functional Academics score is poor achievement motivation, the upper portion of the GAC's confidence band should reflect overall adaptive behavior quality more accurately than the GAC itself. For example, with a GAC of 78, the confidence band extends from 75 and 81, so that its upper end falls between 78 and 81. Thus, when the low Functional Academics score is considered to involve inadequate achievement motivation, the 78 to 81 score range should be a more accurate index of adaptive behavior than the score of 78. In terms of the "two out of ten areas" method, consideration should be given to excluding the Functional Academics score from consideration when deficient motivation is considered to have impaired academic achievement.

### REPORTING EVALUATION RESULTS

It is standard practice in forensic contexts to prepare written reports that sufficiently detail the findings of an examination, as well as the reasoning that was applied to formulate the conclusions (17). This requirement applies especially to the presentation of adaptive behavior evaluation results. We recommend that each of the ten skill areas be addressed separately, in terms of a general description of the skills that were assessed, an overview of the kinds of skills that the defendant did and did not display, and which were not manifested for non-disability reasons. Such a comprehensive summary also serves as an excellent resource during subsequent court testimony. Moreover, a thorough description of the defendant's functioning in each skill area, supported by well-reasoned adjustments for socioculturally-based score suppression, tends to educate objective opposing experts, which can limit battles over whether the resultant adaptive behavior scores establish deficits. To promote full disclosure, the obtained *ABAS-II* scores should also be reported in the same table as the adjusted scores, and the rationale for adjusting the defendant's scores should be explained clearly in the affidavit/report of findings.

### DISCUSSION

As conveyed by United States Supreme Court Judge Scalia's dissent in *Atkins*, due to the amount of clinical judgment that must be exercised in the adaptive behavior evaluation of criminal defendants, the judiciary often looks askance at its results. The main concern, as expressed by the Texas Court of Criminal Appeals, is that such assessments are too subjective:

"There is, on the contrary, broad agreement among mental health experts that determining whether a person suffers from the type and level of adaptive deficits that qualifies for a mental retardation diagnosis is highly subjective and largely a matter of individual judgment" (18, p. 7).

Implementation of the methodology advocated in this article should help alleviate such concerns since it affords a logical and systematic means for bridging the gap between the characteristics of contemporary adaptive behavior instruments and those of criminal defendants with a mental retarda-

tion claim. In particular, it offers a transparent procedure for partialing out the confounding psychometric impact of skill limitations that are socioculturally not disability based. Our approach thus generates adaptive behavior scores that are sufficiently free of socioculturally-based suppression to allow their meaningful interpretation within the -2 S.D. deficits framework. Since this assessment model is systematic and transparent, it also affords the possible of verifying or testing the resultant scores' reliability.

With respect to how our methodology has been accepted by juries, judges, defense attorneys and prosecutors, feedback is presently available mostly from Texas proceedings. Juries in that state seemed to have readily understood testimony which explained why the adaptive behavior scores of *Atkins* claimants tend to be lowered artificially by non-disability factors, and how score adjustments were made to counter this suppression. Jurors have indicated that it was helpful for them to have both sets of *ABAS-II* scores for each of the ten skills areas presented as a large exhibit. Defense efforts to dissuade juries from believing that people do not engage in some behaviors simply due to background or choice, and/or that criminal acts reflect adaptive skills, have not succeeded. In all seven contested cases, jury resolution of the mental retardation claim coincided with the results of the *ABAS/ABAS-II* based adaptive behavior evaluation.

Most district attorneys and judges understand that standardized adaptive behavior instruments do not capture adequately the adaptive skills of most *Atkins* claimants. In only two of nine cases where mental retardation was diagnosed by the first author was that finding contested by the prosecution. It was claimed that the adjustments for socioculturally-based score suppression were inadequate, and that insufficient weight was given to the adaptive skills that the defendant displayed during commission of crimes. One of those defendants has been executed, the other case is under appeal in the federal court system, and the death penalty of each remaining defendant has been commuted to life imprisonment.

Defense attorneys have tried to discredit our self-report based adaptive behavior evaluation method by contending that this format is unreliable because defendants with more modest mental ability do not comprehend some of the *ABAS-II* skill descriptors and/or cannot remember if they performed



certain skills, that the rating adjustments are arbitrary, and that the overall approach makes it harder to be mentally retarded. But it has been determined that even persons with mental retardation rate their adaptive behavior adequately (19), and a review of the literature noted that many mentally retarded persons are accurate reporters of even more complex personal information, such as symptoms of psychopathology (20). The 0.91 to 0.95 concurrent validity correlations reported in the *ABAS-II* manual between adults self-rating and their rating by others should thus apply to *Atkins* claimants. Our approach is also far from arbitrary since the each step is reasoned and systematic, and a concrete justification is documented to support each rating adjustment. Viewed objectively, it also should be evident that our evaluative process merely makes it harder for criminal defendants to be misclassified as being mentally retarded.

#### RESEARCH RECOMMENDATIONS

We consider that our approach to evaluating the adaptive behavior of criminal defendants evidences compelling face validity, and it rests on the *ABAS-II*, which features sound construct and clinical validity (21). Nonetheless, it would be helpful to systematize our methodology further. *ABAS-II* studies of sufficient numbers of mainstream persons with IQs in the 65 to 75 range should disclose which skills persons with that aptitude typically display. On that basis, it may be feasible to devise a fixed set of adjustments for the socioculturally-based score suppression which typifies the *ABAS-II* data of criminal defendants. Standards for crediting defendants for skills that facilitate illicit endeavors could also be useful. For instance, someone who retrieves a pistol from a hiding place, conceals it on his person, asks a friend to drive him to a store that he wants to rob, waits to enter until no customers are inside, engages the clerk in disarming conversation, makes a small purchase, pulls a gun when the clerk opens the cash register and demands all the money has demonstrated quite a bit of planning and execution skill. Anyone who engaged in such an activity needs to be credited with at least item 22 of the *ABAS-II* Self-Direction section, "Makes plans for home projects in logical steps." If the defendant's robbery netted a large amount of money, it seems to have been a big project, and appears to merit credit for that section's item 21: "Plans ahead to allow enough time to complete big projects."

Establishing consensus on which *ABAS-II* skills should be credited for specific kinds of crime-facilitating behavior should reduce the disagreement which typically exists over the weight that should be given to how a defendant executed crimes. Until research of this kind permits further systematization of our approach to adjusting adaptive behavior ratings of *Atkins* claimants for socioculturally-based suppression, we recommend that it be implemented only by clinicians who have ample hands-on experience with criminal offenders, the mentally retarded, and with adult adaptive behavior assessment.

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